I-140 DAYS & I-140 NIGHTS

BEST PRACTICES, COMMON PITFALLS & EVIDENCE REVIEW

SUPPLEMENTARY MATERIALS

Dustin J. O'Quinn, Lane Powell
Seattle, WA
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Chatanooga, TN
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Allentown, PA

ABILITY TO PAY

The Simple Solution

AAO: “In determining the petitioner’s ability to pay the offered wage during a given period, USCIS 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.”

Net or Taxable Income Evidence to Submit with I-140

Ability to pay documentation *must* be included with the initial I-140 filing, because the requirement is listed as under 8 CFR 204.(g), as “Initial Evidence”. Always include either:

- Prior year federal tax return;
- Must recent annual audited financial statement; or
- Most recent annual reports.

Federal Corporate Tax Return Types and Timing of Returns

For C Corporations (Inc.), Form 1120, U.S. Corporation Income Tax Return.

For S Corporations, AAO considers net income to be ordinary income shown on line 21 of the IRS 1120S, and adjustments are made on Schedule K. Confirmed in footnote 2 of *Matter of* _____, EAC 06-081-50227 (AAO Feb. 20, 2008).

For a partnership, Form 1065.

For a limited liability company (LLC), Form 1065 or Form 1120.

For a sole proprietorship, Form 1040, Schedule C. The net income of the business is labeled "Net profit or (loss)."

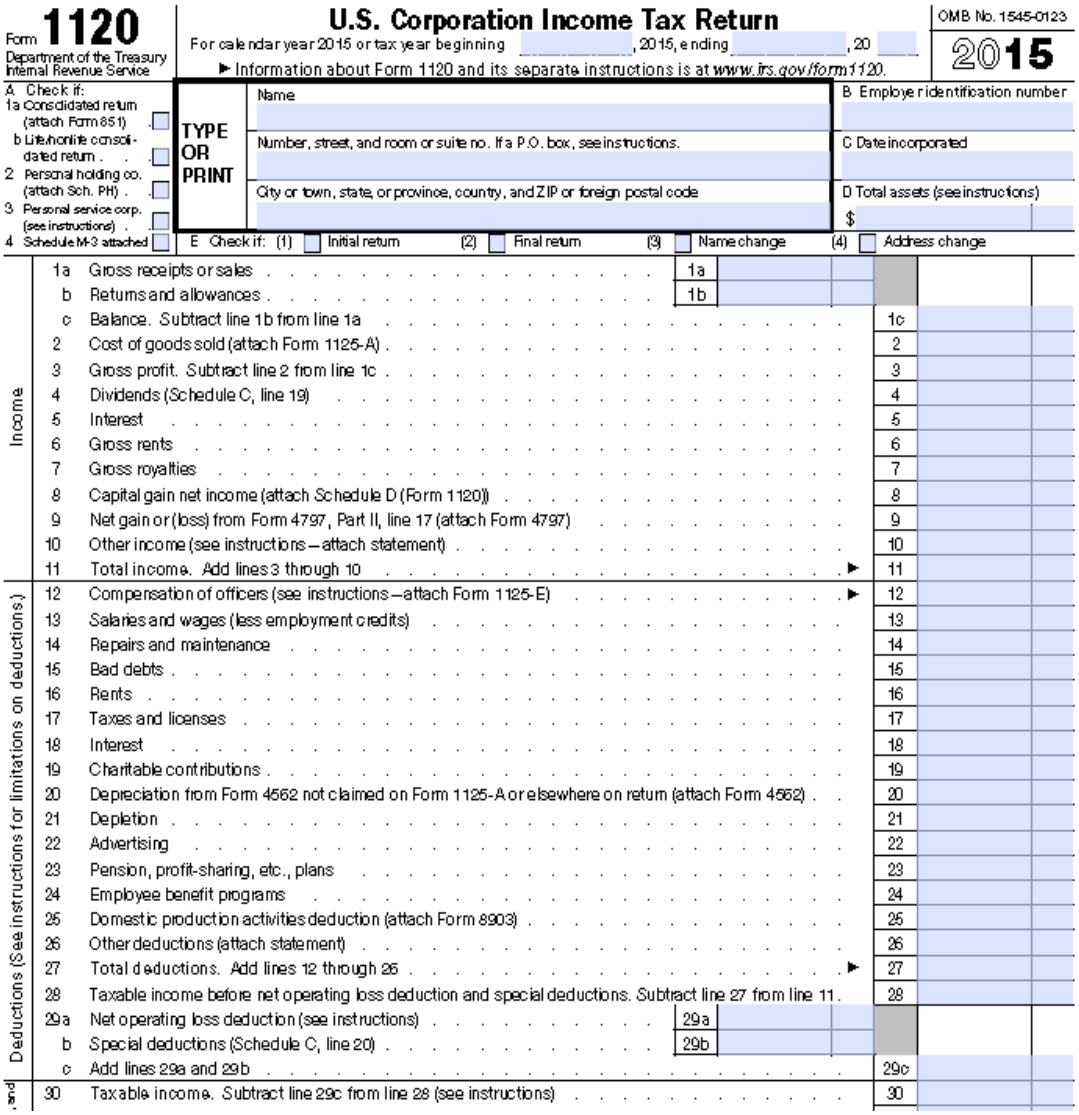
Timing

After October 1st, submit last year's tax return.

Before October 1st, submit either:

- Last year's tax return; or
- Year before last tax return, plus IRS Application for Automatic Extension of Time to File Income Tax Return.

Form 1120, Line 28, (Taxable Income Before Special Deductions),
Must Be Equal To Or Greater Than The Wage



Form **1120** — Department of the Treasury, Internal Revenue Service

U.S. Corporation Income Tax Return

For calendar year 2015 or tax year beginning _____, 2015, ending _____, 20 ____

▶ Information about Form 1120 and its separate instructions is at *www.irs.gov/form1120*.

OMB No. 1545-0123

2015

A Check if:
1a Consolidated return (attach Form 851) ☐
b Life/nonlife consolidated return ☐
2 Personal holding co. (attach Sch. PH) ☐
3 Personal service corp. (see instructions) ☐
4 Schedule M-3 attached ☐

TYPE OR PRINT

Name

Number, street, and room or suite no. If a P.O. box, see instructions.

City or town, state, or province, country, and ZIP or foreign postal code

B Employer identification number

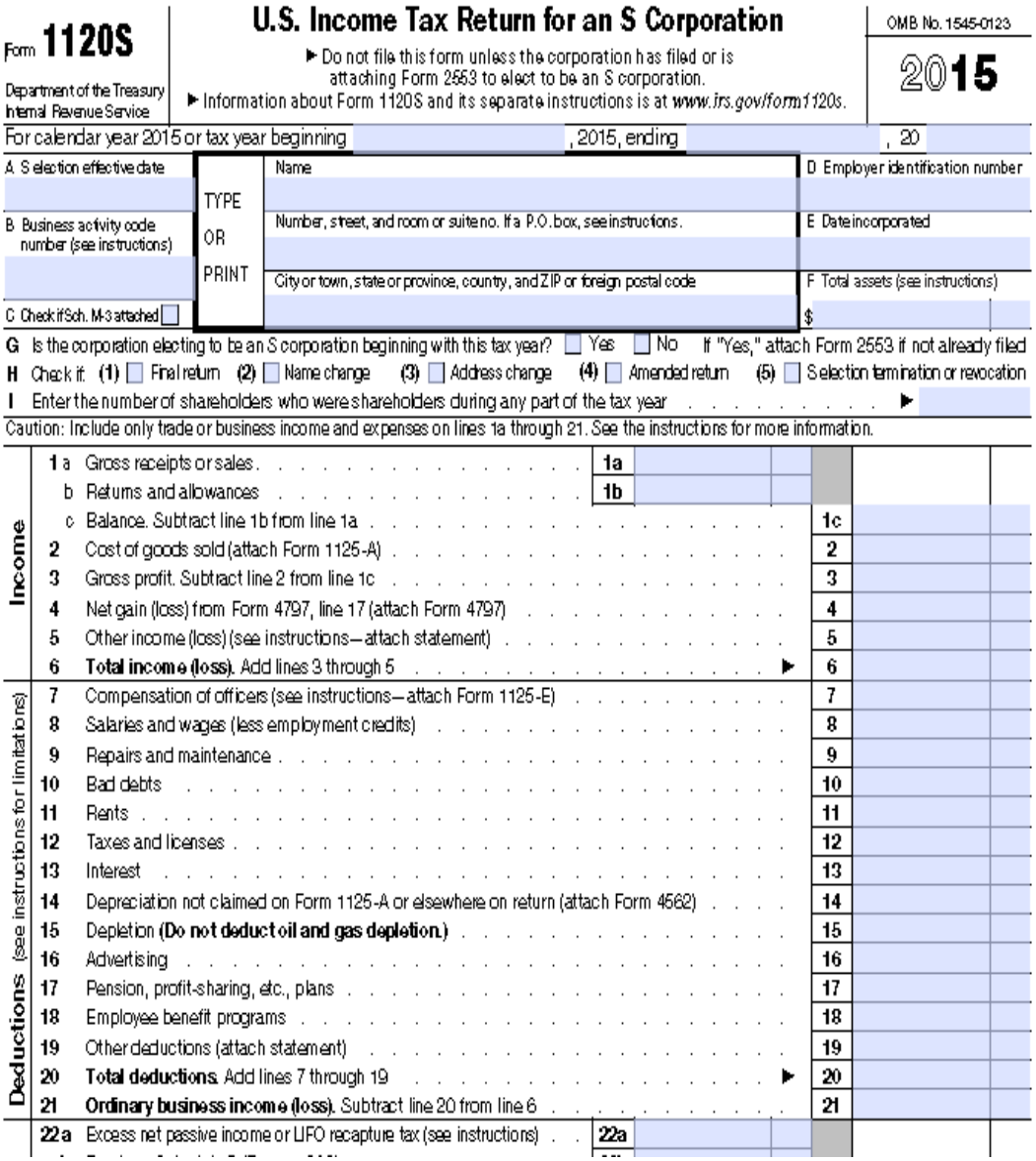
C Date incorporated

D Total assets (see instructions) $

E Check if: (1) ☐ Initial return (2) ☐ Final return (3) ☐ Name change (4) ☐ Address change

Income	1a	Gross receipts or sales	1a		
	b	Returns and allowances	1b		
	c	Balance. Subtract line 1b from line 1a		1c	
	2	Cost of goods sold (attach Form 1125-A)		2	
	3	Gross profit. Subtract line 2 from line 1c		3	
	4	Dividends (Schedule C, line 19)		4	
	5	Interest		5	
	6	Gross rents		6	
	7	Gross royalties		7	
	8	Capital gain net income (attach Schedule D (Form 1120))		8	
	9	Net gain or (loss) from Form 4797, Part II, line 17 (attach Form 4797)		9	
	10	Other income (see instructions – attach statement)		10	
	11	Total income. Add lines 3 through 10	▶	11	
Deductions (See instructions for limitations on deductions.)	12	Compensation of officers (see instructions – attach Form 1125-E)	▶	12	
	13	Salaries and wages (less employment credits)		13	
	14	Repairs and maintenance		14	
	15	Bad debts		15	
	16	Rents		16	
	17	Taxes and licenses		17	
	18	Interest		18	
	19	Charitable contributions		19	
	20	Depreciation from Form 4562 not claimed on Form 1125-A or elsewhere on return (attach Form 4562)		20	
	21	Depletion		21	
	22	Advertising		22	
	23	Pension, profit-sharing, etc., plans		23	
	24	Employee benefit programs		24	
	25	Domestic production activities deduction (attach Form 8903)		25	
	26	Other deductions (attach statement)		26	
	27	Total deductions. Add lines 12 through 26	▶	27	
	28	Taxable income before net operating loss deduction and special deductions. Subtract line 27 from line 11		28	
	29a	Net operating loss deduction (see instructions)	29a		
	b	Special deductions (Schedule C, line 20)	29b		
	c	Add lines 29a and 29b		29c	
and	30	Taxable income. Subtract line 29c from line 28 (see instructions)		30	

For S Corporations, Form 1120s, Line 21, (Ordinary Income) And …



Form **1120S**

Department of the Treasury
Internal Revenue Service

U.S. Income Tax Return for an S Corporation

▶ Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.

▶ Information about Form 1120S and its separate instructions is at *www.irs.gov/form1120s*.

OMB No. 1545-0123

2015

For calendar year 2015 or tax year beginning , 2015, ending , 20

A S election effective date	Name	D Employer identification number
B Business activity code number (see instructions)	Number, street, and room or suite no. If a P.O. box, see instructions.	E Date incorporated
C Check if Sch. M-3 attached ☐	City or town, state or province, country, and ZIP or foreign postal code	F Total assets (see instructions) $

TYPE OR PRINT

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☐ No If "Yes," attach Form 2553 if not already filed

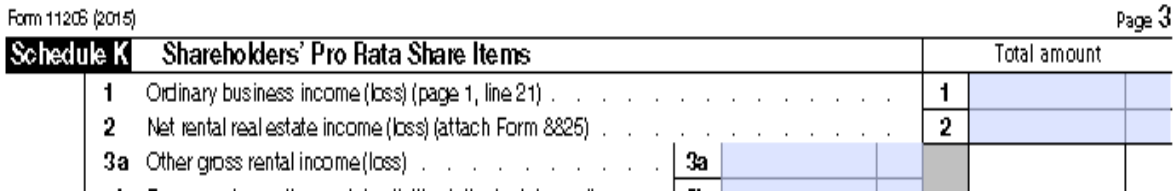
H Check if: (1) ☐ Final return (2) ☐ Name change (3) ☐ Address change (4) ☐ Amended return (5) ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year ▶

Caution: Include only trade or business income and expenses on lines 1a through 21. See the instructions for more information.

Income	1a	Gross receipts or sales	1a		
	b	Returns and allowances	1b		
	c	Balance. Subtract line 1b from line 1a		1c	
	2	Cost of goods sold (attach Form 1125-A)		2	
	3	Gross profit. Subtract line 2 from line 1c		3	
	4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)		4	
	5	Other income (loss) (see instructions—attach statement)		5	
	6	**Total income (loss).** Add lines 3 through 5 ▶		6	
Deductions (see instructions for limitations)	7	Compensation of officers (see instructions—attach Form 1125-E)		7	
	8	Salaries and wages (less employment credits)		8	
	9	Repairs and maintenance		9	
	10	Bad debts		10	
	11	Rents		11	
	12	Taxes and licenses		12	
	13	Interest		13	
	14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)		14	
	15	Depletion **(Do not deduct oil and gas depletion.)**		15	
	16	Advertising		16	
	17	Pension, profit-sharing, etc., plans		17	
	18	Employee benefit programs		18	
	19	Other deductions (attach statement)		19	
	20	**Total deductions.** Add lines 7 through 19 ▶		20	
	21	**Ordinary business income (loss).** Subtract line 20 from line 6		21	
	22a	Excess net passive income or LIFO recapture tax (see instructions)	22a		

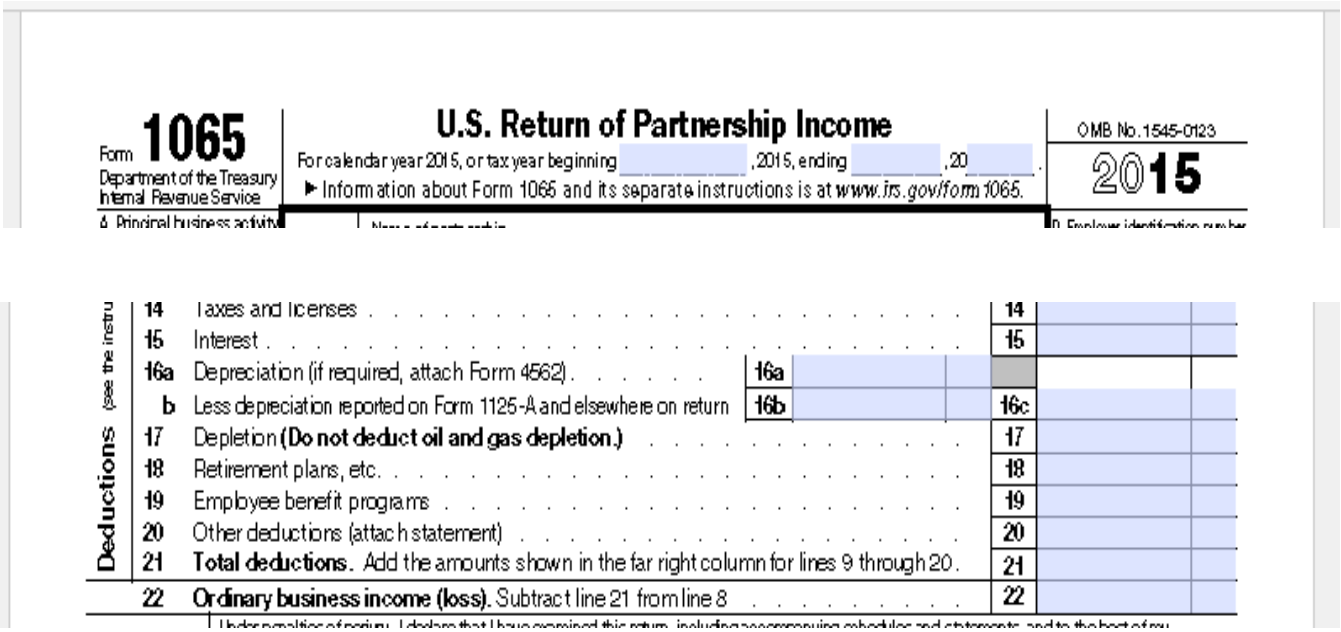
Also Schedule K, Line 1 (Ordinary Business Income)



Form 1120S (2015) Page 3

Schedule K	Shareholders' Pro Rata Share Items		Total amount
1	Ordinary business income (loss) (page 1, line 21)	1	
2	Net rental real estate income (loss) (attach Form 8825)	2	
3a	Other gross rental income (loss)	3a	

For Partnerships And LLCs, Form 1065, Line 22 (Ordinary Income/Loss)



Form **1065**
Department of the Treasury
Internal Revenue Service

U.S. Return of Partnership Income

For calendar year 2015, or tax year beginning _____, 2015, ending _____, 20_____.
▶ Information about Form 1065 and its separate instructions is at www.irs.gov/form1065.

OMB No. 1545-0123
2015

A Principal business activity | Name of partnership | D Employer identification number

Deductions (see the instru	14	Taxes and licenses			14	
	15	Interest			15	
	16a	Depreciation (if required, attach Form 4562)	16a			
	b	Less depreciation reported on Form 1125-A and elsewhere on return	16b		16c	
	17	Depletion **(Do not deduct oil and gas depletion.)**			17	
	18	Retirement plans, etc.			18	
	19	Employee benefit programs			19	
	20	Other deductions (attach statement)			20	
	21	**Total deductions.** Add the amounts shown in the far right column for lines 9 through 20.			21	
	22	**Ordinary business income (loss).** Subtract line 21 from line 8			22	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my

Adding Back Depreciation Expenses: The Donut Case

Depreciation is not a current use of cash, it does not represent amounts available to pay wages. Therefore, depreciation can be added back to the income/loss figure. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

Measuring The Shortfall Against Net Income And Net Current Assets

AAO: "If the net income the petitioner demonstrated it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the offered wage or more, the USCIS will review the petitioner's net current assets."

Net Current Assets or Working Capital on Tax Return: Total Current Assets – Total Current Liabilities

- Total current assets (Schedule L, lines 1 through 6)
- minus total current liabilities (Schedule L, lines 16 through 18)
- equals net current assets

Partnership Return (1065), Schedule L Balance Sheet

Analysis of Net Income (Loss)

1	Net income (loss). Combine Schedule K, lines 1 through 11. From the result, subtract the sum of Schedule K, lines 12 through 13d, and 16l	1	

2	Analysis by partner type:	(i) Corporate	(ii) Individual (active)	(iii) Individual (passive)	(iv) Partnership	(v) Exempt Organization	(vi) Nominee/Other
a	General partners						
b	Limited partners						

Schedule L	Balance Sheets per Books	Beginning of tax year		End of tax year	
	Assets	(a)	(b)	(c)	(d)
1	Cash				
2a	Trade notes and accounts receivable				
b	Less allowance for bad debts				
3	Inventories				
4	U.S. government obligations				
5	Tax-exempt securities				
6	Other current assets (attach statement)				
7a	Loans to partners (or persons related to partners)				
b	Mortgage and real estate loans				
8	Other investments (attach statement)				
9a	Buildings and other depreciable assets				
b	Less accumulated depreciation				
10a	Depletable assets				
b	Less accumulated depletion				
11	Land (net of any amortization)				
12a	Intangible assets (amortizable only)				
b	Less accumulated amortization				
13	Other assets (attach statement)				
14	Total assets				
	Liabilities and Capital				
15	Accounts payable				
16	Mortgages, notes, bonds payable in less than 1 year				
17	Other current liabilities (attach statement)				
18	All nonrecourse loans				
19a	Loans from partners (or persons related to partners)				
b	Mortgages, notes, bonds payable in 1 year or more				
20	Other liabilities (attach statement)				
21	Partners' capital accounts				
22	Total liabilities and capital				

IRS Form 1120, C Corporation

IRS 1120 is complicated for determining net current assets because its Schedule L Balance Sheet includes shareholders equity so that total assets will equal total liabilities.

Line 15 Total Assets minus (Lines 16 + 17 + 18) = Net Current Assets

15	Total assets				
	Liabilities and Shareholders' Equity				
16	Accounts payable				
17	Mortgages, notes, bonds payable in less than 1 year				
18	Other current liabilities (attach statement)				
19	Loans from shareholders				
20	Mortgages, notes, bonds payable in 1 year or more				
21	Other liabilities (attach statement)				
22	Capital stock: a Preferred stock				
	b Common stock				
23	Additional paid-in capital				
24	Retained earnings—Appropriated (attach statement)				
25	Retained earnings—Unappropriated				
26	Adjustments to shareholders' equity (attach statement)				
27	Less cost of treasury stock		( )		( )
28	Total liabilities and shareholders' equity				

Annual Reports Or Financial Statement

- Publicly traded corporations: Check "investor relations" on company website for SEC 10k.

- Privately held corporations, partnerships, LLCs - audited or "reviewed" financial statements from an independent accounting firm.

- "Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage."

Net Current Assets (Working Capital) Annual Report

Financial Status

Item	2014
Current Assets	110,286,950
Properties	23,435,556
Intangible Assets	7,209,291
Other Assets	22,906,477
Total Assets	163,838,274
Current Liabilities	83,258,739
Non-current Liabilities	246,162
Total Liabilities	83,504,901
Capital Stock	8,349,521
Capital Surplus	15,140,687
Retained Earnings	59,531,103
Other Equity	1,062,118
Treasury Stock	(3,750,056)
Non-Controlling Interest	-
Total Stockholders' Equity	80,333,373

Net Current Assets Balance Sheet (From Audited Financial Report)

Balance Sheet
As of December 31, 2010

Cash Basis

	Dec 31, 2010
Assets	
Current Assets	
Checking/Savings	
Operating Bank Account	**$ 5,000.00**
Total Checking/Savings	$ 5,000.00
Other Current Assets	
Inventory	$ 10,000.00
Total Other Current Assets	$ 10,000.00
Total Current Assets	**$ 15,000.00**
Fixed Assets	
Machinery & Equipment	$100,000.00
Total Fixed Assets	$100,000.00
Total Assets	$115,000.00
Liabilities & Equity	
Liabilities	
Current Liabilities	
Accounts Payable	
Accounts Payable	$110,000.00
Total Accounts Payable	$110,000.00
Total Current Liabilities	**$110,000.00**
Total Liabilities	$110,000.00
Equity	
Capital Stock	$170,000.00
Net Income	($165,000.00)
Total Equity	$ 5,000.00
Total Liabilities & Equity	$115,000.00

Current Assets **$ 15,000.00**
Current Liabilities **($110,000.00)**
Net Current Assets **($ 95,000.00)**

BENEFICIARY'S ELIGIBILITY

Establishing Experience – Experience Letters

Ideally, experience letter should track exactly the information in Section K of the 9089 for that job.

If experience letter does not track exactly the information in Section K of the 9089 for that job, then alternatively, at a minimum, the letter should make it clear that all of the necessary experience and special requirements encompassed in Section K of the 9089 for that job are satisfied.

- E.g., if one of the requirements is 24 months of "preparing H-1B petitions," and the Beneficiary gained that experience during the two years he worked at O'Quinn, Olsen & Zimskind, the letter from O'Quinn, Olsen & Zimskind should specifically state that one of the Beneficiary's job duties was to prepare H-1B petitions. (Not just to "prepare immigration filings.")

Establishing Experience – Declarations Under Penalty of Perjury

What if letter from employer can't be obtained or letter is basic "name, rank and serial number" letter?

- Next best – Declaration from former manager **combined with** Declaration from employee as to why detailed letter on company letterhead is unavailable.
- Next best after that - Declaration from former colleague **combined with** Declaration from employee as to why detailed letter on company letterhead is unavailable.
- And then throw in anything else you might have to substantiate the employment and experience gained during the employment. E.g., offer letters, employment contracts, prior H-1B supporting letters, prior labor certification applications, etc.

- Slightly different wording if Declaration executed outside the U.S.

  "Pursuant to 28 USC § 1746, I, Mary Jones, hereby declare under penalty of perjury under the laws of the United States of America as follows:"

  "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Establishing Experience – Sample Declaration

SAMPLE DECLARATION UNDER PENALTY OF PERJURY

Pursuant to 28 USC § 1746, I, Bob Sacomano, hereby declare under penalty of perjury [under the laws of the United States of America]* as follows:

I joined Vandelay Industries Ltd. on November 21, 2005 and currently hold the position of Systems Integration Manager, based in Helsinki, Finland. This letter is to confirm that Lloyd Braun was a full-time employee with Vandelay Industries Ltd. from July 1, 2007 to December 7, 2010 as a Systems Analyst for the Latex Division. I was Mr. Braun's manager during his employment with Vandelay, and I can confirm that during his employment he had the following responsibilities:

- Served as Oracle Lead for the analysis, design, development, testing and implementation of Oracle ERP 11.5.10 financial modules, including General Ledger, Fixed Assets, Accounts Payables, Accounts Receivables, Project Accounting, Purchasing, and Order Management.

- Served as Team Lead for the project life cycle for each of these modules, which involved requirements gathering, functional design, technical design, system configuration; reviewing and developing custom components to meet the business requirements and integrate them with Oracle Applications; preparation of Component Test Scenarios & Conditions and Unit Testing; preparation of Installation Instructions; fixing of Bugs reported during Black Box testing, Assembly testing and defects that arose in the production service.

This position required the regular use of SQL for troubleshooting and development and support of customizations, Oracle Database technologies, Oracle Applications eBusiness Suite 11i, Oracle Reports, Oracle forms, Workflows, Discoverer for creation of ad hoc reports, and XML Publisher.

I declare under penalty of perjury [under the laws of the United States of America]* that the foregoing is true and correct.

Executed on _____, 2016.

_____

Bob Sacomano

*Include what is bracketed if Declaration executed outside the U.S.

Establishing Experience – Experience Letters

- Experience gained with the petitioning employer
    - In the "good old days," USCIS tended to accept experience gained with the same employer as long as it was gained before the priority date. E.g., *Matter of Wing's Tea House*, 16 I & N Dec. 158 (R.C. 1977)
    - Now, USCIS cites J-21 on the 9089, which asks: "*Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?*"
    - If the answer is NO, which it almost always will be and must be, USCIS takes the (surprisingly logical) position that experience with the petitioning employer can't be used to satisfy the requirements.
    - Experience with the petitioning employer **can** be used if it was gained in a position **not** substantially comparable to the PERM/I-140 position (50% or less overlap in time spent performing same job duties).
    - If experience with the petitioning employer was gained in a position that was not substantially comparable, submit a grid detailing the percentage of time spent on duties of each job to show they did not overlap by more than 50%. **Even if the job title and the job duties were exactly the same**, and even if the jobs were not separated out on the 9089, many jobs evolve and the percentage of time spent on certain duties may differ drastically in year 1 versus year 4.

SAMPLE JOB DUTIES COMPARISON GRID

	1. Design Engineer (April 1, 2009 – December 31, 2011)	2. Lead Support Engineer (January 1, 2012 – December 31, 2012)	3. Lead Support Engineer (January 1, 2013 – Present)	Overlap		Cosmo Kramer, Director of Support Engineering
Duties	**Hours per month (173 total)**	**Hours per month (173 total)**	**Hours per month (173 total)**	**1v3**	**2v3**	
Liaise with U.S. professional service team to provide technical input and problem resolution into the deployments of Vandelay products prior to the solutions going live on customer sites - *Gathering technical information and providing workarounds*	22	18	5	5	5	
Liaise with U.S. professional service team to provide technical input and problem resolution into the deployments of Vandelay products prior to the solutions going live on customer sites - *Resource allocation for resolving issues*	0	5	15	0	5	
Liaising with the U.S. based support organization for troubleshooting installations on customer sites - *Gathering technical information and providing workarounds*	22	18	5	5	5	
Liaising with the U.S. based support organization for troubleshooting installations on customer sites - *Resource allocation for resolving issues*	0	5	15	0	5	
Provision of solutions that involve modifications to the codebase	50	30	3	3	3	
Coordinate with design and development engineering staff to incorporate previous patch releases into existing code - *Coding merge patches*	10	7	1	1	1	
Coordinate with design and development engineering staff to incorporate previous patch releases into existing code - *Providing time table and task assignment*	0	2	2	0	2	
Validate interface requirements	0	2	3	0	2	
Validate and advise on implemented engineering solutions	3	3	3	3	3	
Provide support to test group	10	4	0	0	0	
Project management and technical leadership in deployment of maintenance patches and emergency patches for Vandelay product solutions in U.S.	0	1	2	0	1	
Responsible for the complete life cycle of a trouble ticket from analysis to delivery	35	27	2	2	2	
Review junior engineers	0	2	3	0	2	
Delegate and oversee assignments internally and externally to	0	5	25	0	5	

ensure rapid issue resolution						
Interface with technical and HR management regarding resourcing	0	5	15	0	5	
Interview potential staff	0	2	3	0	2	
Managing tasks for team of employees in U.S. to run Vandelay's product maintenance function locally in the U.S.	0	5	25	0	5	
Training and mentoring U.S. hired staff	0	2	5	0	2	
Expand troubleshooting capabilities of the team by introducing Vandelay tools and techniques	5	5	5	5	5	
Lead 24/7 product support function	0	2	3	0	2	
Lead technical reviews of documentation and source code	0	1	3	0	1	
Establish/maintain liaison with Vandelay Ltd. in Australia to ensure uniformity maintained throughout the worldwide organization	0	2	5	0	2	
Serve as lead technical contributor within the Support Engineering team - *Low level code feedback and recommendation*	1	1	0	0	0	
Serve as lead technical contributor within the Support Engineering team - *High level design feedback and recommendation for future functionalities*	0	2	5	0	2	
Analyze complex software components and apply engineering concepts in accordance with Vandelay engineering objectives to develop creative, effective and timely solutions to complex technical problems - *Providing in code solution to debug current and future problems*	10	7	5	5	5	
Analyze complex software components and apply engineering concepts in accordance with Vandelay engineering objectives to develop creative, effective and timely solutions to complex technical problems - *Providing external to product debugging toolset, knowhow and solutions*	0	5	10	0	5	
Identify risks and develop contingency plans - *Identifying potential code risks*	5	3	2	2	2	
Identify risks and develop contingency plans - *Identifying process, resourcing problems and providing alternative plans*	0	2	3	0	2	
Total hours	173	173	173	31	81	

Education Issues

USCIS letter to Rep. Crowley – USCIS endorse or encourage EDGE over other credible equivalency resource materials. (USCIS pretends this letter doesn't exist and if EDGE addresses the degree in question, USCIS goes with EDGE).

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Congressional Relations
Washington, DC 20529

U.S. Citizenship and Immigration Services

MAR 13 2014

The Honorable Joseph Crowley
Member, U.S. House of Representatives
82-11 37th Avenue, Suite 402
Jackson Heights, NY 11372

Dear Representative Crowley:

We regret the delay in responding your inquiry regarding U.S. Citizenship and Immigration Services (USCIS) use of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE).

At the outset, it is important to note that a foreign worker must meet the applicable statutory and regulatory requirements for the particular nonimmigrant or immigrant benefit requested. For example, the foreign worker may have to meet certain educational requirements to be eligible for the requested benefit.

In this regard, USCIS considers all opinions rendered by an educational credentials evaluator(s) in conjunction with a review of the foreign worker's relevant educational credentials. In the course of adjudication, USCIS may refer to other available credible resource material regarding the equivalency of the educational credentials to college degrees obtained in the United States, such as AACRAO EDGE database.

The opinions expressed in evaluations and resource materials, as well as EDGE, are not binding on USCIS. Additionally, USCIS does not endorse or encourage the use of EDGE over other types of credible resource material regarding the equivalency of the educational credentials to college degrees obtained in the United States.

As to your constituent's request for a copy of the investigative report, the Office of Security, Investigations Division does not respond directly for requests for information. Instead, please have your constituent direct his inquiries to the following link to the USCIS Freedom of Information Act (FOIA) website and follow the directions on how to file a FOIA request: http://www.dhs.gov/freedom-information-act-and-privacy-act.

We hope the information provided is helpful. If we may be of assistance in the future, please let us know.

Sincerely,

FOR THE DIRECTOR

James W. McCament
Chief

Education Issues

8 U.S.C. § 204.5(k) Aliens who are members of the professions holding **advanced degrees** or aliens of exceptional ability.

204.5(k)(2) Definitions As used in this section:

Advanced degree means **any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate**. A United States **baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience** in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

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8 U.S.C. § 204.5(l) **Skilled workers, professionals, and other workers**.

204.5(l)(1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

204.5(l)(2) Definitions As used in this part:

Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (**requiring less than two years training or experience**), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Professional means a qualified alien who holds at least **a United States baccalaureate degree or a foreign equivalent degree** and who is a member of the professions.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (**requiring at least two years training or experience**), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Education Issues

Date degree awarded can be crucial if it must be shown that Beneficiary has five years of **post-Bachelor's experience**.

Often, and particularly in India, the formal degree is not awarded until many months after completion of exams, or issuance of provisional degree certificate, and sometimes not for a year or more.

- In H-1B context, no worries. USCIS website states as follows:

  "Evidence of Beneficiary's Educational Background

  You must submit evidence of the beneficiary's education credentials at the time of filing. ***If all of the requirements for a degree have been met, but the degree has not yet been awarded, you may submit the following alternate evidence****:*

  A copy of the beneficiary's final transcript; or

  A letter from the registrar confirming that all of the degree requirements have been met. If the educational institution does not have a registrar, then such a letter must be signed by the person in charge of educational records where the degree will be awarded."

- 2015 (non-precedent) AAO case, states as follows:

  "Based on the plain language of section 203(b)(2)(A) of the Act and the ordinary meaning of the term "degree" in an academic context, the record establishes the beneficiary's possession of a foreign equivalent of a U.S. Bachelor's degree ***upon completion of his studies and exams****."*

- HOWEVER - several of our colleagues continue to report that USCIS is denying cases because it is not considering the degree to have been earned until it is formally awarded.

- Thread on AILA Message Center discusses developments on this issue - http://messages.aila.org/showthread.php?73674-Indian-Provisional-Degree-Certificates

2015 (NON-PRECEDENT) AAO CASE ON TIMING OF DEGREE

IN RE: Petitioner: [Name redacted]
Beneficiary: [Name redacted]

Administrative Appeals Office

FILE #: [File name redacted]

2015/06/18

PETITION RECEIPT #: [Name redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153 (b)(2)(A)

ON BEHALF OF PETITIONER: [Lawyer name redacted]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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DISCUSSION: The Director, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on the petitioner's appeal. The appeal will be sustained, the Director's decision will be withdrawn, and the petition will be approved.

The petitioner operates the largest public school system in the United States. It seeks to permanently employ the beneficiary as an Applications Developer - Financial Systems. The petition requests classification of the beneficiary as an advanced degree professional under section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The DOL accepted the labor certification application for processing on August 8, 2012, establishing the petition's priority date. *See* 8 C.F.R. § 204.5(d).

The Director concluded that the record did not demonstrate the beneficiary's possession of the post-baccalaureate experience required for the requested classification and the offered position by the petition's priority date. Accordingly, the Director denied the petition on July 15, 2014.

The appeal is properly filed and alleges specific errors in law and fact. We conduct appellate review on a *de novo* basis.[1] We consider all pertinent evidence of record, including new evidence properly submitted on appeal.[2]

The Beneficiary's Eligibility for the Classification Sought and the Offered Position

Section 203(b)(2)(A) of the Act provides visas to qualified immigrants who are members of the professions holding advanced degrees or their equivalents. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

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Based on the plain language of section 203(b)(2)(A) of the Act and the ordinary meaning of the term "degree" in an academic context, the record establishes the beneficiary's possession of a foreign equivalent of a U.S. Bachelor's degree upon completion of his studies and exams.[3] Thus, the Director erred in concluding that the beneficiary could not have obtained five years of post-baccalaureate experience before the petition's priority date of August 8, 2012. The Director's decision will therefore be withdrawn.

Evidence of the Beneficiary's Qualifying Post-Baccalaureate Experience

A petitioner must support a beneficiary's claimed qualifying experience with copies of letters from former employers. 8 C.F.R. § 204.5(k)(3)(i)(B). The letters must include the names, addresses, and titles of the employers, and specific descriptions of the duties performed by the beneficiary. *Id.* "If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered." 8 C.F.R. § 204.5(g)(1).

In response to our Notice of Derogatory Information and Intent to Dismiss (NOID), dated October 24, 2014, the petitioner submitted additional documentation establishing the beneficiary's qualifying, post-baccalaureate experience. The record therefore establishes the beneficiary's possession of at least five years of progressive, post-baccalaureate experience by the petition's priority date as required for the requested classification and as specified on the accompanying labor certification. Accordingly, the petition must be approved.

The appeal will be sustained for the foregoing reasons. In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende,* 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has met that burden.

ORDER: The appeal is sustained, the Director's decision of July 15, 2014 is withdrawn, and the petition is approved.

Notes:

[1.] *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dep't of Transp., NTSB,* 925 F.2d 1147,1149 (9th Cir. 1991). Federal courts have long recognized our *de novo* authority. *See, e.g., Soltane v. Dep't of Justice,* 381 F.3d 143, 145 (3d Cir. 2004).

[2.] The instructions to Form I-290B, Notice of Appeal or Motion, allow the submission of additional evidence on appeal. *See* 8 C.F.R. § 103.2(a)(1) (incorporating a form's instructions into the regulations). The instant record provides no reason to preclude consideration of the documents submitted on appeal. *See Matter of Soriano,* 19 I&N Dec. 764, 766 (BIA 1988).

[3.] Online records indicate the beneficiary's completion of his university studies in 2004 and the original issuance of his diploma on April 27, 2005. *See* [Name redacted] (accessed June 9, 2015).

IMPACT OF I-140 ON NIV STATUS

- **O-1, E** – not dual intent but definitions in INA do not include requirement of residence abroad which FN has no intention of abandoning.
    - O-1

      8 CFR §214.2(o)(13)

      The **approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an O-1 petition, a request to extend such a petition, or the alien's application for admission, change of status, or extension of stay**. The alien may legitimately come to the United States for a temporary period as an O-1 nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

    - E

      9 FAM 402.9-4(C) Intent to Depart Upon Termination of Status

      An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time, nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The alien may sell his or her residence and move all household effects to the U.S. The alien's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien's intent is to the contrary. If there are such objective indications, inquiry is justified to assess the applicant's true intent. As discussed in 9 FAM 402.12-14, **an applicant might be a beneficiary of an immigrant visa petition filed on his or her behalf. However, the alien might satisfy you that his and/or her intent is to depart the United States upon termination of status, and not stay in the United States to adjust status or otherwise remain in the United States regardless of legality of status**.

- **TN** – a little trickier.
    - 9 FAM 402.17-7 TEMPORARY ENTRY

      "The agreement encompasses only business persons coming to the United States temporarily. INA 214(b), therefore, is fully applicable to TN visa applicants. Chapter 16 provides the following definition: "Temporary entry means an entry into the United States without the intent to establish permanent residence." The department's regulation (22 CFR 41.59(c)) amplifies this definition to provide additional guidance. The essence of the requirement is that the alien is seeking "temporary" entry into the United States. You must be satisfied that the alien's proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment. **An intent to immigrate in the future that is in no way connected to the proposed immediate trip need not in itself result in a finding that the immediate trip is not temporary.** An extended stay, even in terms of years, may be temporary, as long as there is no immediate intent to immigrate."

    - 1996 Yvonne LaFleur Letter

"The fact that an alien is the beneficiary of **an approved I-140 petition may not be, in and of itself, a reason to deny** an application for admission, readmission, or extension of stay if the alien's intent is to remain in the United States temporarily."

- Chapter 15.5(b)(3) of the (now defunct) CBP Inspector's Field Manual

"The fact that an alien is the beneficiary of **an approved I-140 petition may not be, in and of itself, a reason to deny** an application for admission, readmission, or extension of stay if the alien's intent is to remain in the United States temporarily."

1996 YVONNE LAFLEUR LETTER

SEROTTE, REICH, SEIPP & KENMORE, LLP
Attorneys & Counselors At Law

March 7, 1996

Ms. Yvonne M. LaFleur
Nonimmigrant Branch - Adjudications
U.S. Immigration and Naturalization Service
425 Eye St., N.W.
Washington, D.C. 20536

Donald D. Serotte
(1929-1985)

Anthony J. Barone, Jr.

Mark T. Kenmore

William Z. Reich

Larry A. Scott

Gerald P. Seipp

Michael I. Serotte

Re: Lifting of I-94s from Approved TN Canadian NAFTA Applicants

Dear Ms. LeFleur:

I would appreciate if you would clarify your agency's position about the following scenario.

A Canadian citizen professional, eg. engineer, is approved in Buffalo, New York, for TN classification and is issued an I-94 for one year to work in Chicago. Some time after the entry, the employer files an I-140 petition, which is approved and forwarded for immigrant visa processing abroad to a U.S. Consular Post.

During the year of authorized TN classification, the alien returns to Canada for a family social function and seeks to reenter at a Port of Entry in Detroit. The inspector, upon learning that an I-140 has been approved, lifts the engineer's approved TN I-94 and refuses him admission. Further, the inspector suggests if the I-140 for the benefit of the engineer is withdrawn, then he may be readmitted.

We respectfully submit that even before the H and L regulations provided for "dual intent", status was not summarily revoked at the border merely because an immigrant visa petition had been approved. Moreover, if an individual was entering solely to continue temporary employment and not to pursue an immigrant visa, the mere filing or approval of an immigrant petition would not automatically trigger refusal.

The US/Canada FTA specifically recognized dual intent for TN's. Dual intent was not carried over into the NAFTA, however, NAFTA regulations at 8 CFR 214.6(b) define a temporary entry as an "entry without the intent to establish permanent residence." In our example, the engineer will leave the U.S. to complete immigrant visa processing abroad. He clearly has no intent to establish permanent residence by seeking to enter as a TN. He does not intend to apply for adjustment of status.

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Toronto and
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and Consular Matters.

SEROTTE, REICH, SEIPP & KENMORE, LLP

Therefore, we respectfully submit that a Canadian professional worker who is returning in unexpired approved TN status should not be prevented from returning to complete the temporary employment engagement simply because he is the beneficiary of an approved I-140 petition.

Your guidance on the subject would be most greatly appreciated.

Very truly yours,

WILLIAM Z. REICH
WZR/pcz

U.S. Department of Justice

Immigration and Naturalization Service
HQ 1313-C

425 Eye Street N.W.
Washington, D.C. 20536

JUN 18 1998

Mr. William Z. Reich
300 Delaware Avenue
Buffalo, New York 14202

Dear Mr. Reich:

This refers to your letter of March 7, in which you state that a Canadian citizen was refused admission as a TN nonimmigrant under the North American Free Trade Agreement (the NAFTA) because he is the beneficiary of an approved I-140, Immigrant Petition for Alien Worker, and, therefore, could not establish that his entry was without the intent to establish permanent residence in the United States. You submit that a TN nonimmigrant may be admitted to the United States to complete a temporary employment engagement even though he or she is the beneficiary of an approved I-140 petition.

This office has oversight for the uniform application of immigration laws, regulations, and statute. It does not determine eligibility for specific nonimmigrant classifications in individual cases. The determination as to whether or not an alien is eligible for admission or extension of stay as a TN professional must be made by the immigration officer at the time the alien applies for admission or extension of stay. Each application must be judged on its own merits. Nevertheless, we can provide you with a very general statement relating to the facts described in your letter.

At the present time, there is no specified upper limit on the number of years a citizen of Canada or a citizen of Mexico may remain in the United States in TN classification as there is with the majority of nonimmigrant classifications contained in section 101(a)(15) of the Act. However, the presumption of immigrant intent under section 214(b) of the Act is applicable to NAFTA professionals under section 214(e) of the Act (unlike that for H and L nonimmigrants who are no longer subject to section 214(b) of the Act). Accordingly, applicants for admission, extension, or readmission as NAFTA professionals will be subject to a determination by the Service of the applicability of section 214(b) of the Act to the applicant.

The fact that an alien is the beneficiary of an approved I-140 petition may not be, in and of itself, a reason to deny an application for admission, readmission, or extension of stay if the

alien's intent is to remain in the United States temporarily. Nevertheless, because the Service must evaluate each application on a case-by-case basis with regard to the alien's intent, this factor may be taken into consideration along with other relevant factors every time that a TN nonimmigrant applies for admission, readmission or a new extension of stay. Therefore, while it is our opinion that under the conditions as described in your letter, a TN nonimmigrant may apply for readmission in the TN classification, if the inspecting officer determines that the individual has abandoned his or her temporary intent, that individual's application for admission as a TN nonimmigrant may be refused.

I trust this response has been of some assistance to you with regard to your question.

Sincerely,

Yvonne M. LaFleur

Yvonne M. LaFleur, Chief
Business and Trade Services Branch
Benefits