ORANGE COUNTY BAR ASSOCIATION

IMMIGRATION LAW SECTION WEBINAR

Show Me the Money: How The I-864 Affidavit of Support is Used Outside of Immigration Context and The Use of the I-944 Declaration of Self-Sufficiency

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Immigration Support Advocates

SUING ON THE I-864 AFFIDAVIT OF SUPPORT

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When a married couple separates, spousal maintenance (or "alimony") is generally not available automatically as a matter of right.[1] Whether one former spouse will be responsible for supporting the other depends on a multitude of factors which vary state-to-state. It may therefore come as a shock to family law practitioners to learn of a common immigration form that may require a divorce court to award substantial financial support, regardless.[2] The form may require payment of financial support for an unlimited period of time, even when a marriage was short lived.

As immigration practitioners are well aware, most family-sponsored visa beneficiaries and certain employment-based immigrants are required to file an I-864 Affidavit of Support.[3] The document is required for a noncitizen to overcome inadmissibility due to a likelihood of becoming a "public charge."[4] Unlike its unenforceable predecessor,[5] the I-864 purports to be a binding contract between a U.S. citizen "sponsor" and the U.S. government.[6] The sponsor promises to maintain

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[1] *See*, *e.g.*, Marriage of Irwin, 822 P.2d 797, 806 (Wash. App. 1992), *rev. denied*, 833 P.2d 387.

[2] Anecdotally, it appears the family law implications of the I-864 Affidavit of Support have received relatively little air time in media devoted to the domestic bar. *But see* Geoffrey A. Hoffman, *Immigration Form I-864 (Affidavit of Support) and Efforts to Collect Damages as Support Obligations Against Divorced Spouses — What Practitioners Need to Know*, 83 FLA. BAR. J. 9 (Oct. 2009) (articulately sounding the alarm bell).

[3] INA § 212(a)(4)(C), 8 U.S.C. § 1182(a)(4)(C) (family-sponsored immigrants); INA § 212(a)(4)(D), 8 U.S.C. § 1182(a)(4)(D) (employment-based immigrants). *See* Form I-864, Affidavit of Support (rev'd Sep. 19, 2011), *available at* http://www.uscis.gov/files/form/i-864.pdf (last visited Oct. 16, 2012).

[4] INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

[5] The Form I-134 *Affidavit of Support* was used prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009. *Cf.* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741 (1998) (discussing changes to the Affidavit of Support). The Form I-134 may still be used to overcome public charge inadmissibility for intending immigrants not required to file the I-864. *See* Instructions for Form I-134, Affidavit of Support (rev'd May 25, 2011), *available at* http://www.uscis.gov/files/form/i-134instr.pdf (last visited Nov. 12, 2012).

[6] Form I-864, *supra* note 3, at 6; INA § 213A(a)(1)(B), 8 U.S.C. § 1183a(a)(1)(B) (requirement of enforceability); 8 C.F.R. § 213a.2(d) (same). Interim regulations for the I-864 were first published in 1997 and were finalized July 21, 2006. Affidavits of

the intending immigrant at 125% of the Federal Poverty Guidelines ("Poverty Guidelines") and to reimburse government agencies for any means-tested benefits paid to the noncitizen beneficiary.[7] This is a substantial level of support: for it would require support of $13,963 annually ($1164 per month) for a single individual, adding $4,950 for each additional family member.[8] The I-864 provides that the sponsor will be held personally liable if he fails to maintain support, and may be sued by either the beneficiary or by a government agency that provided means-tested public benefits.[9] Where a single sponsor is unable to demonstrate adequate finances to provide the required support, additional "joint-sponsors" may be used to meet the required level, and thereby become jointly and severally liable.[10]

The mid-naughts witnessed the first round of state and federal cases in which I-864 beneficiaries successfully sued their sponsors for missing financial support. Sadly, this timing likely coincided with the unraveling of marriages on the basis of which the first I-864s had been executed.[11] In a thorough Bulletin published in 2005, Charles Wheeler reported on developments to date and highlighted a multitude of

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Support on Behalf of Immigrants, 62 Fed. Reg. 54346 (Oct. 20, 1997) (to be codified at 8 C.F.R. § 213.a1 *et seq*.) (hereinafter Preliminary Rules); Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732 (June 21, 2006) (same) (hereinafter Final Rules).

[7] Form I-864, *supra* note 3, at 6. *See also* INA § 213A(a)(1)(A), 8 U.S.C. § 1183a(a)(1)(A) (same requirement by statute). The Poverty Guidelines are published each year in the Federal Register. *See* Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034 (Jan. 26, 2012) (hereinafter Poverty Guidelines).

[8] Poverty Guidelines, *supra* note 7.

[9] Form I-864, supra note 3, at 7. In lieu of tiptoeing around gendered pronouns, beneficiaries and sponsors will be assigned the feminine and masculine herein, respectively, as this represents the vast majority of cases discussed herein.

[10] 8 C.F.R. § 213a.2(c)(2)(iii)(C). Joint sponsors are jointly and severally liable, but there is no known case in which joint sponsors have been sued by a beneficiary. INA § 213A(f), 8 U.S.C. § 1183a(f) (defining sponsor).

[11] All cases cited in this BULLETIN arise from Affidavits executed for spouses, though some employment-sponsored visas also require the I-864. *See supra* note 3. Likewise, though virtually no available cases discuss the right of a sponsored child to maintain an action on the I-864, there appears to be no reason such an action would be improper. *See* Chang v. Crabill, 2011 U.S. Dist. LEXIS 67501 (N.D. Ind. June 21, 2011) (denying motion to dismiss action by sponsored spouse and child).

potential pitfalls for beneficiaries seeking to sue on the I-864.[12] The present Bulletin provides an update on this evolving area of law.

It is established that noncitizen-beneficiaries may sue on the I-864 as a contract, but courts continue to struggle with a myriad of potential defenses. Likewise, beneficiaries have successfully relied on the I-864 to achieve substantial spousal maintenance awards, but this is not possible in all jurisdictions. This Bulletin offers updated advice to immigration and family law attorneys in this hybrid practice area, noting a thread of confusion over how the I-864 ought to be interpreted in light of its underlying statutory framework.

I. Contract Issues

It is now settled law that the I-864 provides the noncitizen-beneficiary a private cause of action against the sponsor, should he fail to maintain support.[13] Specifically, the intending noncitizen is a third-party beneficiary with respect to the promise of support made by the sponsor to the U.S. Government.[14] Under the terms of the I-864, only five specified events end the sponsor's support obligations: the beneficiary (1) becomes a U.S. citizen; (2) can be credited with 40 quarters of work; (3) is no longer a permanent resident *and* has departed the U.S.; (4) after being ordered removed seeks permanent residency based on a different I-864; or (5) dies.[15] It is settled that a

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[12] Charles Wheeler, *Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support*, 1-23 BENDER'S IMMIGR. BULL. 3 (2005).

[13] *See*, *e.g.*, Moody v. Sorokina, 40 A.D.2d 14, 19 (N.Y.S. 2007) (holding that trial court erred in determining I-864 created no private cause of action). No known appellate case has held to the contrary. *But see* Rojas-Martinez v. Acevedo-Rivera, 2010 U.S. Dist. LEXIS 56187 (D. P.R. June 8, 2010) (granting defendant's motion to dismiss; holding that I-134, predecessor to I-864, was not an enforceable contract, even though executed after the effective date of IIRAIRA legislation).

[14] *See*, *e.g.*, Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 45729, at *19 (D. Ind. May 27, 2005) (memo op.) (granting in part plaintiff's motion for summary judgment; rejecting argument that noncitizen could have failed to perform duties under the I-864, as there was no support for proposition that third-party beneficiary could breach a contract).

[15] Form I-864, *supra* note 3, p. 7. *See also* INA § 213A(a)(2), (3); 8 U.S.C. § 1183a(a)(2), (3) (describing period of enforceability).

couple's separation or divorce does not terminate the sponsor's duty.[16] While an I-864 beneficiary may sue a sponsor for support, courts have taken diverging approaches to a host of issues surrounding the particulars of the contract action.[17]

I.A. Duration of obligation

Conditions precedent. A condition precedent is an event that must occur before an obligor has a duty to perform on a contract.[18] Courts have grappled with several possible preconditions to a beneficiary's right to sue on the I-864.

In *Baines v. Baines* a Tennessee court rejected the argument that a beneficiary must have received means-tested public benefits in order to seek support from a sponsor.[19] The Court took recourse to the statute, "which provides that the sponsor agrees to provide support to the sponsored alien and that the agreement to support is legally enforceable against the sponsor by the sponsored alien."[20] In fact, the current I-864 appears to make this clear, proving in separate paragraphs: "[i]f you do not provide sufficient support [to the beneficiary]… that person may sue you for support;" and "[i]f a [government or private agency] provides any covered means-tested public benefits… the agency may ask you to reimburse them…"[21] Comparing the paragraphs, it is clear that receipt

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[16] Hrachova v. Cook, No. 5:09-cv-95-Oc-GRJ, 2009 U.S. Dist. LEXIS 102067, at *3 (M.D. Fla. Nov. 3, 2009) ("[t]he view that divorce does not terminate the obligation of a sponsor has been recognized by every federal court that has addressed the issue").

[17] Note that the Department of Homeland Security expressly defers to the courts on issues relating to the contract-based enforcement of the I-864. Final Rules, *supra* note 6, at 35742-43 ("It is for the proper court to adjudicate any suit that may be brought to enforce an affidavit of support").

[18] The second *Restatement* of contracts abandoned the characterization of conditions as precedent or subsequent, *compare* RESTATEMENT (SECOND) of Contracts § 224 (1981) (hereinafter RESTATEMENT (2nd)) *with* RESTATEMENT (FIRST) OF CONTRACTS § 250 (1932) (defining condition precedent), yet use of the term persists.

[19] No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761 (Tenn. Ct. App. Nov. 13, 2009) (holding that such an argument was inconsistent with the "clear language" of the statute). *See also Stump*, 2005 U.S. Dist. LEXIS 45729, at *2 (noting prior order denying sponsor-defendant's Fed. R. Civ. Pro. 12(b)(6) motion to dismiss due, *inter alia*, to plaintiff-beneficiary's failure to allege she had received means-tested benefits).

[20] *Baines*, 2009 Tenn. App. LEXIS 761, at *12.

[21] Form I-864, *supra* note 3, p. 7.

of means-tested benefits is a pre-condition only to an agency seeking reimbursement, not to an action by the noncitizen-beneficiary for support.

By contrast, courts hold that a beneficiary's household income must fall beneath 125% of the Poverty Guidelines before an action may be maintained against the sponsor.[22] This result is not surprising. The duty owed by a sponsor to a beneficiary is to maintain the beneficiary at 125% of the Poverty Guidelines; if the beneficiary's income has not slipped beneath this point then the sponsor's duty of financial support has not been triggered.

An important condition precedent has been recognized under the latest iteration of the I-864 (revised September 19, 2011).[23] Under the new form, it appears that a beneficiary must have achieved lawful permanent resident (LPR) status in order to sue for support.[24] The I-864 previously provided that the sponsor's promise was made, "in consideration of the sponsored immigrant *not being found inadmissible* to the United States under section 212(a)(4)(C) . . . and to enable the sponsored immigrant to overcome this ground of inadmissibility."[25] Examining that language, the consideration offered by the government was the return promise that the intending immigrant would overcome public charge inadmissibility,[26] the elements of contract formation were

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[22] *See*, *e.g.*, In re Marriage of Sandhu, 207 P.3d 1067 (Kan. Ct. App. 2009) (holding that beneficiary had no cause of action due to earnings over 125% of the Poverty Guidelines). *See also* Iannuzzelli v. Lovett, 981 So.2d 557 (Fla. Dist. Ct. App. 2008) (noting that beneficiary-plaintiff was awarded no damages at trial because she had failed to demonstrate "that she ha[d] been unable to sustain herself at 125% of the poverty level since her separation from the marriage").

[23] *See supra* note 3.

[24] *See* 8 C.F.R. § 213a.2(e) (support obligations commence when intending immigrant is granted admission as immigrant or adjustment of status).

[25] Form I-864, Affidavit of Support p. 4 (rev'd Nov. 5, 2001), on file with the author (emphasis added); Form I-864, Affidavit of Support, p. 4 (rev'd Oct. 6, 1997), on file with the author (same).

[26] Worded this way, was the return promise illusory? Recall that the government has discretion to find a noncitizen inadmissible on public charge grounds regardless of a signed I-864. INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A).

met, rendering an enforceable agreement – so reasoned a federal court in *Stump v. Stump*.[27]

In the current version of Form I-864, the language just quoted has been struck. Instead, the Form recites that "[t]he intending immigrant's *becoming a permanent resident* is the 'consideration' for the contract."[28] This alone might not change the result reached in *Stump*, since the carrot of future permanent residency could constitute an immediate valuable exchange at the time the Form is signed.[29] If so, the elements of contract formation would be met and the reasoning of *Stump* would make the agreement immediately enforceable. The important difference occurs where the new Form clarifies in two different places that the sponsor's *obligations* commence, "[i]f an attending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed."[30] Looking to this revised language, in *Chavez v. Chavez* a Virginia court easily concluded that "becoming a permanent resident is a condition precedent" to a beneficiary suing on an I-864.[31] This result is consistent with the understanding of the Department of Homeland Security, which expressly considered and endorsed the view that a sponsor's support duties arise only after the intending immigrant acquires status.[32]

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[27] No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 45729, at *18 (D. Ind. May 27, 2005) (granting in part plaintiff's motion for summary judgment).

[28] Form I-864, *supra* note 3, p. 4. The revised language appears clearly to be more consistent with the INA interpretation exposed in the federal regulations. *See* 8 C.F.R. § 213a.2(e) (support obligations commence "when the immigration officer or the immigration judge grants the intending immigrant's application for admission as an immigrant or for adjustment of status…").

[29] Like the "consideration" of permanent residency, the promise of overcoming public charge inadmissibility is something that can be realized only in the future. Yet the *Stump* Court found such a promise constituted consideration forming a binding contract at the time of signing. 2005 U.S. Dist. LEXIS 45729, at *18.

[30] Form I-864, *supra* note 3, p. 4.

[31] Civil No. CL10-6528, 2010 Va. Cir. LEXIS 319 (Va. Cir. Crt. Dec. 1, 2010) (denying beneficiary's motion for relief *pendente lite*).

[32] Final Rules, *supra* note 6, at 35740 ("[t]he final rule clarifies that, for the obligations to arise, the intending immigrant must actually acquire permanent resident status").

Terminating obligation - quarters of work. Of the five events that may terminate a sponsor's obligations under the I-864[33] only one has received attention in the context of actions by noncitizen-beneficiaries. In *Davis v. Davis*, the Ohio Court of Appeals addressed how to calculate 40 quarters of work for purposes of determining when a sponsor's support duty has terminated.[34] The Court concluded the total would be calculated by adding all qualifying quarters worked by the beneficiary to all those worked by the sponsor – apparently even if this results in counting a single quarter twice (once for the beneficiary, once for the sponsor). As argued by a dissenting opinion, this result seems starkly at odds with the purpose of the I-864.[35] Were a beneficiary and sponsor both gainfully employed, support duties could terminate in five rather than ten years.

I.B. Defenses

Litigants have tested the waters with a number of defenses to a noncitizen-beneficiary's recovery under the I-864.

Lack of consideration. If a party to a contract reserves the discretion to choose whether or not to perform his obligation, his promise is illusory and the agreement is unenforceable as lacking consideration.[36] Courts have rejected the argument that the I-864 lacks of consideration on the part of the Government. As discussed above, under the previous iteration of the Form, overcoming public charge inadmissibility was the value held forth by the Government as a carrot for the sponsor's promised support.[37] Relying on this language, courts readily held that

[33] See *supra* note 15.

[34] No. WD-11-006 (Ohio Ct. App. May 11, 2012), *available at* http://www.sconet.state.oh.us/rod/docs/pdf/6/2012/2012-ohio-2088.pdf (last visisted Nov. 12, 2012).

[35] *Id.* At *19 (Singer, J., dissenting).

[36] RESTATEMENT (2nd) § 77.

[37] See *supra*, text accompanying notes 24-32.

the promise of overcoming inadmissibility is a thing of value adequate for consideration.[38]

The present version of the I-864 sets forth "becoming a permanent resident" as the consideration carrot offered by the Government to the sponsor.[39] Courts have yet to address whether the revised Form is vulnerable to attack as lacking consideration. In fact, there is serious reason to question whether the revised language is more prone to challenge.

As Charles Wheeler pointed out with respect to a prior version of the Form, the Government's promise was in a sense illusory where it promises the intending immigrant would overcome public charge admissibility. Under the INA, the Government retained discretion to find a noncitizen inadmissible regardless of a properly executed I-864.[40] Yet the language of the previous I-864 was given an interpretive gloss to avoid the problem of the Government's reservation of discretion. It required only minor semantic contortion to say that the Government had promised that the intending immigrant *would be inadmissible unless the application was signed*. In other words, the Government promised the intending immigrant will overcome the *per se* basis for denial (i.e., lacking an I-864). Indeed, the federal court in *Stump v. Stump* seemed to believe this was precisely the consideration set forth in the I-864.[41]

It would be more difficult to apply this interpretive gloss to save the current I-864, under which the Government has even greater opportunity to fail its promised performance. Again, the Form now asserts that "[t]he intending immigrant's becoming a permanent

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[38] No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761, at *13-14 (Tenn. Ct. App. Nov. 13, 2009); Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602, at *11-12 (M.D. Fla. May 4, 2006).

[39] *See supra*, text accompanying note 28.

[40] Wheeler, *supra* note 12.

[41] *See* No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, at *6-7 (N.D. Ind. Oct. 25, 2005) ("The [sponsor] made this promise as consideration for the [beneficiary's] application not being denied on the grounds that she was an immigrant likely to become a public charge").

resident is the 'consideration' for the contract."[42] The Government's promise is now insulated by two layers of statutory discretion: it must favorably exercise discretion both for the immigrant to overcome public charge inadmissibility and to grant permanent residency.[43] But more importantly – regardless of a properly executed I-864 – the Government would be statutorily prevented from upholding its promise if the intending immigrant is statutorily ineligible to adjust, for instance because she entered the country without inspection.[44] Likewise, any other grounds of inadmissibility could statutorily prevent the Government from upholding its promise – can the Government promise a sponsor that his Nazi-persecutor wife may become a permanent resident if the sponsor signs the I-864?[45] All this serves to question whether the Government's promise is illusory, since it simply is not the case that the Government is prepared to grant permanent residency merely because a sponsor has signed the I-864.[46]

Unconscionability. A contract is rendered unenforceable if it was unconscionable at the time the agreement was entered into.[47] *Baines v. Baines* is the leading case discussing the alleged unconscionability of the Affidavit of Support.[48] There, the sponsor asserted that his wife's immigration benefit would have been denied had he refused to sign the I-864 and also that she would have divorced him.[49] Yet considering the exchange at the time it was made, the Court found it reasonable that

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[42] Form I-864, *supra* note 3 at 6.

[43] *See*, *e.g.*, INA § 245(a), 8 U.S.C. § 1255(a) (Attorney General may adjust status to lawful permanent residency "in his discretion").

[44] *Id.* (adjustment of status generally available only to noncitizen "who was inspected and admitted or paroled into the United States").

[45] *See* INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E) (participants in Nazi persecution are inadmissible).

[46] *But see* RESTATEMENT (2nd) § 78 ("[t]he fact that a rule of law renders a promise voidable or unenforceable does not prevent it from being consideration").

[47] *See* RESTATEMENT (2nd) § 208.

[48] No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761 (Tenn. Ct. App. Nov. 13, 2009). *Cf.* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 12-20 BENDERS IMMIGR. BULL. 1 (2007), text accompanying notes 376-80 (arguing that sponsor may not understand responsibilities under Affidavit).

[49] *Baines*, 2009 Tenn. App. LEXIS 761 at *14-15.

the sponsor would want to support his wife in the immigration process, as well as financially (he was doing so already).[50] Indeed, in prenuptial contracts couples routinely commit to substantial financial obligations – even duties of personal performance… or non-performance[51] – yet these agreements are generally enforceable.[52] It is notable, however, that the *Baines* Court took a careful look at the factual record, suggesting there might be more severe fact patterns that could render the agreement unconscionable.[53] Note that any fact pattern severe enough to rise to the level of unconscionability would likely raise questions no only relating to the bonafides of the marriage, but of deportable fraud.[54]

Testing slightly different waters, in *Al-Mansour v Shraim*, the Court rejected an argument that the I-864 is unconscionable because it is a 'take it or leave it' contract of adhesion.[55] The Court found the various cautionary recitals in the Form adequate to overcome the charge of unconscionability, even given the extra scrutiny visited on contracts of adhesion.[56]

Fraud. Sponsors have alleged they were fraudulently induced to sign Affidavits of Support, but such defenses or counterclaims have tended to die quick deaths at summary judgment. In *Carlbog v. Tompkins* the plaintiff-beneficiary successfully defeated the defendant-sponsor's counterclaim of fraud, where the sponsor had produced inadmissible translations of emails purporting to show that the beneficiary had designed a scam marriage – but even if admitted the

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[50] *Id.*, at *16.

[51] *See*, *e.g.*, Favrot v. Barnes, 332 So.2d 873 (La.Ct. App. 1967), *rev'd on other grounds*, 339 So.2d 843 (La.1976), *cert. den.*, 429 U.S. 961 (prenuptial agreement limiting sexual intercourse to about once a week).

[52] *See*, *e.g.*, Susan Wolfson, *Premarital Waiver of Alimony*, 38 FAM. L.Q. 141, 146 (Spring 2004) (observing that prenuptial agreements impacting alimony may be enforceable).

[53] A situation in which a foreign national defrauded a citizen into signing the Form I-864 might be such a scenario. With the noncitizen as a third-party beneficiary, it might be difficult to raise a theory of fraud in the inducement.

[54] *See* INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (grounds of deportation for marriage fraud).

[55] No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864 (D. Md., Feb. 2, 2011).

[56] *Id.*, at *7-8.

emails lacked sufficient particulars to pass summary judgment on the question of fraud.[57] As mentioned with respect to unconscionability, a beneficiary who defrauded an I-864 sponsor could also face immigration consequences for that action.

Impossibility. Addressing an unlikely fact pattern, in *HajiZadeh v. HajiZadeh*, the Court upheld the trial court's finding that the beneficiary-sponsor had rendered performance of the I-864 impossible by returning to his home country (temporarily) and concealing his whereabouts.[58] This was a battle lost at trial – the appellate court refused to reweigh the evidence, ending the argument.

I.C. Damages

Where a sponsor fails his support duties under the I-864, the measure of damages is fundamentally straight-forward. To calculate damages, courts compare the plaintiff's actual annual income for each particular year at issue against the 125% of Poverty Guideline threshold for that year.[59] But the devil, naturally, is in the details.

Determining required level of support. A plaintiff-beneficiary is entitled to receive support "necessary to maintain him or her at an income that is at least 125 percent of the [Poverty Guidelines]."[60] Courts agree that if a beneficiary has an independent source of income, such as a job, the sponsor need pay only the difference required to bring the beneficiary to 125% of the Poverty Guidelines.[61] But what counts as income for this purpose? The term is not defined by the I-864, and mysteriously courts have generally ignored the fact that C.F.R.

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[57] 10-cv-187-bbc, 2010 U.S. Dist. LEXIS 117252, at *8 (W.D. Wi., Nov. 3, 2010). *See also* Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fl., May 4, 2006) (following trial, finding no evidence adequate to prove plaintiff-beneficiary had defrauded defendant-sponsor into signing Form I-864 with a false promise of marriage, despite early marital problems).

[58] 961 N.E.2d 541, (Ind. Ct. App. Jan. 18, 2012) (unpublished decision).

[59] *See*, *e.g.*, *Al-Mansour*, 2011 U.S. Dist. LEXIS 9864, at *11; Shumye v. Felleke, 555 F. Supp. 2d 1020, 1024 (N.D. Cal. Apr. 3, 2008); Carlborg v. Tompkins, 2010 U.S. Dist. LEXIS 117252, at *8 (W.D. Wi., Nov. 3, 2010); *Cheshire*, 2006 U.S. Dist. LEXIS 26602, at *17. *See* INA § 213A(h); 8 U.S.C. § 1183a(h) (Poverty Guidelines means official poverty line "as revised annually"); 8 C.F.R. § 213a.1 (same).

[60] Form I-864, *supra* note 3, p. 6.

[61] *Cheshire*, 2006 U.S. Dist. LEXIS 26602, at *17.

regulations define income by reference to federal income tax liability.[62] Indeed, in considering whether gifts would count towards a beneficiary's income, the court in *Younis v. Farooqi* appeared to indicate the question would not be answered by the fact that gifts are not income for tax purposes.[63]

Shumye v. Felleke considered whether a number of financial sources constitute "income" for purposes of the I-864: a divorce settlement is not income because it was a settlement of the married couple's preexisting community property rights; student loans are not income because they are a form of debt, but student grants are income because they need not be repaid; and affordable housing subsidies would also be counted as income.[64] In *Nasir v. Asfa Ahad Shah* the Court held that the plaintiff-beneficiary was not entitled to additional support to make up for personal debts.[65] And another court determined that child support payments do not count towards income, since they are intended for the benefit of the child rather than sponsored parent.[66]

As discussed throughout this Bulletin it is not clear what rule the INA and C.F.R. play in determining contract rights under the I-864. But the vague meaning of "income" in the I-864 could certainly be clarified by taking recourse to the C.F.R. definition, incorporating the detailed federal income tax guidelines.

Failure to mitigate. The weightiest case law development in the past year has been *Liu v. Mund*, the Seventh Circuit holding that an I-864 beneficiary has no duty to mitigate damages by seeking employment.[67] Though not actually a "duty" as such, a party generally "cannot recover damages for a loss that he could have avoided by

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[62] 8 C.F.R. § 213a.1. *See also* Love v. Love, 33 A. 3d 1268, 1277 (Pa. Super. Ct. 2011) (noting the "narrow" definition of income under state domestic code).

[63] Younis v. Farooqi, 597 F. Supp. 2d 552, 555, n. 3 (D. Md. Feb. 10, 2009). The court did not decide the issue since the gifts in question were minimal.

[64] 555 F. Supp. 2d 1020 (N.D. Cal. Apr. 3, 2008).

[65] No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207, at *10-11 (S.D. Ohio Sept. 21, 2012).

[66] *Younis*, 597 F. Supp. 2d at 555 ("child support is a financial obligation to one's non-custodial child, not a monetary benefit to the other parent").

[67] 686 F.3d 418 (7th Cir. 2012).

reasonable efforts."[68] While not the first case to consider the issue, *Liu* is the most thorough treatment to date.[69] In *Liu*, the plaintiff-beneficiary lost at summary judgment on the finding that she had not actively pursued work during the period for which support was sought.[70] The Seventh Circuit, per Judge Posner, found that the I-864 itself, the INA and federal regulations were all silent as to whether the beneficiary had a duty to seek employment.[71] Instead, the decisive analytical factor was the clear statutory purpose behind the I-864: to prevent the noncitizen from becoming a public charge.[72] Worth noting is that one magistrate judge deployed precisely the same policy consideration to reach the opposite conclusion: "[i]f the sponsored immigrant is earning, or is capable of earning, [125% of the Poverty Guidelines] or more, there obviously is no need for continued support."[73]

In *Liu* the government, as amicus, argued the Court should look to the common law duty to mitigate.[74] The Seventh Circuit rejected this both because it found no federal common law duty to mitigate and due to outright skepticism of the traditional cannon that abrogation of common law is disfavored.[75] Neither of those analytic moves are sure to

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[68] RESTATEMENT (2nd) § 350, cmt. b. *See id.* § 350(1) ("[Generally] damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation").

[69] For example, in *Younis v. Farooqi* the Court assumed for the sake of argument that such a duty existed, but concluded the defendant-sponsor failed to demonstrate the plaintiff-beneficiary had failed that duty. 597 F.Supp.2d at 556-57.

[70] *Liu*, 686 F.3d at 420.

[71] *Id.*

[72] *Id.*, at 422. *See also* Love v. Love, 33 A. 3d 1268, 1276 (Pa. Super. Ct. 2011) (holding that earning capacity could not be imputed to beneficiary, because "[i]t is abundantly clear that the purpose of the Affidavit is to prevent an immigrant spouse from becoming a public charge"); Carlborg v. Tompkins, No. 10–cv–187–bbc, 2010 U.S. Dist. LEXIS 1175252, at *11 (W.D. Wis. Nov. 3, 2010) ("If defendant could defeat a suit for damages by relying on plaintiff's failure to carry her part, government agencies would be stuck with the costs of the destitute spouse, with no recourse").

[73] Ainsworth v. Ainsworth, No. 02-1137-A, 2004 U.S. Dist. LEXIS 28962, at *4 (M.D. La. Apr. 29, 2004) ("the entire purpose of the affidavit is to ensure that immigrants do not become a 'public charge'"), *recommendation rejected*, 2004 U.S. Dist. LEXIS 28961 (May 27, 2004).

[74] *Liu*, 686 F.3d at 421.

[75] *Id.*, at 423, 421.

find traction elsewhere. States generally do have common law doctrines imposing a duty to mitigate damages, [76] and this duty includes using reasonable efforts to seek employment – in the case of wrongful discharge, for example.[77] Moreover, other federal courts have looked to the common law doctrine in the state where the federal action was brought.[78] And it is doubtful that all tribunals could be quite so bold with respect to the cannon of construction cast asunder by the Seventh Circuit – not everyone is a Judge Posner.[79]

When beneficiaries seek to enforce the I-864 in the context of a domestic relations support order, courts have addressed whether income may be "imputed" to the beneficiary based on earning capacity.[80] In *Love v. Love*, the Superior Court of Pennsylvania followed similar moves to the Seventh Circuit in *Liu*.[81] Noting the lack of definition for "income" under the INA, the *Love* Court noted the

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[76] *See* RESTATEMENT (2nd) § 350 (generally, damages cannot be recovered for avoidable loss); Naik v. Naik, 944 A. 2d 713, 717 (N.J. Super. Ct. A.D., Apr. 24, 2007) (asserting without discussion that "the sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages").

[77] *See*, *e.g.*, CAL. JURY INSTR.--CIV. 10.16 (rev'd fall 2012) ("An employee has sustained financial loss as a result of a breach of an employment contract by the employer, has a duty to take steps to minimize the loss by making a reasonable effort to find [and retain] comparable, or substantially similar, employment to that of which the employee has been deprived").

[78] *See*, *e.g.*, Younis v. Farooqi, 597 F. Supp. 2d 552, 556 (D. Md. Feb. 10, 2009) (citing Maryland law for the proposition that the plaintiff-beneficiary had a duty to make reasonable efforts to mitigate damages by obtaining employment). Whether a federal court applies state or federal common law is question governed by that bane of first year law students, the *Erie* doctrine. *See Cf.* 19 Charles A. Wright, *et al.*, Federal Practice & Procedure § 4501 (West, 2d ed. 2012).

[79] *See*, *e.g.*, Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* (rev'd Aug. 31, 2008) *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf (last visited Nov. 8, 2012), at 18 (explaining the canon as traditionally formulated and currently used).

[80] In *Mathieson v. Mathieson* a plaintiff-beneficiary brought a federal court action to seek support of I-864 support obligations. No. 10–1158, 2011 U.S. Dist. LEXIS 44054 (W.D. Penn., Apr. 25, 2011). The Court found the action barred by the Rooker-Feldman doctrine in light of a prior state court domestic support order, but noted that it would have agreed with the state court's holding that income could be imputed to the beneficiary based on earning capacity. *Id.*, at *10, n. 3.

[81] *Love v. Love*, 33 A.3d 1268 (Pa. Super. Ct. 2011).

"narrow" definition under state domestic code and the C.F.R..[82] As in *Liu*, the decisive factor was the policy purpose underlying the I-864: "[u]nlike actual income, earning capacity will never provide shelter, sustenance, or minimum comforts to a destitute immigrant."[83] Yet in *Barnett v. Barnett*, the Supreme Court of Alaska concluded summarily that "[e]xisting case law" supported the conclusion that earning capacity should be imputed to an I-864 beneficiary, thus holding that spousal support was not appropriate given the beneficiary's imputed earning capacity.[84]

Attorney fees. The I-864 warns the sponsor: "If you are sued, and the court enters a judgment against you… [y]ou may also be required to pay the costs of collection, including attorney fees."[85] Likewise, 8 U.S.C. § 1183a(c) provides that remedies available to enforce the Affidavit of Support include "payment of legal fees and other costs of collection." Indeed, courts have proved willing to award fees, subject to typical limitations of reasonableness.[86] Following the language of the Affidavit, the plaintiff-beneficiary is entitled to fees only if she prevails and a judgment is entered.[87] Where a noncitizen-beneficiary pursues her entitlement to support in the context of a maintenance order, her attorney would be wise to carefully track hours spent specifically on the I-864 claim. The beneficiary may or may not be entitled to an award of reasonable attorney fees with respect to the entire divorce proceeding. If a court is unable fairly to discern the time spent prosecuting the I-864 claim it could refuse to allow any fee recovery.

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[82] *Id*., at 1277-78. *See* 8 C.F.R. § 213a.1 ("income" means "an individual's total income… for purposes of the individual's U.S. Federal income tax liability").

[83] *Id.,* at 1278.

[84] 238 P.3d 594, 598 (Alaska 2010).

[85] Form I-864, *supra* note 3, p. 7.

[86] *See*, *e.g.*, Sloan v. Uwimana, No. 1:11-cv-502 (GBL/IDD), 2012 U.S. Dist. LEXIS 48723 (E.D. Va. Apr. 4, 2012) (awarding fees in reliance on 8 U.S.C. § 1183a(c), subject to scrutiny for reasonableness pursuant to the Lodestar method).

[87] *See*, *e.g.*, *Barnett*, 238 P.3d at 603 (holding that fees were appropriately denied in absence of judgment to enforce I-864); Iannuzzelli v. Lovett, 981 So.2d 557 (Fla. Dist. Ct. App. 2008) (holding that the fees were appropriately denied in absence of damages; note that action was based on a prior iteration of Form I-864).

II. Procedural Issues

Both the I-864 and the INA provide that the sponsor submits to the personal jurisdiction of any competent U.S. court by executing the Affidavit of Support.[88] While personal jurisdiction appears to have posed little trouble,[89] a number of procedural issues have arisen for noncitizen-beneficiaries seeking to litigate against sponsors.

II.A. Federal Court

Federal courts historically have had no difficulty finding subject matter jurisdiction over suits on the I-864. Yet to paraphrase Vice-President Dan Quayle, this is an irreversible trend that could change.[90] The I-864 statute, at 8 U.S.C. § 1183a(e)(I), provides that "[a]n action to enforce an affidavit of support… may be brought against the sponsor in *any appropriate court*… by a sponsored alien, with respect to financial support."[91] Most courts to consider the issue have held that this provision creates federal question jurisdiction with regards to a suit by a beneficiary against a sponsor.[92] Moreover, even in cases where the

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[88] I-864, *supra* note 3, p. 7 ("I agree to submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against me to enforce my obligations under this Form I-864"); INA § 213A(a)(1)(C); 8 U.S.C. § 1183a(a)(1)(C).

[89] *But see* HajiZadeh v. HajiZadeh 961 N.E.2d 541, (Ind. Ct. App. 2012), discussed *supra* at *text accompanying* note 58 (in which the *beneficiary* had absconded to the foreign country, making performance of the sponsor's duties impossible).

[90] *See* Howard Rich, *The Stunning, Sudden Reversal of Economic Freedom in America* (Sep. 25, 2012), www.forbes.com (quoting the Vice President: "I believe we are on an irreversible trend toward more freedom and democracy, but that could change").

[91] INA § 213A(e); 8 U.S.C. § 1183a(e) (emphasis added). By signing the Form I-864, the sponsor also agrees to "submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against [the sponsor] to enforce [his/her] obligations under this Form I-864." Form I-864, at 7. *Cf.* Younis v. Rarooqi, 597 F. Supp. 2d 552, 554 (D. Md. Feb. 10, 2009) (noting that sponsor submits himself to personal jurisdiction "of any federal or state court in which a civil lawsuit to enforce the affidavit has been brought"). This language may be broader than the actual requirements of the statute, which appear to require only that the sponsor waive personal jurisdiction with respect to actions brought to compel reimbursement to a government agency. *See* INA § 213A(a)(1)(C), 8 U.S.C. § 1183a(a)(1)(C) (sponsor agrees to submit to jurisdiction for purposes of actions under "subsection (b)(2)," concerning actions to compel reimbursement of government expenses).

[92] *See*, e.g., Liu v. Mund, 686 F.3d 418 (7th Cir. 2012); Montgomery v. Montgomery, 764 F. Supp. 2d 328, 330 (D. N.H. Feb. 9, 2011); Skorychenko v. Tompkins, 08-cv-626-

issue has not been addressed expressly, it is safe to presume that other federal courts have reached the same conclusion *sub silentio*, as there is an affirmative obligation for a tribunal to ensure it has subject matter jurisdiction.[93]

Departing from other decisions in the same district,[94] in *Winters v. Winters* a federal court in Florida recently concluded that it lacked subject matter jurisdiction over an I-864 contract action against a sponsor.[95] The Court's critical analytical move was to clarify that the suit sounded only on contract law and was not predicated on the underlying immigration statute.[96] The case was a suit on the contract, and did "not involve the validity, construction or effect of the federal law, but [only] construction of the contract.[97] 8 U.S.C. § 1183a(e)(I) speaks only of jurisdiction in an "appropriate court," without specifying expressly that federal tribunals would be "appropriate."[98]

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slc, 2009 U.S. Dist. LEXIS 4328 (W.D. Wis. Jan. 20, 2009); Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, *1 (N.D. Ind. Oct. 25, 2005); Ainsworth v. Ainsworth, No. 02-1137-A, 2004 U.S. Dist. LEXIS 28961, at *4 (M.D. La., May 27 2004); Tornheim v. Kohn, No. No. 00-CV-5084 (SJ), 2002 U.S. Dist. LEXIS 27914, (E.D. N.Y. Mar. 26, 2002) ("Plaintiff's suit arises under the laws of the United States . . ."). *See also* Cobb v. Cobb, 1:12-cv-00875-LJO-SKO, 2012 U.S. Dist. LEXIS 93131, at *6 (E.D. Cal. July 3, 2012) (noting that INA "expressly creates a private right of action allowing a sponsored immigrant to enforce an affidavit of support," but declining to reach issue); Al-Mansour v. Ali Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864, at *9 (D. Md. Feb. 2, 2011) (holding that Court had jurisdiction over suit to enforce I-864, because the "claim involve[d] a federal statute"). *But see*, Davis v. U.S., 499 F.3d 590, 594-95 (6th Cir. 2007) (holding that court lacked subject matter jurisdiction over declaratory judgment action seeking to clarify sponsor's duties under I-864).

[93] *See*, *e.g.*, Rembert v. Apfel, 213 F.3d 1331, 1333 (11th Cir. 2000) ("As a federal court of limited jurisdiction, we must inquire into our subject matter jurisdiction *sua sponte* even if the parties have not challenged it.") *overruled on other grounds by* Roell v. Withrow, 538 U.S. 580 (2003).

[94] Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fla. May 4, 2006); Hrachova v. Cook, No. 5:09–cv–95–Oc–GRJ, 2009 U.S. Dist. LEXIS 102067 (M.D. Fla. Nov. 3, 2009).

[95] No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069 (M.D. Fla. Apr. 25, 2012).

[96] *Id.*, at *5 ("while the federal statute requires execution of the affidavit, it is the affidavit and not the statute that creates the support obligation").

[97] *Id.*, at *8.

[98] *Id.*, at *6.

It is too early to gauge the impact of *Winters*, but it is difficult to image a sudden change in the vast current of cases acknowledging jurisdiction (even if tacitly). Yet *Winters* illustrates a pervasive confusion over the nature of an noncitizen-beneficiary's suit against a sponsor. Time and again, courts have been less than clear about why and how the INA and C.F.R. govern the duties of a sponsor and rights of a beneficiary.[99] Whereas some courts have glibly referred to such suits as involving "federal statute,"[100] the *Winters* Court viewed the case before it as a simple contract action and rigorously scrutinized the statute for a federal cause of action, finding none.

In contrast to the prevailing view that federal courts possess subject matter jurisdiction over private suits on the I-864, and notwithstanding *Winters*, federal tribunals have been vigilant against collateral attacks on state court judgments.[101] Pursuant to the *Rooker-Feldman* doctrine, federal courts lack subject matter jurisdiction over attempts to take a second bite at a litigation apple in federal court that has already been munched in state court.[102] When it comes to the I-864, a federal court generally will lack jurisdiction to enter a judgment pertaining to the actionable of time for which support was sought in a state court

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[99] For further discussion see *infra*, section III.B.

[100] Al-Mansour v. Ali Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864, at *9 (D. Md. Feb. 2, 2011) ("This court has subject matter jurisdiction over this case because [the beneficiary's] claim involves a federal statute").

[101] *See*, *e.g.*, Nguyen v. Dean. Civil No. 10-6138-AA, 2011 U.S. Dist. LEXIS 3903 (D. Or. Jan. 14, 2011) (holding that plaintiff was barred from relitigating spousal support in federal court, rebranding request as "financial support" rather than "spousal support"); Schwartz v. Shwartz, 409 B.R. 240, 249 (B.A.P. 1st Cir. Aug. 26, 2008) (noting that *Rooker-Feldman* doctrine would bar suit if I-864 had been considered by state divorce court); Davis v. U.S., 499 F.3d 590, 595 (6th Cir. 2007) (as alternate basis for dismissal, holding that *Rooker-Feldman* doctrine bared suit).

[102] Under the *Rooker-Feldman* doctrine, a federal court lacks jurisdiction where:

> (1) the federal plaintiff lost in state court; (2) the federal plaintiff complains of injuries caused by the state court's rulings; (3) those rulings were made before the federal suit was filed; and (4) the federal plaintiff is asking the district court to review and reject the state court rulings.

Mathieson v. Mathieson, No. 10–1158, 2011 U.S. Dist. LEXIS 44054, at *5 (W.D. Penn. Apr. 25, 2011) (citing Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 166 (3d Cir. 2010).

action.[103] Even if the state court action was based on a family law statute, incorporating the I-864 obligation into a spousal support order,[104] the federal court action may be barred based on the I-864, not a separate federal statute.[105] Yet a district court in New Hampshire reached a contrasting result deploying abstention doctrine.[106] There, a state court had entered a temporary support order that might or might not have relied upon the I-864, but regardless of whether it did a federal order mandating payment of support would not "interfere" with the state court order, as it would not require the federal tribunal to "countermand the temporary order."[107]

II.B State Court

State courts have unanimously found subject matter jurisdiction over a claims by I-864 beneficiaries against their citizen sponsors.[108] This is no surprise, as contract actions fall squarely within the competency of a court of general jurisdiction. Without known exception, these claims have arisen exclusively in family law proceedings.[109] Yet there seems to be no reason a beneficiary could not bring suit outside the context of family law proceedings in a State court of general jurisdiction.

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[103] Mathieson, 2011 U.S. Dist. LEXIS 44054, at *7.

[104] *See infra* section II.B.1.

[105] Mathieson, 2011 U.S. Dist. LEXIS 44054, at *9. Note the *Winters* court made a similar move before concluding it lacked federal question jurisdiction over a private suit on the I-864. If the federal action is based on no federal statute – for purposes of a *Rooker-Feldman* analysis – how is there federal question jurisdiction?

[106] Montgomery v. Montgomery, 764 F. Supp. 2d 328 (D. N.H. Feb. 9, 2011).

[107] *Id.*, at 333-34. *See also* Cobb v. Cobb, 1:12-cv-00875-LJO-SKO, 2012 U.S. Dist. LEXIS 93131, at *6 (E.D. Cal. July 3, 2012) (noting that Court would lack jurisdiction under domestic relations exception to hear alleged diversity jurisdiction suit seeking review of alimony order involving I-864).

[108] *See*, *e.g.*, Marriage of Sandhu, 207 P.3d 1067, 1071 (Kan. Ct. App. 2009) (holding that family court erred in dismissing for lack of subject matter jurisdiction the beneficiary's claim for maintenance based on the I-864).

[109] *See*, *e.g.*, Baines v. Baines, No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761, at *8 (Tenn. Ct. App. Nov. 13, 2009) (holding that family law court had jurisdiction over contractual claim for specific performance of I-864).

II.B.1 Maintenance ("Alimony") Orders

Every known case in which an I-864 beneficiary has sued a sponsor in state court has arisen in family law proceedings. A source of confusion has been *how* precisely the I-864 comes into play procedurally. Specifically, it has been litigated both: as (1) a standalone contract cause of action, joined to a divorce/dissolution proceeding; and (2) a basis for awarding spousal maintenance. This is a distinction with a difference for the beneficiary. Unlike contract judgments, spousal maintenance orders have special enforcement mechanisms in many states, making enforcement cheaper and easier.[110] Furthermore, spousal maintenance – unlike payment on a contract judgment – is counted as income to the recipient for purposes of federal income tax, and is deductible for the payer.[111] Another difference might be the ability to discharge a contract judgment in bankruptcy proceedings. But Bankruptcy Courts have ruled that judgments predicated on the I-864 are non-dischargeable domestic support obligations.[112]

In *Love v. Love* a Pennsylvania trial court was reversed for refusing to "apply" the I-864 when setting a spousal support obligation.[113] The appeals court held that the Affidavit merited deviation from the standard support schedule, though it did not specify which statutory factor merited the deviation.[114] The trial court had relied on a state precedent opinion for the proposition that contractual agreements could not be incorporated into statutory support orders, but the appeals court disagreed there was such a rule and held that the I-864 beneficiary had

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[110] *See* 20 WASH. PRAC., FAM. AND COMMUNITY PROP. L. (West 2011) § 36.10 (maintenance order can be enforced by State agency through property lien, withholding of federal benefits, and intercepting income tax refunds *inter alia*).

[111] *See* IRS, Publication 17, *Tax Guide 2011 for Individuals*, Ch. 18 (Dec. 21, 2011), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf (last visited Nov. 20, 2012). I owe this observation to Prof. Kevin Ruser.

[112] Matter of Ortiz, No. 6:11-bk-07092-KSJ, 2012 Bankr. LEXIS 5324 (Bankr. M.D. Fla. Oct. 31, 2012) (granting summary judgment to beneficiary); Hrachova v. Cook, 473 B.R. 468 (Bankr. M.D. Fla. 2012).

[113] 33 A. 3d 1268 (Pa. Super. Ct. 2011).

[114] *Id.*, at 1273. *See* Pa. R. C. P. 1910.16-5 (grounds for deviating from support guidelines), *available at* http://www.pacode.com/secure/data/231/chapter1910/s1910.16-5.html (last visited Oct. 18, 2012).

the option to pursue either.[115] An energetic dissent in *Love* argued that incorporating a contractual agreement into a support order violates constitutional prohibitions on imprisonment for debts, since jail time is an enforcement mechanism available for support orders.[116] Note that some state courts have held that the proscription on debt imprisonment is inapplicable to enforcement of spousal maintenance.[117]

By contrast, in *Greenleaf v. Greenleaf* a Michigan court held that a lower court erred by incorporating the I-864 into a support order.[118] Under Michigan law, support awards are made in equity on consideration of 14 enumerated factors.[119] But the Court held that the lower court should first have determined the sponsor's "obligation" under the I-864, then proceeded to determine spousal support as a separate consideration.[120]

The appropriate duration of a support order based on the I-864 is impressive. One appellate court held that it is erroneous to order support for a period shorter than the terminating events specified in the I-864.[121] Because there is no date on which any of the five terminating events is sure to occur, a support order cannot set a date certain for termination of obligations. Indeed, it appears the best practice would be for the support order to simply echo the five terminating events articulated in the I-864.

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[115] Love, 33 A. 3d at 1274.

[116] *Id.*, at 1281 (Freedberg, J., dissenting).

[117] *See*, *e.g.*, Decker v. Decker, 326 P.2d 332, 337–38 (Wash. 1958).

[118] No. 299131 (Mich. Ct. App., Sep. 29, 2011), *available at* http://www.michbar.org/opinions/appeals/2011/092911/49856.pdf (last visited Oct. 18, 2012). *See also* Varnes v. Varnes, No. 13-08-00448-CV (Tex. App., Apr. 23, 2009) (noting it was undisputed that beneficiary was not entitled to spousal support based on I-864 under either of the two statutory grounds allowed by Texas law) *available at* http://statecasefiles.justia.com/documents/texas/thirteenth-court-of-appeals/13-08-00448-cv.pdf (last visited Oct. 18, 2012).

[119] Greenleaf, *supra* 118, at *3.

[120] *Id.*, at *5.

[121] In re Marriage of Kamali, 356 S.W.3d 544, 547 (Tex. App. Nov. 16 2011) (holding that trial court erred in limiting payments to an "arbitrary" 36-month period).

In jurisdictions lacking established law on this issue, family practitioners would be wise to raise the I-864 in the pleadings as a separate, alternate contractual cause of action.[122] Should the court determine that the Affidavit cannot be incorporated into a spousal support order, the practitioner will want this alternate basis on which to seek relief. Indeed, as discussed below, failure to do so could preclude the beneficiary from bringing a subsequent action on the Affidavit.[123]

II.B.2 Issue Preclusion, Claim Preclusion

Procedural doctrines prohibit the litigation both of matters that have already been *actually* litigated and that *could* have been litigated. The former is referred to as issue preclusion, the latter as claim preclusion.[124]

Where a family law court has considered the I-864 in calculating a spousal support order, issue preclusion prevents the beneficiary from bringing a subsequent contract action.[125] Such was the case in *Nguyen v. Dean*, where the plaintiff-beneficiary had expressly argued to the family law court that spousal support should be predicated on the Affidavit of Support. [126] By contrast, issue preclusion did not prevent the plaintiff-beneficiary's federal court action in *Chang v. Crabill*, where the family law court stated that "[n]o request was made by the respondent for spousal maintenance of any kind."[127]

Could a contract action be barred by claim preclusion (f.k.a. res judicata) because the plaintiff-beneficiary *could* have litigated the

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[122] *See*, *e.g.*, *Varnes*, *supra* note 118, at *9-10 (holding that trial court properly refused to address a contractual theory of recovery where beneficiary had pled only that spouse "'should support' her pursuant to the Affidavit of Support").

[123] See section II.B.2 *infra*.

[124] *Cf.* 18 WRIGHT § 4406.

[125] As discussed above, the federal court also may lack subject matter jurisdiction over such an action under the Rooker-Feldman doctrine. See section II.A *supra*.

[126] No. 10–6138–AA, 2011 U.S. Dist. LEXIS 3803 (D. Or. Jan. 14, 2011) (granting defendant's motion for summary judgment).

[127] No. 1:10 CV 78, 2011 U.S. Dist. LEXIS 67501 (N.D. Ind. June 21, 2011).

matter in a prior dissolution case?[128] In *Nasir v. Shah* the Court dismissed this possibility with a terse assertion that "[w]hether or not plaintiff sought or was entitled to spousal support is irrelevant to defendants' [sic.] obligation to maintain plaintiff at 125% [Poverty Guidelines]."[129] But the issue gave pause to the *Chang* Court. It ruled that the matter could not be resolved on the record presented at summary judgment, since it was unclear when the plaintiff-beneficiary should have discovered her right to sue on the I-864 (e.g., the sponsor may not have failed to meet support obligations prior to the dissolution order).[130] If the beneficiary could be charged with such notice at the time of her dissolution proceedings, it appears the *Chang* Court would have barred her subsequent federal action.

Because a sponsor's duty of support is ongoing, it appears a beneficiary could face claim preclusion only with respect to periods of time prior to the conclusion of a dissolution action. The beneficiary could not generally be charged with notice of a sponsor's future failure to provide support.[131] Recall that courts have been willing to enter spousal support orders mandating the terms of the I-864, which orders are of indefinite duration. A sponsor might argue that a beneficiary's failure to seek such a support order has a claim preclusive effect with respect to any future contract-based action, since any time period could have been covered by the spousal support order. But regardless of the statutory rules governing spousal support, claim preclusion does not attach if a cause of action has not yet accrued, so failure to obtain a prospective support order cannot have a preclusive effect with respect to future contract breaches.

III. Unresolved issues

III.A Prenuptial agreements

A major unresolved issue is whether a noncitizen-beneficiary and sponsor may enter into a prenuptial agreement that limits or eliminates

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[128] *Id.*, at *7-13.

[129] No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207, at*15 (S.D. Ohio Sept. 21, 2012).

[130] *Id.*, at *11.

[131] Except perhaps where the sponsor, for example, announces his intention to discontinue payment.

the sponsor's duties to the noncitizen-beneficiary under the I-864.[132] At least one federal court has touched on the issue, but in dicta only.[133] In *Blain v. Herrell* a couple signed a pre-marital contract, agreeing to be "solely responsible for his or her own future support after separation" and waiving rights to alimony and spousal support.[134] The agreement was signed approximately one year before the U.S. citizen spouse executed an I-864 for his then-wife.[135] In subsequent divorce proceedings, a Hawai'i state court determined the pre-marital agreement was enforceable, and apparently refused to award alimony based on the I-864 because of the valid pre-marital agreement.[136] The citizen-sponsor then filed *pro se* a separate action in U.S. district court. Though the action was dismissed on the sponsor's own motion, the Court opined on the merits of the case.[137] The Court easily concluded that the noncitizen-beneficiary was entitled to waive her rights under the I-864.[138] The noncitizen-beneficiary, "signed a contract directly with Defendant, the Pre-Marital Agreement, in which he voluntarily chose to waive his right to any support from Defendant."[139] Thus, the issue was settled.

Indeed, the Department of Homeland Security (DHS) has endorsed the view that, in a divorce proceeding, an noncitizen-beneficiary could settle her rights under the I-864. "If the sponsored immigrant is an adult, he or she probably can, in a divorce settlement, surrender his or

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[132] *Cf.* Shereen C. Chen, *The Affidavit of Support and its Impact on Nuptial Agreements*, 227 N.J. LAW. 35 (April 2004) (discussing I-864 in relation to Uniform Premarital Agreement Act).

[133] Blain v. Herrell, No. 10-00072 ACK-KSC, 2010 U.S. Dist. LEXIS 76257 (D. Haw. July 21, 2010).

[134] *Id.*, at *1-2.

[135] *Id.*, at *5.

[136] *Id.*, at *11.

[137] *Id.*, at *22-25.

[138] *Id.*, at *24-25 ("It is… a basic principle of contract law that a party may waive legal rights and this principle is applicable here").

[139] *Id.*, at *25.

her right to sue the sponsor to enforce an affidavit of support."[140] In *Blain* the parties had entered in the pre-marital agreement before executing the I-864 – though this timeline was mentioned in the Court's analysis its import is unclear.[141] Taken together, *Blain* and the DHS guidance suggest that a noncitizen-beneficiary may elect to waive her right to sue under the I-864 both before and after its execution. But these positions have yet to be seriously tested. For instance, courts routinely cite Congressional policy when construing the meaning of the I-864.[142] Where a prenuptial agreement waives a beneficiary's rights under the Affidavit, is it unenforceable as against public policy?[143] Courts routinely treat the I-864 not merely as a contract but as a hybrid creature of federal statutes. The INA expressly gives a noncitizen-beneficiary the right to sue a sponsor for violation of the I-864[144] – may parties privately agree to nullify this right?[145] While these issues remain unresolved, family law attorneys should remain extremely cautious when advising clients about their ability to contract around the I-864.

III.B Interpreting the I-864[146]

A persisting question is the extent to which the courts should rely on the INA and C.F.R. to determine the beneficiary and sponsor's rights

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[140] Final Rules, *supra* note 6 at 35740 (but clarifying that a sponsor's duties to reimburse government agencies would remain unchanged).

[141] *Blain*, 2010 U.S. Dist. LEXIS 76257 at *25.

[142] *See*, *e.g.*, *supra* at text accompanying notes 67-73.

[143] *See* RESTATEMENT (2nd) § 178(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

[144] INA § 213A(a)(1)(B), 8 U.S.C. § 1183a(a)(1)(B) (Affidavit of Support must be enforceable be beneficiary).

[145] If in fact it is the statute that creates the right. See Section III.B, *infra*.

[146] This BULLETIN does not distinguish between the 'construction' and 'interpretation' of contracts. *Cf.* Black's Law Dictionary (9th ed. 2009) (suggesting such distinction is antiquated).

and duties.[147] Courts have been analytically mushy as to how these statutes and regulations come into play. Here are three possibilities.

It could be that the relevant provisions of the INA and C.F.R. are incorporated by reference into the I-864. Indeed, all versions of the I-864 have purported to do this, at least to some extent. Each version has recited that "under section 213A of the [INA]" the Form creates a contract.[148] Previous versions went further, reciting that a sponsor could be sued by the beneficiary or an agency if he failed to meet his obligations "under this affidavit of support, *as defined by section 213A and INS regulations*."[149] The current version cautions: "[p]lease note that, by signing this Form I-864, you agree to assume certain specific obligations *under the Immigration and Nationality Act and other Federal laws*."[150] The Form then explains that "[t]he following paragraphs *explain* those obligations," but perhaps the provision could be read as an incorporation.[151] Nonetheless, if courts viewed this language as incorporation by reference, they have not said so.

Another option – it could be that courts look to the INA and C.F.R. to clarify the meaning of vague or missing terms in the I-864, rather than wholly incorporating the statute and regulations into the written agreement.[152] Consider the meaning of "income," which is not defined in the I-864. Courts have treated the term as an enigma,[153] despite the

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[147] Interpreting contracts in the context of a statutory scheme is not unique to the Affidavit of Support. For instance, there is a jurisdictional split on the issue of whether unemployment benefits received by a wrongfully discharged employee may be deducted from the employer's damages. 24 WILLISTON ON CONTRACTS § 66:6 (West 4th ed.), nn. 88 & 89. The author owes this analogy to Prof. Robert Denicola .

[148] Form I-864, *supra* note 3, p. 6; Form I-864(rev'd Nov. 5, 2011), *supra* note 25, p. 5; Form I-864 (rev'd Oct. 6, 1997),), *supra* note 25, p. 5.

[149] Form I-864 (rev'd Nov. 5, 2011), *supra* note 25, p. 5; Form I-864 (rev'd Oct. 6, 1997), *supra* note 25, p. 5.

[150] Form I-864, *supra* note 3, p. 6 (emphasis added).

[151] *Id.* (emphasis added).

[152] *See* RESTATEMENT (2nd) § 216(1) ("[e]vidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated").

[153] In *Shumye v. Felleke*, for example, the court made findings as to whether a litany of assets constituted "income," but it is unclear what standard governed those determinations. 555 F. Supp. 2d 1020, 1025-28 (N.D. Cal. Apr. 3, 2008).

fact it is defined by the C.F.R. by reference to the meaning used for federal income tax.[154] A Pennsylvania court located the C.F.R. definition, but seemed to place greater reliance on the definition of income in the state family code – clearly the Court did not believe the C.F.R. definition was conclusive.[155] Why not?

Finally, it could be that the I-864 itself is nothing more than window dressing for rights and duties that arise directly from statute. It could be that Congress has dictated the rights of a beneficiary against a sponsor, without regard to whether these duties could be created arise under traditional contract law principles, looking only at the Affidavit of Support. In some states, for instance, so-called private attorney general statutes empower individual citizens to enforce public laws in a manor usually reserved to public prosecutors.[156] These individuals are even entitled to receive penalty payments from those they successfully prosecute.[157] Likewise, the INA could conceivably give a noncitizen-beneficiary a cause of action to pursue her I-864 sponsor, completely aside from whether a contractual cause of action exists. Congress might simply have decreed that sponsors have specified liabilities that may be enforced by beneficiaries.

Recall that in *Winters v. Winters* one federal court searched carefully for a private cause of action in the I.N.A. provisions and was able to find none, therefore finding no federal question jurisdiction.[158] By contrast, most courts have appeared to find that suits on the I-864 are based on

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[154] 8 C.F.R. § 213a.1. The definition has made reference to federal income rules since the first interim rules were promulgated. Preliminary Rules, *supra* note 6, 54352.

[155] Love v. Love, 33 A. 3d 1268, 1277 (Pa. Super. Ct. 2011).

[156] *See*, *e.g.*, David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 428-34 (2010) (discussing evolution of such statutes); Steve Baughman, *Sleazy Notarios: How to Crush them and Get Paid for it*, 7 BENDER'S IMMIGR. BULL. 187 (Feb. 15, 2002) (discussing use of California private attorney general statute to combat unauthorized practice of immigration law).

[157] Baughman, *supra* note 156 at n. 3 (reporting on collecting $35,000 in fees against defendant).

[158] No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069, at *5 (M.D. Fla. Apr. 25, 2012) ("while the federal statute requires execution of the affidavit, it is the affidavit and not the statute that creates the support obligation").

"federal statute."[159] This may hint at some disagreement towards the nature of the beneficiary's cause of action. Yet certainly it would seem odd if Congress had simultaneously (1) given beneficiaries statutory rights against a sponsor, yet (2) went through the motions of requiring the Affidavit of Support to be a contract in its own right.[160]

IV. Conclusion

This hybrid area of law virtually demands collaboration across practice areas. Few in the domestic bar will care to tangle with an area of law routinely characterized by appellate judges – or their exasperated law clerks – as byzantine.[161] Likewise, few immigration practitioners will have the skills to venture beyond their home turf of "happy law" to successfully wage warfare in the trenches of family law.[162]

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[159] Al-Mansour v. Ali Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864, at *9 (D. Md. Feb. 2, 2011). *See supra*, note 92 (collecting cases).

[160] *See* INA § 213A(a)(1)(B), 8 U.S.C. § 1183a(a)(1)(B) (mandating that Affidavit of Support be enforceable as a contract).

[161] *See*, *e.g.*, Japarkulova v. Holder, 615 F.3d 696, 706 (6th Cir. 2010) (Martin, J., concurring) ("…our Byzantine immigration laws…"). *See also* Singh v. Ashcroft, 362 F.3d 1164, 1168 (9th Cir. 2004) ("In this case, it is the INS that has been stymied by its own byzantine rules").

[162] According to Pete Roberts of the Washington State Bar Association there are two areas of happy law, adoption and immigration.

Immigration Support Advocates

SUING ON THE I-864 AFFIDAVIT OF SUPPORT
MARCH 2014 UPDATE

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Most immigration attorneys are aware that the I-864 Affidavit of Support is a binding legal contract that can be enforced by its beneficiary.[1] Practitioners need to be aware that this proposition is not merely academic and that beneficiaries around the country are testing the boundaries of their rights. Much discussion has appropriately been given to ethical issues that arise from dual representation in immigration matters,[2] and practitioners may regard potential conflicts of interest with renewed energy when they better understand the nuances of I-864 enforcement. This article deals with those nuances.

I-864 enforcement is most likely to arise in the context of divorce proceedings,[3] but family law attorneys may have little awareness of the issue. In discussions with the author of this Bulletin, more than one family law attorney has dismissively said of the I-864, "in [a large number] of years of practice, I've never had this issue come up in a case." Has that attorney never actually represented an I-864 sponsor or beneficiary, or has she, perhaps, simply never spotted the issue? Around seven percent of U.S. marriages involve one or more foreign-

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[1] *See* Form I-864, Affidavit of Support (rev'd March 22, 2013), *available at* http://www.uscis.gov/files/form/i-864.pdf (last visited Jan. 22, 2014). Under the I-864, the sponsor also has the responsibility of repaying the cost of any federally-funded, means-tested public benefits received by the I-864 beneficiary. *See* INA § 213A(a)(1)(A), 8 U.S.C. § 1183a(a)(1)(A) (same requirement by statute). While enforcement of that duty is beyond the scope of this BULLETIN, it should be noted that no reported cases in the United States address the subject.

[2] *See*, *e.g.*,. Counterpoint: Cyrus Mehta, *Counterpoint: Ethically Handling Conflicts Between Two Clients Through the "Golden Mean"*, 12-16 BENDER'S IMMIGR. BULL. 5 (2007); Austin T. Fragomen and Nadia H. Yakoob, *No Easy Way Out: The Ethical Dilemmas of Dual Representation*, 21 GEO. IMMIGR. L.J. 521 (Summer 2007); Bruce A. Hake, *Dual Representation in Immigration Practice: The Simple Solution Is the Wrong Solution,* 5 GEO. IMMIGR. L.J. 581 (Fall 1991). *See also*, Doug Penn & Lisa York, *How to Ethically Handle an I-864 Joint Sponsor*, http://tinyurl.com/pp2h37t (AILA InfoNet Doc. No. 12080162) (posted No. 7, 2012).

[3] *See* Greg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 BENDER'S IMMIGR. BULL. 1943 (DEC. 15, 2012), *available at* http://tinyurl.com/oxhujy5, at text accompanying note 111.

born spouse.[4] In a career spanning potentially thousands of matrimonial matters, it is unlikely that a family law attorney will never encounter a foreign-born spouse. Without a doubt, in all divorce cases, family law practitioners should assess whether either spouse is a foreign national, and then explore whether an I-864 may have been executed. Immigration attorneys can do their matrimonial law colleagues a service by encouraging them to adopt this screening protocol for all cases.

A December 2012 Bulletin by this author examined all case law then available concerning the ability of an I-864 beneficiary to sue her sponsor for financial support.[5] The article is available free of charge online.[6] This author also maintains a blog that tracks developments relating to enforcement of the I-864, which can be found at http://www.i-864.net. Since the time of the 2012 publication there have been many interesting developments in I-864 enforcement. The current Bulletin provides a "pocket part"-style case law update to the 2012 publication. In the interest of brevity this Bulletin has been drafted with the intention that readers refer back to corresponding sections of the 2012 publication for background discussion.

I. Contract Issues

Case law has conclusively established that the I-864 is an enforceable contract and that the immigrant-beneficiary may sue to enforce the sponsor's support obligation.[7] As discussed below, such cases have been successfully brought in both state and federal courts.[8] Unsurprisingly, litigants have continued to encounter challenges when

[4] Luke Larsen and Nathan Walters, United States Census Bureau, *Married-Couple Households by Nativity Status: 2011* (Sep. 2013), *available at* http://www.census.gov/population/foreign/ (last visited Jan. 22, 2014).

[5] McLawsen, *supra* note 3.

[6] *See* http://tinyurl.com/oxhujy5 (last visited Jan. 29, 2014).

[7] McLawsen, *supra* note 3, at text accompanying notes 15-19.

[8] *See infra*, Section II.

they fail to introduce the executed I-864 into evidence.[9] When the parties have not retained a copy of the executed I-864, they may request a copy from the beneficiary's alien file through a Freedom of Information Act (FOIA) request. As a practical matter, however, this may pose a challenge, given the lengthy processing times for FOIA requests to the U.S. Citizenship and Immigration Service.[10] Moreover, at least one attorney representing a sponsor has had a FOIA request for the I-864 denied, apparently on the basis that it concerned the personal records of the immigrant-beneficiary.[11] An alternative method of establishing the requisite factual record could be to call an immigration attorney as an expert at trial. The attorney could be qualified to give testimony to the effect that the immigrant visa or permanent residency card could not have been issued unless the sponsor had executed an I-864.

Two recent cases have been the first to examine the liability of household members who execute Form I-864A.[12] The I-864A allows a

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[9] *See*, *e.g.*, Knope v. Knope, 103 A.D.3d 1256 (N.Y.A.D. 4 Dept. Feb. 8, 2013) (upholding trial court's denial of non-durational maintenance where beneficiary had failed to prove that an I-864 had been executed). *Compare* Choudry v. Choudry, No. A-4476-11T4, 2013 N.J. Super. LEXIS 1856, at *2 n. 1 (N.J. Super A.D. July 9, 2013) (although record did not contain the I-864, the court assessed support obligations based on testimony establishing that the I-864 was executed, and based on the Form as available online) *with* Kalincheva v. Neubarth, No. 2:12-cv-2231 JAM DAD PS, 2012 U.S. Dist. LEXIS 154334, at *9 (E.D. Cal. Oct. 25, 2012). (noting that since complaint alleged that immigration form was executed in 1991, it could not be the I-864, since that form was did not exist prior to 1996 legislation).

[10] USCIS reports that it takes an average of 31 days to request an item from an alien file, assuming the requestor is not in removal proceedings (i.e., a "Track One" request). USCIS, FOIA Request Status Check & Average Processing Times, http://tinyurl.com/kt9a5el (last visited Jan. 30, 2014).

[11] Email from Robert Gibbs, Founding Partner, Gibbs Houston Pauw, to the author (Aug., 6, 2013, 15:18 PST) (on file with author but containing confidential client information).

[12] *See* Form I-864A, Contract Between Sponsor and Household Members (rev'd Mar. 22, 2013), *available at* http://www.uscis.gov/i-864a (last visited Jan. 20, 2014). There continues to be no case that addresses the liability of a joint sponsor. The issue was touched upon in *County of San Bernardino Child Support Division v. Gross*, in which the issue was whether I-864 support could be considered income under California's

member of an I-864 sponsor's household to make her income available for purposes of calculating the income level of the I-864 sponsor.[13] Unlike the I-864, the I-864A does not set forth a complete recitation of the immigrant-beneficiary's enforcement rights under the I-864, such as the right to attorney fees.[14] Rather, the I-864A purports to incorporate by reference the sponsor's duties under the I-864.[15] *Panchal v. Panchal* dealt with a judgment against an I-864 sponsor and an I-864A household member for substantial attorney fees.[16] The court assessed liabilities to the household member identical to those of the I-864 sponsor.[17] If representing an I-864A household member, practitioners may be well-advised to examine the case law in their jurisdiction regarding contracts that incorporate other writings by reference.

In *Liepe v. Liepe*, an I-864 beneficiary—and her sponsor-husband—brought suit against the sponsor-husband's father, who had allegedly signed an I-864A.[18] The husband-sponsor was a full-time student, and lived at his father's house along with his beneficiary-wife.[19] The father executed a Form I-864A, as a member of the husband-sponsor's household, so that his income could be counted on the husband's I-864.[20] The plaintiffs' summary judgment motion was denied, their

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child support statute (the court held it could). E054457, 2013 Cal. App. LEXIS 5156 (Cal. App. 4th Dist. July 23, 2013). There, the appeals court made mention of an earlier trial court order "confirming that, despite the divorce proceedings, the [joint sponsor's I-864] was enforceable." *Id.* at *8.

[13] *See* Form I-864A, *supra* note 12.

[14] By executing the I-864A the individual promises, "to be jointly and severally liable for any obligations I incur under the affidavit of support," and agrees to be "jointly and severally liable for payment of any and all obligations owed by the sponsor under the affidavit of support to the sponsored immigrant(s)." *Id.*, Page 3.

[15] 2013 IL App (4th) 120532-U, No. 4-12-0532, 2013 Ill. App. LEXIS 1864, at *11 (Ill. App. Ct. 4th Dist. 2013).

[16] *Id.*

[17] *Id.*

[18] Civil No. 12–00040 (RBK/JS), 2012 U.S. Dist. LEXIS 174246 (D.N.J. Dec. 10, 2012).

[19] *Id.* at *3.

[20] *Id.*

having failed to establish that the defendant executed the I-864A.[21] As the motion was poorly documented with respect to evidence of the executed contract,[22] *Liepe* should not be taken as an indication that an I-864A signer holds no liability.

I.A. Duration of obligation

[Reserved]

I.B. Defenses

Defendant-sponsors have tested a host of contract law defenses, including lack of consideration (illusory promise), unconscionability, fraud and impossibility.[23] Generally these have fallen flat.[24] A district court has again addressed a defense by an I-864 sponsor that he was fraudulently induced to execute the I-864.[25] At summary judgment, the husband-sponsor alleged that the immigrant-beneficiary married solely for immigration purposes.[26] The parties agreed that they had spent minimal time together before marrying, had never been alone together, and that the marriage had never been consummated.[27] The parties disagreed, however, about the subjective intent behind the marriage and the cause if its breakdown. Because of the factual dispute over the immigrant-beneficiary's intent to deceive, the sponsor's motion for summary judgment was denied.[28] Since a fraud defense will turn on the subjective intentions of the immigrant-beneficiary, it would seem virtually impossible for a sponsor-defendant to prevail at summary

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[21] *Id.* at *3.

[22] *Id.* (evidence in support of the motion did not even include a full copy of the executed I-864A).

[23] *See* McLawsen, *supra* note 3, at text accompanying notes 38-60.

[24] *See id.*

[25] Farhan v. Farhan, Civil No. WDQ-11-1943, 2013 U.S. Dist. LEXIS 21702 (D. Md. Feb. 5, 2013). *See also* Carlbog v. Tompkins, 10-cv-187-bbc, 2010 U.S. Dist. LEXIS 117252, at *8 (W.D. Wi., Nov. 3, 2010) (rejecting a defendant-sponsor's counterclaim of fraud).

[26] *Id.* at *3.

[27] *Id.*

[28] *Id.*

judgment. No sponsor has yet succeeded on a fraud defense, either in motion practice or at trial.

In dicta, a different district court suggested that a defendant-sponsor waived the right to raise the defense of fraud in an I-864 contract suit, in which he failed to assert that defense in a prior dissolution action.[29] In *Erler v. Erler*, the district court held that the defendant-sponsor had failed to provide "sufficient" evidence of fraud at summary judgment.[30] Nonetheless, the court then went on to state that the time to contest the marriage's validity had passed, and that "[a]ny allegations of fraud should have been made to the state court during divorce proceedings."[31] Prior cases have suggested that an immigrant-beneficiary may be precluded from maintaining a contract suit on the I-864 if she fails to raise the claim in a divorce proceeding.[32] *Erler* suggests the possibility that a sponsor, too, may face preclusion if he fails to raise the issue of fraud in a divorce proceeding.

An unpublished New Jersey case has touched on an immigrant-beneficiary's ability to collect I-864 support. In *Choudry v. Choudry*, a sponsor-defendant argued that wage garnishment for a support order violated the federal Fair Debt Collection Act (FDCA).[33] A provision in the FDCA caps the maximum amount of wage garnishment at 25 percent of an individual's "aggregate disposable earnings."[34] However, where garnishment is for child and/or spousal support payments, the maximum is capped at 50 or 60 percent, depending on whether or not

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[29] Erler v. Erler, No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *11 (N.D. Cal. Nov. 21, 2013) (order denying plaintiff's motion for summary judgment and giving parties notice regarding possible summary judgment for defendant).

[30] *Id.* at *10.

[31] *Id.* at *11.

[32] For a discussion on whether an immigrant-beneficiary may face issue or claim preclusion if she fails to raise the I-864 in a divorce proceeding, see McLawsen, *supra* note 3, at text accompanying notes 126-133.

[33] Choudry v. Choudry, No. A-4476-11T4, 2013 N.J. Super. LEXIS 1856 (App.Div. July 24, 2013).

[34] *Id.* at *6 (citing 15 U.S.C. § 1673(a)(1)).

the individual is also supporting a spouse or dependent.[35] The appeal failed on the facts, as the sponsor-defendant did not show the actual order for wage garnishment.[36] Bankruptcy courts have treated I-864 support judgment as non-dischargeable domestic support obligations.[37] If courts took this approach, viewing I-864 support as the functional equivalent of spousal support, it would be reasonable to subject garnishment to the higher cap under the FDCA.

I.C. Damages

Damages in an I-864 suit are calculated by taking the required support level – 125% of the Federal Poverty Guidelines for the beneficiary's household size – and subtracting any support paid to the beneficiary or other income.[38] In *Erler v. Erler*, a district court provided the most detailed discussion to date of calculating household size for the purpose of calculating the required level of support under the I-864.[39] The court began by recognizing that there is no single definition of "household size" for purpose of the Federal Poverty Guidelines that applies across all federal law contexts.[40] Instead, the Department of Health and Human Services defers to programs that rely on the Guidelines for administering various benefits.[41] Indeed, the I-864 regulations do provide a definition of household size,[42] but the definition is made "for the express purpose of determining whether the intending

[35] *Id.* (citing 15 U.S.C. § 1673(b)(2)).

[36] *Id.* at *8.

[37] Matter of Ortiz, No. 6:11-bk-07092-KSJ, 2012 Bankr. LEXIS 5324 (Bankr. M.D. Fla. Oct. 31, 2012) (granting summary judgment to beneficiary); Hrachova v. Cook, 473 B.R. 468 (Bankr. M.D. Fla. 2012).

[38] *See* McLawsen*, supra* note 3, at text accompanying notes 61-68.

[39] No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *14–16 (N.D. Cal. Nov. 21, 2013).

[40] *Id.* at *14.

[41] *Id.*

[42] 8 C.F.R. § 213a.1.

sponsor's income is sufficient to suppose the intending immigrant."[43] That is, the definition applies at the stage at which USCIS assesses the adequacy of the I-864, not necessarily in the context of a subsequent suit by the I-864 beneficiary.

Under the I-864 regulations, "household size" necessarily includes the following:

- The sponsor;
- The sponsor's spouse;
- The sponsor's unmarried children under age 21 (not including stepchildren);
- Any person claimed as a dependent on the sponsor's federal income tax return for the most recent year;
- The number of non-citizens the sponsor has sponsored under an I-864, where the obligation has not terminated; and
- All non-citizens sponsored under the current I-864.[44]

Household size *may* also include the sponsor's parent, adult child, brother or sister, if that person's income is used for the current I-864.[45]

The plaintiff-beneficiary in *Erler* lived with her adult son, whose income, if imputed to her, would place her above 125% of the Federal Poverty Guidelines.[46] Hence, the beneficiary was incentivized to argue that she was a household of one, in order to present herself as having no income. The court rejected the argument that it was bound by the fact that the beneficiary had a household size of one for purposes of the food stamps program[47] since, among other reasons, the Guidelines

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[43] Erler v. Erler, No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *14 (N.D. Cal. Nov. 21, 2013).

[44] 8 C.F.R. § 213a.1.

[45] *Id.*

[46] *Erler*, 2013 U.S. Dist. LEXIS 165814, at *3.

[47] Now called the Supplemental Nutrition Assistance Program (SNAP).

make clear that household definition is context-specific.[48] Likewise, the court rejected the argument that it should look only to the sponsor-defendant for financial support in lieu of the beneficiary's son, as only the defendant had a contractual support obligation.[49] The court rejected this proposition without legal citation, "because it leads to an untenable result" that the beneficiary would be entitled to I-864 support even if she "becomes part of a millionaire's family."[50]

Instead, the court determined that it must "strike a balance between ensuring that the immigrant's income is sufficient to prevent her from becoming a public charge while preventing unjust enrichment to the immigrant."[51] Where an immigrant "lives alone, or only temporarily with others, she should receive payments based on a one-person household."[52] But the court believed the plaintiff-beneficiary would be "unjustly enriched" if she received income support from her I-864 sponsor, since her adult child was in fact providing support.[53]

Note the Hobson's choice with which an immigrant is left by this holding. An I-864 beneficiary may elect to live on her own with no financial support – in which case, she may seek recovery from her I-864 sponsor – or else she may impose herself upon a friend or family member, thereby negating her ability to receive I-864 support. Imputing income from the family member may seem unproblematic for the "millionaire" households envisioned by the *Erler* court, but that hypothetical situation is distant from the reality of many immigrant families. Indeed, the beneficiary's son in *Erler* earned only two and one-half times the Poverty Guidelines for a household of two.[54]

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[48] *Erler*, 2013 U.S. Dist. LEXIS 165814, at *14.

[49] *Id.* at *18.

[50] *Id.*

[51] *Id.* at *20 (citing Stump v. Stump, No. 1:04-CV-253-TS, 2005 WL 2757329, at *5-6 (N.D. Ind. Oct. 25, 2005).

[52] *Id.*

[53] *Id.* at *21.

[54] *Id.*

In *Villars v. Villars*, the Supreme Court of Alaska addressed another aspect of calculating the requisite support level.[55] In a spousal maintenance order, the sponsor had been ordered to support his beneficiary wife—who resided with her daughter—based on Poverty Guidelines for a two-person household in Alaska.[56] The annually-published Guidelines are identical for the contiguous 48 states, but higher for the states of Alaska and Hawaii.[57] When the beneficiary later alleged the sponsor had fallen behind with his support obligations, a trial was held.[58]

On appeal, the Supreme Court held that the trial judge had appropriately calculated the required level of support based upon the state where the beneficiary resided (California) rather than where the original support order entered (Alaska).[59] While the Immigration and Nationality Act (INA) does not expressly set forth this approach,[60] the court reasoned it was consistent with the statutory purpose of ensuring financial support for the beneficiary without providing her a windfall, as would have been the case were she to have continued collecting support at the heightened level for Alaska.[61]

The Court then rejected the trial court's blanket finding that the beneficiary had received as "income" the entire earnings of another man with whom she had resided for part of the time period in question.[62] Rather, the court delved into a careful analysis of precisely what financial benefits the record demonstrated that she had received.[63] As the record was not adequately clear on this account, a remand was

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[55] 305 P.3d 321 (Alaska 2013).

[56] *Id.* at 323.

[57] *See* Dept. of Health and Human Services, *Annual Update of the HHS Poverty Guidelines*, 78 Fed. Reg. 5182, 5183 (Jan. 24, 2013).

[58] *Villars*, 305 P.3d at 323.

[59] *Id.* at 325.

[60] *See* INA § 213A(h); 8 U.S.C. § 1183a(h).

[61] *Villars*, 305 P.3d at 325.

[62] *Id.* at 326.

[63] *Id.*

required to assess the appropriate amount to offset the sponsor's support payments.[64] Unlike the *Erler* court, the *Villars* court did not presume that an income from a cohabiter would necessarily be available to an immigrant-beneficiary. This approach certainly renders a fairer result where the beneficiary shares a roof with another individual without receiving in-kind or financial support.

In *Nasir v. Shah*, a district court briefly considered whether an immigrant-beneficiary's unemployment insurance payments qualified as "income" for purposes of offsetting his sponsors' I-864 support obligations.[65] The immigrant-beneficiary provided no authority for his argument that such payments are not income, and the court instead followed the defendants' citation to Internal Revenue Service (IRS) guidelines, characterizing such payments as taxable income.[66] The court correctly interpreted the term income by referencing IRS guidelines, as the regulations underlying the I-864 expressly make that cross-reference.[67]

Both the I-864 and its underlying statute make clear that a beneficiary may recover attorney fees incurred to enforce support obligations.[68] In *Panchal v. Panchal*, an Illinois appellate court has served a reminder that counsel should be careful to document which legal fees were incurred specifically for the purpose of enforcing I-864 obligations.[69] In *Panchal*, the appellate court upheld the trial judge's

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[64] *Id.* at 327.

[65] No. 2:10-cv-01003, 2013 U.S. Dist. LEXIS 165814 (N.D. Cal. Nov. 21, 2013).

[66] *Id.* at *9 (citing http://www.irs.gov/taxtopics/tc418.html).

[67] *See* McLawsen, *supra* note 3, at text accompanying note 64 ("The term [income] is not defined by the I-864, and mysteriously, courts have generally ignored the fact that C.F.R. regulations define income by reference to federal income tax liability") (citing 8 C.F.R. § 213a.1).

[68] Form I-864, *supra* note 1; 8 U.S.C. § 1183a(c).

[69] No. 4-12-0532, 2013 Ill. App. LEXIS 1864 (Ill. App. Ct. 4th Dist. 2013). *See* McLawsen, *supra* note 3, at text accompanying note 89 ("Where a noncitizen-beneficiary pursues her entitlement to support in the context of a maintenance order, her attorney would be wise to carefully track hours spent specifically on the I-864 claim").

decision to reduce fees awarded to a plaintiff-beneficiary.[70] The court held that the plaintiff-beneficiary could recover fees for prosecuting a contact claim on the I-864, but not for a concurrently pending dissolution action (since divorce is irrelevant to I-864 support obligations), nor for a related eviction action.[71] Especially where an I-864 issue arises in a divorce proceeding, practitioners are well-advised to carefully document fees specifically related to I-864 enforcement.

II. Procedural Issues

II.A. Federal Court

In *Delima v. Burres*, the Federal District Court for Utah reached the unusual conclusion that it lacked personal jurisdiction over a sponsor-defendant in an action to enforce I-864 support obligations.[72] As discussed below, other federal courts have readily concluded that they possess personal jurisdiction over an I-864 sponsor, as the Form contains a clause that appears to submit the sponsor to the jurisdiction of any otherwise-competent tribunal.[73] In *Delima*, it appears the parties hired a Utah law firm to prepare immigration filings, including the I-864, but executed the Form in Montana. The magistrate judge first analyzed whether the plaintiff had demonstrated "minimum contacts" with Utah sufficient for the State's long-arm statute and due process. The court found that hiring the Utah law firm to prepare the Form was not a minimum contact, and that the plaintiff had failed to show other plausible grounds.[74] The magistrate then briefly assessed whether a C.F.R. provision waived the defense of personal jurisdiction by a sponsor who signed the I-864.[75] The magistrate summarily concluded

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[70] *Id.* *4.

[71] *Id.*

[72] No. 2:12–cv–00469–DBP, 2013 U.S. Dist. LEXIS 26995, at *12 (D. Utah Feb. 26, 2013).

[73] *See, e.g.,* Younis v. Rarooqi, 597 F. Supp. 2d 552, 554 (D. Md. Feb. 10, 2009).

[74] *Id.*, at *3-4.

[75] *Id.,* at *4. Whereas the court cited 8 C.F.R. § 213a.2(d) (stating that the I-864 creates a binding contract), but may have intended 8 C.F.R. § 213a.2(c)(2)(i) (C)(2)

that the "defendant's decision to sign the Form I-864… does [not?] constitute a waiver or replacement of her constitutional due process rights related to personal jurisdiction."[76]

This result is an outlier, and it will be interesting to see if the magistrate's decision will be upheld. Individuals, of course, *can* waive objection to personal jurisdiction, even where the jurisdictional defect is constitutional in nature.[77] The INA mandates that the I-864 be drafted such that the "sponsor agrees to submit to the jurisdiction of any federal or state court for the purpose of actions brought."[78] Other courts have seen this language and readily concluded that "[t]he signing sponsor submits himself to the personal jurisdiction of any federal or state court in which a civil lawsuit to enforce the affidavit has been brought."[79] The *Delima* decision gave no analysis of why the contractual provisions in the INA or the Form itself were insufficient to waive personal jurisdiction; it is the opinion of this author that *Delima* was wrongly decided.

Affirming a minority rule endorsed by only one court, a second magistrate judge for the Middle District of Florida has concluded that federal courts lack federal question subject matter jurisdiction over suits by I-864 beneficiaries.[80] In *Vavilova v. Rimoczi*, the magistrate

("Each individual who signs an affidavit of support attachment agrees… to submit to the personal jurisdiction of any court that has subject matter jurisdiction over a civil suit to enforce the contract or the affidavit of support").

[76] *Delima*, 2013 U.S. Dist. LEXIS 26995, at *12.

[77] *Cf.* Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L REV. 753, 793 (Fall 2003) ("other areas of the law--as well as comparative systems of personal jurisdiction--are rooted in interests beyond that of the individual, yet the individual can waive objection")

[78] 8 U.S.C. § 1183a(a)(1)(C).

[79] *See, e.g.,* Younis v. Rarooqi, 597 F. Supp. 2d 552, 554 (D. Md. Feb. 10, 2009) (citing 8 U.S.C. § 1183a(a)(1)(C)).

[80] Vavilova v. Rimoczi, 6:12-cv-1471-Orl-28GJK, 2012 U.S. Dist. LEXIS 183714 (M.D. Fla. Dec. 10, 2012) (report and recommendation of magistrate judge). *See* Winters v. Winters, No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069 (M.D. Fla. Apr. 25, 2012) (holding that court lacked subject matter jurisdiction over an I-864 contract action against a sponsor).

judge concluded that 8 U.S.C. § 1183a(e)(1) does not create a federal cause of action, where it permits an I-864 enforcement action in an "appropriate court" without saying expressly that federal courts are "appropriate."[81] Finding that Congress had not expressly exercised the Supremacy Clause to divest state courts of concurrent jurisdiction, the judge concluded that no federal question jurisdiction was created.[82] The view endorsed by the *Vavilova* is at the very least coherent: Absent a federal cause of action, the I-864 is simply a suit on the contract, over which federal courts lack jurisdiction unless there is diversity between the parties.

By contrast, in a memorandum order, a District Court for the Eastern District of New York easily concluded that it possessed federal question jurisdiction over an I-864 enforcement suit, following the prevailing view on that issue.[83] The court in *Pavlenco v. Pearsall* cited only to previous federal decisions that had reached the same view.[84]

The *Pavlenco* court then provided one of the better discussions to date of federal abstention doctrines in the context of I-864 enforcement.[85] Abstention doctrines refer to a series of judicial canons pursuant to which a federal court will decline to adjudicate a matter to avoid infringing on the authority of a state tribunal.[86] In *Pavlenco*, the parties had a pending state court divorce matter, approximately one month from trial, in which the beneficiary had sought to raise issues

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[81] *Vavilova*, 2012 U.S. Dist. LEXIS 183714, at *7-8.

[82] *Id.* at *9.

[83] Pavlenco v. Pearsall, No. 13-CV-1953 (JS)(AKT), 2013 U.S. Dist. LEXIS 169092 (E.D.N.Y. Nov. 27, 2013) (memo. order).

[84] *Id.* (citing Tornheim v. Kohn, No. No. 00-CV-5084 (SJ), 2002 U.S. Dist. LEXIS 27914, (E.D. N.Y. Mar. 26, 2002); Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fla. May 4, 2006)).

[85] *See also* Shah v. Shah, Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596 (D.N.J. Jan. 14, 2014) (memo. op.) (denying the defendant's motion for summary judgment on the basis of the Rooker–Feldman doctrine, where the defendant had failed to brief the issue).

[86] *Cf.* Charles Alan Wright, et al., 17A FED. PRAC. & PROC. JURIS. § 4241 (3D ED.)

pertaining to the I-864.[87] The beneficiary had sought enforcement of the I-864 in the divorce proceeding, but alleged that the defendant-sponsor had not "allow[ed]" her to do so.[88]

Under "*Younger* abstention," a federal court will decline to hear a matter where there is concurrent litigation in a state tribunal.[89] Declination is appropriate where:

(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims.[90]

Whether abstention was required, the *Pavlenco* court reasoned, turned on whether the plaintiff-beneficiary would have a full opportunity to pursue her federal claim in the state court action, and whether the federal action would interfere with the state court matter.[91] The court determined that because the plaintiff-beneficiary had not yet succeeded in bringing I-864 enforcement issues to the attention of the state court, enforcement in the federal lawsuit would not have the effect of enjoining any state court action.[92] Moreover, the court noted that the mere existence of a parallel state court action does not implicate *Younger* abstention.[93]

The court then considered *Colorado River* abstention, another federal judicial doctrine that requires declination where a matter is being simultaneously litigated in a state tribunal.[94] Under *Colorado River*, a federal court must consider:

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[87] *Pavlenco*, 2013 U.S. Dist. LEXIS 169092, at *6.

[88] *Id.* What exactly this means is unclear.

[89] *See Younger v. Harris*, 401 U.S. 37 (1971).

[90] *Pavlenco*, 2013 U.S. Dist. LEXIS 169092, at *5 (quoting Diamond "D" Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir.2002)).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

(1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less inconvenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether state procedures are adequate to protect the plaintiff's federal rights.[95]

The court found that three factors weighed in favor of abstention. First, a stay would avoid piecemeal litigation, as the court believed it was likely the state court would address the I-864 issue.[96] Second, the court noted the advanced stage of the state court litigation (approximately a week before trial).[97] Finally, the court noted that although I-864 enforcement involved "federal law," state courts were equipped to adjudicate I-864 obligations in the context of a divorce proceeding.[98] The court therefore entered a six-month stay on the federal action.

The choice of many beneficiaries to enforce the I-864 in federal rather than state court is somewhat puzzling. Practitioners may be inclined toward federal court on the partially-mistaken view that I-864 enforcement involves "federal law." The better understanding is that enforcement is a suit on a contract, precisely the type of dispute that a state court of general jurisdiction is competent to adjudicate. Terms within the I-864, such as "income" and "quarters of work," may need to be clarified by reference to the underlying regulations and statute, but a federal tribunal is not uniquely qualified to do so. Litigants will generally do well to take advantage of the speedier and less costly

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[95] *Pavlenco*, 2013 U.S. Dist. LEXIS 169092, at *7 (quoting Woodford v. Cmty. Action Agency of Greene Cnty., Inc., 239 F.3d 517, 522 (2d Cir.2001)). *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

[96] *Id.* at *9. This reasoning is somewhat confusing; although the defendant-sponsor argued to the federal court that I-864 enforcement should be raised in state court, it is unclear why the defendant would have any incentive not to fight adjudication of the issue in state court, as well.

[97] *Id.*

[98] *Id.*

resolution offered by state courts; indeed, some I-864 matters could be efficiently brought in small claims court.

II.B State Court

II.B.1 Maintenance ("Alimony") Orders

[Reserved]

II.B.2 Issue Preclusion, Claim Preclusion

Procedural doctrines prohibit the litigation both of matters that have *actually* been litigated and those that *could* have been litigated. The former is referred to as issue preclusion and the latter as claim preclusion.[99] In *Yuryeva v. McManus*, a Texas appeals court stated clearly, although in dicta, that an immigrant-beneficiary could bring a subsequent contract action on the I-864, despite failing to raise enforcement in the context of her divorce proceeding.[100] In the divorce proceeding, the beneficiary had put the I-864 into evidence, and had testified that the sponsor had been failing to meet support obligations. The sponsor's attorney had stipulated that "there was an agreement that they were to live together and [the sponsor] would support her."[101] The beneficiary did not, however, specifically request that the trial court "enforce" the I-864 support duty.[102] For this reason the appeals court held that the lower court did not err in failing to incorporate the support obligation into the divorce decree, but the appeals court stated that an actionable contractual obligation survived.[103]

III. Unresolved issues

III.A Prenuptial agreements

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[99] *Cf.* 18 WRIGHT § 4406.

[100] No. 01-12-00988-CV, 2013 Tex. App. LEXIS 14419, at *19 (Tex. App. Houston 1st Dist. Nov. 26, 2013) (memo. op.)

[101] *Id.*

[102] *Id.*

[103] *Id.* For discussion of a possible claim preclusion issue concerning the defense of fraud, see section I.B, above.

Two more federal district courts have weighed in on whether a prenuptial agreement may waive an immigrant-beneficiary's right to seek enforcement of the I-864. Previously, in *Blain v. Herrell*, a district court in Hawaii had concluded that a premarital agreement could waive a beneficiary's rights to enforce the I-864, on the reasoning that the beneficiary was entitled to bargain away her own private rights if she chose to do so.[104]

In *Erler v. Erler*, the parties entered into a premarital agreement stating that "neither party shall seek or obtain any form of alimony or support from the other."[105] When the immigrant-beneficiary brought a contract action on the I-864 to recover support arrearages, the sponsor sought summary judgment, arguing that the premarital agreement rendered the I-864 contract "void."[106] The court rejected this contention on two grounds. First, the court held that premarital agreement could not waive rights under the I-864, as the premarital agreement was executed before the I-864.[107] These facts distinguished *Blain v. Herrell*, in which the premarital agreement was executed *after* the I-864.[108] The court's other rationale was that the defendant-sponsor could not "unilaterally absolve himself of his contractual obligation with the government by contracting with a third party."[109] This reasoning fundamentally departs from *Blain v. Herrell*, where the court reasoned that a beneficiary's private rights were her own to waive if she chose.[110]

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[104] No. 10-00072 ACK-KSC, 2010 U.S. Dist. LEXIS 76257 (D. Haw. July 21, 2010).

[105] No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *1 (N.D. Cal. Nov. 21, 2013) (order denying plaintiff's motion for summary judgment and giving parties notice regarding possible summary judgment for defendant). A previous state court action involving the parties in *Erler* did not reach the issue of the premarital agreement. *See* In re the Marriage of Erler, 2013 Cal. App. LEXIS 3168, at *29 n. 5 (Cal. App. 1st Dist. May 3, 2013) (noting objection at trial that prenuptial agreement was "inconsistent" with I-864 duties).

[106] *Erler*, 2013 U.S. Dist. LEXIS 165814, at *3.

[107] *Id.* at *7 n. 1.

[108] No. 10-00072 ACK-KSC, 2010 U.S. Dist. LEXIS 76257 (D. Haw. July 21, 2010).

[109] *Erler*, 2013 U.S. Dist. LEXIS 165814, at *7.

[110] *Blain*, 2010 U.S. Dist. LEXIS 76257, at *25.

Indeed, the Department of Homeland Security itself has opined that a beneficiary may elect to waive her right to enforcement of the I-864.[111]

The District Court for New Jersey reached the same conclusion as the *Erler* court in *Shah v. Shah*.[112] There, the parties had signed a prenuptial agreement prior to executing the I-864. The court held that the language of the prenuptial agreement by itself was inadequate to waive the sponsor's support duty, as it failed to specifically embrace those rights.[113] The court went on to hold that, contractual language aside, the parties lacked authority to waive the sponsor's support duty. First, the court noted that "immigration regulations" list the five circumstances that terminate support obligations, and that "a prenuptial agreement or other waiver by the sponsored immigrant" does not terminate obligations under the regulations.[114] This argument is incomplete, as it fails to address both whether the beneficiary has private rights, and if so, why she lacks the legal ability to waive those rights.

The court then went on to offer an interesting second argument in support of the non-waivability of support rights. It noted that under the INA, the "Government" may not accept an I-864 unless that I-864 is "legally enforceable against the sponsor by the sponsored alien."[115] The language quoted is where the INA mandates creation of the document

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[111] Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732, 35740 (June 21, 2006) (but clarifying that a sponsor's duties to reimburse government agencies would remain unchanged).

[112] Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596 (D.N.J. Jan. 14, 2014) (memo. op.)

[113] The agreement stated, under a section entitled "Alimony," that the immigrant-beneficiary:

> waives, releases and relinquishes any and all rights whatsoever, whether arising by common or statutory law (present or future) of any jurisdiction to spousal alimony, maintenance, or other allowances incident to divorce or separation....

Id. at *9.

[114] *Id.*

[115] *Id.* at *11.

that became the I-864,[116] which replaced the unenforceable I-134.[117] The court's reasoning is essentially, "the I-864 could not have been unenforceable if the government accepted it, the government *did* accept it, therefore the Form must be enforceable." This syllogism is perhaps a bit formalistic. The deeper question is whether the parties' rights are fundamentally statutory or contractual in nature. The *Shah* court found that it would "undermine the purpose of the statute" to allow beneficiaries to waive support,[118] but a vague reference to statutory purpose does not explain why an individual cannot waive her own private contractual rights. As noted elsewhere, courts are often unclear about how they justify reliance on the INA when examining parties' rights under the I-864; at the same time, other federal courts reject subject matter jurisdiction over I-864 disputes precisely because they are contractual in nature, rather than posing a federal question.[119]

III.B Interpreting the I-864

[Reserved]

IV. Conclusion

Enforcement of the I-864 is a very real issue that immigration practitioners are wise to recognize. While many complex issues remain for a beneficiary seeking to vindicate her rights, the bottom line is that the I-864 is an enforceable agreement – everything else is fine print. Immigration lawyers will do well to bear this in mind when counseling couples and conferring with family law colleagues.

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[116] *Id.* (citing 8 U.S.C. § 1183a(a)(1)).

[117] *See* Rojas-Martinez v. Acevedo-Rivera, 2010 U.S. Dist. LEXIS 56187 (D. P.R. June 8, 2010) (granting defendant's motion to dismiss; holding that I-134 was not an enforceable contract).

[118] *Shah*, 2014 U.S. Dist. LEXIS 4596, at *11.

[119] *See* McLawsen*, supra* note 3, at text accompanying notes 148-162.

Immigration Support Advocates

SUING ON THE FORM I-864 AFFIDAVIT OF SUPPORT

DECEMBER 2016 UPDATE

A version of this paper is forthcoming by Benders Immigration Bulletin

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This is the third in a series of articles summarizing all available case law regarding enforcement of the Form I-864, Affidavit of Support.[1] The previous articles are freely available for download.[2] As with the last piece, the current one is intended as a "pocket part" update to issues discussed in the original 2012 article.

I-864 beneficiaries have continued their strong track record of successfully enforcing support rights in both state and federal courts. There is no longer any question whatsoever as to whether they have the standing to do so. The issues over which courts now disagree are subsidiary ones. For example, what types of financial benefits – housing subsidies, gifts, and so forth – offset a sponsor's support obligation?

Most immigration attorneys are uninterested in civil damages litigation, so why read further? Because we represent I-864 sponsors. Indeed, immigration attorneys commonly represent both a U.S. citizen/resident petitioner and an intending immigrant family member. The same attorney may also represent an I-864 joint sponsor in the same matter, though we argue that is unwise.[3] It is one thing to have a vague sense that the I-864 is an enforceable contract. But it is another matter altogether to see I-864 litigation in action. The cases discussed below may prompt some practitioners to double-check their procedures and advisories when working with I-864 sponsors.

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[1] *See* Greg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 BENDER'S IMMIGR. BULL. 1943 (DEC. 15, 2012) (hereinafter McLawsen (2012)); Greg McLawsen, *Suing on the I-864 Affidavit of Support: March 2014 Update*, 19 BENDER'S IMMIG. BULL. 1943 343 (Apr. 1, 2014) (hereinafter McLawsen (2014)). *See also* Greg McLawsen, The I-864, Affidavit of Support; An Intro to the Immigration Form you Must Learn to Love/Hate, Vol. 48. No. 4 ABA Fam. L. Quarterly (Winter 2015). In this article, as with its predecessors, the female and male pronouns are used when referring to I-864 beneficiary's and sponsors, respectively. This approach is taken if view of the fact that I-864 plaintiffs tend to be female.

[2] Visit www.i-864.net → Resources.

[3] Greg McLawsen and Gustavo Cueva, *The Rules Have Changed: Stop Drafting I-864s for Joint Sponsors*, 20 BENDER'S IMMIGR. BULL. 1287 (Nov. 15, 2015). Colleagues sometimes mistakenly assume that joint sponsors are never sued for I-864 enforcement. That view is inaccurate. Indeed, the author recently settled such a case.

I. Contract Issues

For would-be I-864 plaintiffs, one of the first orders of business is to acquire a copy of the Form I-864 executed by the sponsor. Often, the beneficiary does not possess a copy of the I-864 as filed. That is hardly a surprise. If the foreign national went through consular processing for an immigrant visa, the sponsor – and not the beneficiary – would have filed the I-864 directly with the National Visa Center. And if the foreign national adjusted status, it is often the English-speaking petitioner who takes on the primary logistical role in submitting the application packet.

If the parties were assisted by an attorney, of course, that firm must release the I-864 to the foreign national upon request, as it was drafted on her behalf. The I-864 is submitted in support of the foreign national's adjustment or visa application, not in support of the underlying I-130 petition. This author recently filed a complaint for unauthorized practice of law in Arizona where a notario – a former Immigration and Customs Enforcement officer, to boot – refused to return an adjustment file to a foreign national. A replevin action could be used to claw back a copy of the form, but this would hardly seem worth the effort.

As noted in prior articles, the executed Form I-864 can be requested through a Freedom of Information Act (FOIA) request. Other practitioners have reported that such requests have returned Forms I-864 that are either fully or partially redacted. That result is arguably consistent with protections of the U.S. sponsor's personal information under the Privacy Act. In this author's experience, however, FOIAs submitted by the foreign national typically are returned with an unredacted copy of the I-864. Regardless of whether this is erroneous or not on the part of USCIS, it has proved an expedient means of acquiring the signed contract.

May the beneficiary compel the sponsor to cooperate in a FOIA request to obtain the signed I-864? Surprisingly, at least one case suggests the answer could be no. *Echon v. Sackett* was not I-864 enforcement litigation, but rather a federal district court action against an employer, alleging violations of anti-trafficking and employment laws.[4] In the course of contentious discovery, the plaintiffs sought copies

[4] 14-cv-03420-PAB-NYW (D. Col. May 2, 2016) (discovery order).

of Forms I-864 filed by the employer-defendant. Though unartfully presented, it appears the plaintiffs sought an order compelling the defendants to sign a FOIA request for the Forms I-864, after the defendants denied possessing the documents. After noting that Fed. R. Civ. Pro. 34 does not "expressly authorize a court to order a party to sign a release concerning any kind of record," the Court advised that the plaintiffs should first seek the documents through their own FOIA request, or else via a Rule 45 subpoena.[5]

In this author's experience, sponsor-defendants have readily agreed to cooperate with a FOIA request to acquire the Form I-864 filed by a sponsor. A plaintiff, of course, may compel production of a document that is within the "possession, custody, *or control*" of a defendant.[6] Since signing the FOIA request is hardly burdensome, and the document is highly relevant to the claims, opposing litigants generally have not resisted on this issue.

I.A. Duration of obligation

It is said that bad facts make bad law. Perhaps the only thing that makes worse law is pro se litigants.[7]

In a poorly guided decision, a federal district court for New Jersey held that I-864 obligations terminate once a foreign national has prevailed in an I-751 waiver petition. In *Shah v. Shah*, a pro se foreign national prevailed at a jury trial, demonstrating that her sponsor had failed to fulfill his obligation under the Form I-864.[8] The jury, however,

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[5] *Id.* (citing EEOC v. Thorman & Wright Corp., 243 F.R.D. 426, 428 (D. Kan. 2007); Bouchard v. Whetstone, No. 09-CV-01884-REB-BNB, 2010 WL 1435484, at *1 (D. Colo. Apr. 9, 2010)).

[6] Fed. R. Civ. Pro. 34 (emphasis added).

[7] *See, e.g.*, Encarnacao v. Beryozkina, No. 16-cv-02522-MEJ (N.D. Cal., June 27, 2016) (order) (issuing summons in I-864 matter after having previously having dismissed the Complaint where it "failed to provide enough facts for the Court to determine whether he could state a cognizable claim for relief"); Du v. McCarty, No. 2:14-CV-100 (N.D. W. Vir. Apr. 16, 2015) (order adopting report and recommendations) (denying pro se Sponsor's motion to dismiss based on allegation that Form I-864 signature was not his, since such a matter is for the jury).

[8] No. 12-4648 (RBK/KMW) (N. N.J., Oct. 30, 2015).

appeared to calculate damages based on a cutoff date of when the foreign national won approval of her I-751 petition, which was filed as a waiver without the sponsor's assistance.

The plaintiff, pro se, moved for a new trial, arguing that the I-751 approval did not terminate the sponsor's obligations. Without further explanation, the Court stated:

> After Plaintiff received a one-year extension from USCIS, her status was set to expire on May 25, 2014. But upon Plaintiff's petition, USCIS adjusted Plaintiff's immigration status to that of lawful permanent resident on December 13, 2013. *Because Plaintiff's status adjustment was not based upon Defendant's Form I-864*, her status adjustment terminated Defendant's obligation to support Plaintiff.[9]

These statements are poorly guided – likely in the literal sense that the litigants gave the Court little sound research on which to base its ruling.

The error is this: an I-751 petition is not an application for "status adjustment." An I-751 petition, of course, is exactly what it says on its face – a petition to remove the conditions placed on an individual who is *already* a lawful permanent resident (LPR). That is a distinction with a difference.

Under the plain language of federal regulations conditional residents *are* LPRs.[10] Unless otherwise specified by law, a conditional resident possesses all "rights, privileges, responsibilities and duties which apply to all other lawful permanent residents."[11] As the USCIS Policy Manual states in its introductory sentence to conditional residency, conditional residents have "been admitted to the United States *as LPRs* on a

[9] *Id.* (emphasis added, internal citation omitted).

[10] 8 C.F.R. § 216.1 ("A conditional permanent resident is an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act. . .").

[11] *Id.*

conditional basis for a period of two years."[12] For a foreign national filing an I-751 petition, LPR status is hers to lose, not to gain.[13]

In other words, once a foreign national has acquired conditional LPR status based on an I-864 filed by her sponsor (or a joint sponsor), she has already acquired LPR status, period. All that is left is to remove the conditions placed on her LPR status, but there is no "other" permanent residency status to which she could "adjust." When a conditional resident gets an I-751 approved – whether via a joint petition or waiver – she is not transitioning into a new residency status. The pro se plaintiff in *Shah* was an LPR from the day she first received conditional LPR status, and she maintained that same LPR status through the I-751 petition process. *Shah* was wrongly decided and will hopefully not mislead other courts.

The sponsor's obligation under the I-864 terminates when the beneficiary acquires 40 quarters of work under the Social Security Act.[14] But whose work quarters count towards that threshold? In the California case of *Gross v. Gross*, a pro se plaintiff argued that her husband's quarters of work did not count towards the 40 quarters.[15] Following the plain text of the Form I-864 and underlying statute, the Court disagreed. The statute specifically provides that in counting quarters of work, the beneficiary shall be credited with "all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains

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[12] USCIS Policy Manual Vol. 12, Part G, Chapter 5(A), *available at* http://1.usa.gov/1IArtlI (last visited Dec. 28, 2015) (emphasis added). *See also* 8 CFR § 235.11(c) (The *lawful permanent resident alien status of a conditional resident* automatically terminates if the conditional basis of such status is not removed by the Service through approval of a Form I-751, Petition to Remove the Conditions on Residence. . .") (emphasis added).

[13] A conditional resident maintains status as an LPR unless: (1) she fails to timely file her petition for unconditional status; (2) such a petition is denied; or (3) her status is affirmatively terminated by the government. 8 USC §§ 1186a(c)(2)(A) (lack of timely petition), 1186a(c)(3)(C) (petition denied), 1186a(b)(1) (affirmative termination).

[14] Clients and even immigration attorneys sometimes believe that I-864 obligations end after 10 years. That is incorrect. The obligations are terminated after the beneficiary may be credited with 40 quarters of work under the Social Security Act. That threshold could be met in ten years, but not necessarily.

[15] E060475 (Cal. App., 4th Dist., 2nd Div. Aug. 6, 2015).

married to such spouse or such spouse is deceased."[16] The Form I-864 itself, official instructions, and statute all refer to work quarters with which the beneficiary may be "credited" rather than those she has earned.[17] As the *Gross* Court concludes, it is clear that a beneficiary can be credited with work quarters earned by her spouse. Note, however, that this does not necessarily resolve the issue of whether quarters can be double-stacked. If both the beneficiary and sponsor are working, it is not obvious that two work quarters should be simultaneously counted towards the 40-quarter threshold.[18]

In a published New Jersey case, an appeals court followed the plain language of the Form I-864 to hold that support obligations end upon the death of a sponsor. *Fox v. Lincoln Financial Group* was primarily a state law case about whether marriage should automatically cause one spouse, by operation of law, to become the beneficiary of the other's life insurance policy.[19] When a U.S. citizen spouse died, his foreign national spouse sued the life insurance company, and argued that the Affidavit of Support offered a justification for recovering against the policy. The trial and appeals courts rejected that contention, citing the plain language of the Form I-864, stating that the obligation ends upon the death of the sponsor.[20]

It is important to distinguish, however, between termination of the sponsor's obligation and the viability of claims accrued up to the date of termination. If a sponsor has failed to provide support for a period of one year, for example, and then dies, his estate will remain liable for support arrears up to the date of his death. While the estate is not liable for future support – since the obligation has terminated – the beneficiary does not lose the ability to assert claims that accrued prior to the sponsor's death.

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[16] *Id.* (citing INA § 213A(a)(3)(A)).

[17] *See id*.

[18] *Cf*. Davis v. Davis, No. WD-11-006 (Ohio Ct. App. May 11, 2012), *available at* http://www.sconet.state.oh.us/rod/docs/pdf/6/2012/2012-ohio-2088.pdf (last visited Nov. 15, 2016) (Singer, J. dissenting) (arguing that double-stacking should not be applied).

[19] 109 A.3d 221 (2015).

[20] *Id.* at 223, 227-28.

Under the plain language of the Form I-864, the sponsor's obligations commence when the beneficiary gains lawful permanent residency based on the sponsor's affidavit. Of course, if the Affidavit is signed but never filed, then the sponsor never becomes obligated under the contract.[21]

I.B. Defenses

Sponsor-defendants typically answer I-864 lawsuits by pleading a kitchen sink's worth of affirmative defenses.[22] In the author's experience, these often include defenses that seem hard-pressed to pass even the good faith requirement.[23] The notion, for example, that an I-864 beneficiary "lacks standing" to maintain a suit against a sponsor is simply frivolous. Nonetheless, courts will typically decline to strike even questionable affirmative defenses, at least during early stages of litigation.[24]

I.C. Damages

In December 2016 the North Carolina Supreme Court handed down one of the most important I-864 enforcement opinions in years. In *Zhu v. Deng* the Court held squarely – albeit with little discussion – that the duty to mitigate does not apply in I-864 enforcement cases.[25] The sponsors in *Zhu* argued that their support obligation should be offset by income that the plaintiff *could* be earning, were she not voluntarily unemployed. But the state Supreme Court disagreed. Instead, it followed a seminal Seventh Circuit opinion authored by Judge Posner. In *Liu v. Mund*, Judge Posner opined that the congressional purpose behind the I-864 is to ensure that the sponsored immigrant has *actual* support when

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[21] F.B. v. M.M.R., 120 A.3d 1062 (Pa. Super. 2015).

[22] Commonly asserted defenses include (in no particular order): estoppel, statute of frauds, duress, fraud (typically fraud in the inducement), unconscionability, waiver, res judicata, unclean hands, and "equity."

[23] *See* Fed. R. Civ. Pro. 11.

[24] *See*, *e.g.*, Dahhane v. Stanton, 15-1229 (MJD/JJK) (D. Minn. Aug. 4, 2015) (report and recommendation) (refusing to strike affirmative defenses).

[25] No. COA16-53 (N.C. Dec. 6, 2016)

needed.[26] That purpose would be thwarted if courts were to engage in speculation about whether a sponsored immigrant could be working but was electing not to. With little discussion of its own, the *Zhu* opinion favorably quotes the reasoning in *Liu.*[27]

Damages in I-864 enforcement litigation are easy to calculate – at least in principle. The plaintiff is entitled to recover 125% of the Federal Poverty Guidelines (FPGs), less any actual income she has received.[28] Courts continue to work through the issue of what financial sources qualify as income for purpose of calculating damages. The resulting decisions are a hodgepodge that employ no consistent standard to define what is and is not income for purposes of I-864 lawsuits.

In *Dahhane v. Stanton* a federal judge for the District of Minnesota opined on several financial sources, led by the dubious guidance of pro se litigants[29] The *Dahhane* Court correctly ruled that financial payments from the sponsor to the beneficiary should count against the sponsor's support obligation, regardless of whether they were designated as support payments under the I-864.[30] Yet in reaching that conclusion, the Court unnecessarily opined that the I-864 regulations in Title 8 C.F.R. do not define *income* for purposes of calculating damages under the I-864.

Under those regulations *income* means income as defined "for purposes of the individual's U.S. Federal income tax liability."[31] The Court reasoned,

> 8 C.F.R. § 213a.1 provides definitions for use in determining whether someone is eligible to sponsor an

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[26] 686 F.3d 418, 422 (7th Cir. 2012).

[27] *Id.* ("[W]e can't see much benefit to imposing a duty to mitigate on a sponsored immigrant.").

[28] *See* McLawsen (2012) *supra* note 1 at Section I.C.

[29] No. 15-CV-1229 (PJS/BRT) (D. Minn., Aug. 12, 2016) (Order on plaintiff's objection to magistrate's report and recommendations).

[30] *Id.* ("[Beneficiary] argues that, if [Sponsor] had given him a gift of $1 million in 2003, he could still sue her for failing to support him at 125 percent of the federal poverty level during that year").

[31] 8 C.F.R. § 213a.1.

> immigrant; the regulation has nothing to do with calculating whether an immigrant has been supported at 125 percent of the federal poverty level.

The Court offers no explanation for why 8 C.F.R. § 213a.1 does not provide the definition of *income* for purposes of damages calculations. Why go this far? Instead, the Court could simply have held that a financial transfer from sponsor to beneficiary counts towards the sponsor's support obligation regardless of how it is characterized.

Bizarrely, the *Dahhane* Court next held that money brought by the beneficiary from his home country qualified as *income* for purposes of offsetting damages. This result is jarring, as the Court does a 180-degree flip on its rationale applied earlier in the same decision regarding the import of IRS guidelines. The Court noted that the I-864 regulations permit the sponsor to list the beneficiary's assets for purposes of demonstrating financial sufficiency to qualify as an I-864 sponsor. Thus, the Court reasoned, $3,000 that the beneficiary brought from Morocco counts as *income* provided to him by the sponsor for purposes of damages calculations.

There are two problems with this. First, the Court had just reasoned that *income* defined for initial sponsorship purposes is not the same thing as *income* for purposes of damages calculations. Second, income and assets are of course separate concepts under the I-864. A sponsor need not report his own assets – let alone the assets of the beneficiary – if his income meets the required threshold. In any event, why should reported assets have anything to do with whether a sponsor s fulfilling duty to provide income? The Court gives no reason why the beneficiary's assets, which might or might not have been reported on the I-864, later qualifies as an income source for a later support period.

The *Zhu* case from North Carolina reached the opposite and correct approach regarding assets owned by an I-864 beneficiary.[32] The sponsors in *Zhu* argued that their support obligation should be offset by the beneficiary's share of monetary wedding gifts. Disagreeing, the opinion states:

[32] No. COA16-53 (N.C. Dec. 6, 2016).

> Assets do not amount to income, and a judgment, even a monetary one, is not necessarily an asset for purposes of income. [. . .] Notably, plaintiff-husband listed $150, 000.00 under a heading titled "Assets of the principal sponsored immigrant" on his Form I-864A. This fact had no bearing or impact on the government's requirement that contracts of support were necessary for [the plaintiff-beneficiary] to become a permanent resident, and nor should a judgment against defendant-parents in the amount of $67, 620.

This approach is both clean and correct. The sponsor's obligation is offset by the beneficiary's income. But assets are not income under any normal understanding of the terms.

Departing from other federal courts,[33] the *Dohhane* Court next held that child support payments to the Beneficiary's children qualified as *income* for purposes of the I-864 damages calculation.

Finally, the *Dohhane* Court correctly concluded that federal income tax refunds paid to the Beneficiary do not qualify as income. Since "[a] tax refund is merely the return of the recipient's money," it would be unfair to count it twice, "once when it is received and a second time when it is refunded." Similarly, in *Villars v. Villars*, the Supreme Court of Alaska held that an Earned Income Tax Credit does not constitute income for purposes of offsetting I-864 support obligations.[34]

Other tribunals have reached the opposite conclusion regarding reliance on IRS guidelines. In *Nasir v. Shah*, another U.S. District Court held that the immigrant-beneficiary's unemployment insurance payments qualified as *income*, following the defendants' citation to Internal Revenue Service (IRS) guidelines characterizing such payments as taxable income.[35]

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[33] Younis v. Farooqi, 597 F. Supp. 2d 552, 555 (D. Md. Feb. 10, 2009) ("child support is a financial obligation to one's non-custodial child, not a monetary benefit to the other parent").

[34] 336 P.3d 701, 712 (Ala. 2014).

[35] No. 2:10-cv-01003, 2013 WL 3085208 at *3 (S.D. Ohio June 18, 2013) (citing http://www.irs.gov/taxtopics/tc418.html).

Reaching exactly the opposite conclusion from *Dohhane*, in *Toure-Davis v. Davis* a federal court for the District of Maryland held that IRS guidelines *do* define income for purpose of I-864 damage calculations.

> In determining whether a sponsor has sufficient income to support a sponsored immigrant at a minimum of 125 percent of the Federal poverty line, Form I-864 utilizes the [IRS] rules. This court therefore will consult the IRS rules regarding whether a property settlement incident to a divorce is treated as income.[36]

Relying on that standard, the Court in *Toure-Davis* held that a divorce property settlement did not constitute earned income, and therefore did not offset the Sponsor's I-864 support obligation.

But in the very same memorandum decision, the *Toure-Davis* Court failed to rely on the IRS guidelines. With virtually no discussion, the Court held that the defendant was entitled to an offset for the value of free housing provided to the plaintiff by an individual. The Court reasoned that the free housing was the equivalent of receiving a housing subsidy, and also that it was given as a "bartered service" in exchange for the plaintiff's cooking and cleaning.[37] But wait, is couch-surfing now a form of income taxed by the federal government? If the divorce settlement in *Toure-Davis* was not income – because the IRS guidelines say it was not – why is free housing *income*, when its value is not taxable as income?

The damages to which an I-864 plaintiff is entitled depends on her FPG household size, and courts have struggled to define that term. In *Erler v. Erler* the Ninth Circuit has set forth a helpful bright-line rule for determining household size for the purpose of I-864 damages.[38] After separation, the beneficiary moved in with her adult son. Her son was employed, earning income that exceeded 125% of the FPG for a household

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[36] No. WGC-13-916 (D. Md. March 4, 2014) (memo. op.).

[37] *Id.* (citing Shumye v. Felleke, 555 F.Supp.2d 1020, 1026 (N.D. Cal. 2008) for the proposition that housing subsidies offset I-864 damages).

[38] No. 14-15362 (9th Cir. June 8, 2016). *See also* Toure-Davis v. Davis, WGC-13-916 (D. Md. March 4, 2015) (memo. op.) (holding that U.S. citizen children of the I-864 beneficiary did not count as household members for purposes of damages calculation).

of two. The evidence showed that the beneficiary's son used some of his income to pay rent and living expenses for both himself and the beneficiary.

The beneficiary sued for support under the Form I-864. Although the trial court determined that the obligation survived divorce, it held that the sponsor owed no support.[39] The trial court "imputed" the son's income to the beneficiary. Because his income exceeded 125% FPG for a household of two, the beneficiary was above the required support level and the sponsor owed nothing

First, the Ninth Circuit squarely held that the Form I-864 is an enforceable contract. The Ninth Circuit then went on to the issue of household size. The Court rejected the trial court's view that the son's income should be imputed to the beneficiary. As had the trial court, the Ninth Circuit found that the I-864 statute and regulations did not define household size for enforcement purposes. Note the parallel with the IRS guidelines issue discussed above. There, courts disagreed as to whether rules defining income for determining eligibility of a sponsor also defined that term for purposes of damages calculations.

The Ninth Circuit rejected the idea that household size could be measured by the actual "post petition" household.[40] Instead,

> …in the event of a separation, the sponsor's duty of support must be based on a household size that is equivalent to the number of *sponsored immigrants* living in the household, not on the total number of people living in the household.

In other words, the operative household size is one, plus any other immigrants who were also sponsored by the same Form I-864.

The Court acknowledged that this approach will sometimes seem to give a windfall to the beneficiary. In *Erler*, for example, the beneficiary had access to some resources from her son, even though she was also entitled to a full support (125% FPG) from Sponsor. But the Court reasoned that a sponsor should have anticipated that he might be liable for the amount of support. Moreover, the court reasoned, it would be

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[39] *See* Erler v. Erler, CV-12-02793-CRB, 2013 WL 6139721 (N.D. Cal. Nov. 21, 2013).

[40] That is, the number of individuals actually residing at the dwelling.

unfair to foist the support of the immigrant on – in this case – her son, when in fact it was the sponsor's duty to provide the support.

Although *Erler* is helpful in setting a bright line rule, it leaves unanswered questions. At the top of the list: what happens if the beneficiary has a child? Under *Erler*, because that child is not a sponsored immigrant she will not qualify as a household member. The core purpose of the I-864 is to ensure that a sponsored immigrant has a bare-bones safety net, at the sole expense of the sponsor. The *Erler* approach will fall short of that goal where a sponsored immigrant has to use her resources to provide for a U.S. citizen child. It appears that the beneficiary's best strategy in that situation would be to pursue child support in addition to I-864 support.[41]

May a beneficiary recover damages for periods of time when she is outside the United States? At least two courts have answered yes.

In *Villars v. Villars* a sponsor argued that he was entitled to an offset for any months the beneficiary spent abroad in Ukraine.[42] The Court noted that no language in the statute prevented the beneficiary from recovering support for time spent abroad.[43] The Court then appeared to hold that the beneficiary was not categorically barred from recovering support for time spent abroad. Rather, the Court said that the issue was whether the beneficiary had received support from family members during that period, which amounts would be counted as an offset against the sponsor's support obligation.[44]

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[41] *See* Toure-Davis v. Davis, WGC-13-916 (D. Md. March 4, 2015) (memo. op.) ("The minor children [of the I-864 beneficiary] are U.S. citizens; they are not sponsored immigrant children. The obligation of support imposed by Form I-864 is not legally enforceable by the minor children against their father Charles G. Davis. The issue of child support is a matter of interest to the State of Maryland.").

[42] 336 P.3d 701, 712 (Ala. 2014). *See also* Toure-Davis v. Davis, No. WGC-13-916 (D. Md. March 28, 2014) (memo. op.) ("It is not readily apparent to the court whether Defendant provided financial support during Plaintiff's absence from the United States between the summer of 2009 and December 14, 2010. The parties should discuss whether Plaintiff is or is not entitled to financial support during this period.").

[43] *Id.*

[44] *Id.*

The *Villars* Court's view on family assistance is problematic: that a sponsor may receive an offset if a beneficiary's family pitches in for her wellbeing. The entire congressional purpose of the Affidavit is to mandate that the sponsor serve as the intending immigrant's financial safety net. If the sponsor refuses to support the beneficiary, presumably she must find resources somewhere to survive. In any conceivable hypothetical – except for an immigrant living off her own vegetable garden – the beneficiary must receive some form of financial resources during the time a sponsor has failed to provide support. If friends, relatives or community groups step in to provide for the beneficiary's basic needs, why should the sponsor receive a windfall?

Likewise, in *Toure-Davis v. Davis* the Court held that the I-864 beneficiary was entitled to recover support for a period of time spent in her home country of Ivory Coast.[45] The only question was whether financial sources received during that period of time served to offset the defendant's support obligation.

I-864 beneficiaries typically seek to recover damages from the date of their separation with the sponsor, who was typically also the spouse. Nothing, however, prevents a plaintiff from recovering for the period of time when she was residing with the sponsor. It is simply that the factual assessment may be more complex, as to what contributions were made to joint household expenses. This issue was noted by a federal judge for the Western District of Wisconsin, who requested a further factual showing on the issue from the parties.[46]

In I-864 enforcement cases, plaintiffs may seek both recovery of support arrears and also an order of specific performance, mandating that the sponsor fulfill his support duty until the terminating conditions described by the contract. Courts have proved willing to enter such orders of specific performance.[47] Since the plaintiff-beneficiary's entitlement to I-864 support is contingent upon lacking other income, some form of periodic accounting is appropriate to demonstrate to the defendant that support is required. It has been the author's practice in settlement

[45] No. WGC-13-916 (D. Md. March 4, 2015) (memo. op.).

[46] Santana v. Hatch, 15-cv-89-wmc (W.D. Wis. Apr. 29, 2016) (opinion and order).

[47] *See*, *e.g.*, *id.*

negotiations to propose that the plaintiff provide monthly accounting to the defendant, certifying any earned income and that she has not become a U.S. citizen or otherwise triggered a terminating condition under the contract.

Both the Form I-864 itself and underlying statute make very clear that a beneficiary may recover attorney fees incurred in successfully enforcing the contract. In *Matloob v. Farham*, the plaintiff prevailed after a one-day bench trial and sought just under $40,000 in attorney fees.[48] The Court applied a 10% downward reduction on the basis of some duplicative work between the two lead attorneys, and because the Court believed that the 15 hours spent on the relatively short summary judgment brief was excessive. Notably, the Court acknowledged that although the fee award was nearly four times the amount in controversy, the award was appropriate given the undesirability of the case, and the uncertainty as to whether any fee award could be collected.

The defendants in *Matloob* were pro se and it is unclear how actively they defended the litigation. For example, the fee award motion was not opposed. Defendants in I-864 enforcement actions often plead numerous affirmative defenses, including the fact-intensive defense of fraud. This can lead to extensive discovery that substantially increases litigation expense. Although the fee award in *Matloob* was approximately four times the damages sought, a substantially higher award can be appropriate when the litigation is actively defended.

If the *sponsor* prevails, may he recover attorney fees? In *Yaguil v. Lee*, brought in the Eastern District of California, the sponsor won dismissal on the grounds of res judicata.[49] The sponsor argued that under a California statute, the attorney fee provision in the Form I-864 and underlying statute should be construed as authorizing an award for the prevailing party, not just the beneficiary. The Court disagreed. It reasoned that the lawsuit was grounded in a federal cause of action authorized by the statute underlying the Form I-864. For that reason,

[48] No. WDQ-11-1943 (D. M.D. Oct. 1, 2014). *See also* Toure-Davis v. Davis, No. WGC-13-916 (D. Md. March 4, 2014) (memo. op.) (awarding $32, 854.30 in fees).

[49] No. 2:14-cv-00110 JAM-DAD (N.D. Cal. Aug. 12, 2014) (order denying defendant's motion for attorney fees).

federal rather than California law governed the claim, and the California fee statute simply did not apply. Next, the Court reasoned that the federal statute could not be construed to authorize a prevailing party fee award, as the plain language provides for an award to only the beneficiary, not the prevailing party.[50]

II. Procedural Issues

The lengthy timeline of litigation presents a vexing challenge for I-864 beneficiaries. Plaintiffs eligible to recover under the Affidavit will, by definition, be impoverished and without financial resources. How can the beneficiary meet her basic needs while litigation is pending? At least one I-864 plaintiff has succeeded in obtaining a preliminary injunction, enjoining the sponsor to comply with the support obligation *pendente lite*.[51] Financial loss by itself does not normally meet the irreparable harm standard required by most rules governing preliminary injunction. But a California trial court agreed with an I-864 plaintiff that a damages award, by itself, would not "adequately compensate" her, presumably due to the harm she would suffer while being left without means to meet her most basic needs.[52]

As mentioned, I-864 plaintiffs have few resources. For that reason, courts readily permit I-864 plaintiffs to proceed *in forma pauperis* (IFP).[53] Attorneys sometime mistakenly believe that a plaintiff may not proceed IFP if she is represented by counsel, but in most jurisdictions there is no such rule. Indeed, the author has successfully recovered attorney fees for submitting IFP petitions on behalf of I-864 plaintiffs.

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[50] *Id.* ("If Congress intended to allow defendants to recover attorney's fees pursuant to § 1183a(c), either under a dual standard or an evenhanded approach, this Court would have expected it to include a prevailing party provision").

[51] Gross v. Gross, E057575 (Cal. App., 4th Dist., 2nd Div. Dec. 4, 2014).

[52] *Id.*

[53] *See*, *e.g.*, Santana v. Hatch, 15-cv-089-wmc (W.D. Wis. Apr. 1, 2015) (opinion and order granting request to proceed *in forma pauperis*).

II.A. Federal Court

Under the bankruptcy code "domestic support obligations" (DSOs) are exempt from discharge.[54] As mentioned in prior articles, the only bankruptcy cases to consider the issue have held that support under the Form I-864 is a non-dischargeable DSO.[55] Another bankruptcy judge has reached the same conclusion, where a state family court support order was predicated at least partially on the Form I-864.[56]

Federal courts have continued to exercise caution when I-864 enforcement actions are pursued in parallel with state court dissolution proceedings.[57] In one case in the Southern District of New York, for example, a pro se I-864 beneficiary filed a district court action while her dissolution was still proceeding.[58] The Court stayed the federal action under the *Colorado River* abstention doctrine,[59] and refused to lift the stay where it appeared that the state court was "aware of the Form I-864 issue and was considering it in the divorce proceedings."

II.B State Court

[Reserved]

II.B.1 Maintenance ("Alimony") Orders

May a beneficiary use spousal maintenance as a vehicle to enforce the Affidavit of Support? The answer varies from state to state.[60] In *Matter of Khan*, this author represented a Washington respondent on

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[54] *See* 11 U.S.C. § 101(14A) (defining domestic support obligations).

[55] *Cf.* McLawsen (2014), *supra* note 1, at text accompanying note 37. *See* Matter of Ortiz, No. 6:11-bk-07092-KSJ, 2012 Bankr. LEXIS 5324 (Bankr. M.D. Fla. Oct. 31, 2012) (granting summary judgment to beneficiary); Hrachova v. Cook, 473 B.R. 468 (Bankr. M.D. Fla. 2012).

[56] In re Williams, 15-10056-BAH (BK D. N.H. Jan. 7, 2016).

[57] For an earlier discussion of the doctrines of *Younger* and *Colorado River* absention, see Pavlenco v. Pearsall, No. 13-CV-1953 (JS)(AKT), 2013 WL 6198299 (E.D.N.Y. Nov. 27, 2013) (memo. order).

[58] Levin v. Barone, No. 14-cv-00673 (AJN) (S.D. N.Y. Jan. 28, 2016) (order).

[59] *Cf.* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

[60] *Cf.* McLawsen (2012), *supra* note 1, § II.B.1.

appeal from a divorce trial.[61] The respondent argued that the trial court had abused its discretion by acknowledging the enforceability of the Affidavit of Support but ordering only short-term spousal maintenance. The Court of Appeals disagreed, holding that the Form I-864 obligation did not fall within any of the statutory bases for ordering spousal support.[62] Instead, the Court acknowledged that the Affidavit was enforceable and instructed that the beneficiary could maintain a "separate action" to enforce her rights.[63]

The approach taken by the *Khan* Court is frustrating because of the tremendous inefficiency it imposes on the parties and judicial system. In *Khan*, the trial court partially incorporated the I-864 obligation into a maintenance order, and the sponsor acknowledged to the Court of appeals that he was obligated under the Affidavit.[64] The divorce proceeding could have been used to define the obligation and send the parties on their way. Instead, the beneficiary was forced to bring a separate lawsuit, which resulted in a $104,000 judgment against the Sponsor. The Sponsor was ordered to pay approximately $60,000 in attorney fees to the beneficiary, and presumably paid his own counsel a substantial sum.

In a Kansas case, a sponsor argued that spousal maintenance should be capped at the level provided for in the Affidavit of Support. In *Matter of Dickson* the Court rejected that proposition, reasoning that the Affidavit of Support and maintenance statute serve different purposes:

> The obligation undertaken by signing an 1-864 affidavit is to ensure that the immigrant will not become a public charge. A Kansas court awards maintenance, on the other hand, to provide for the future support of the divorced spouse, and the amount of maintenance is based on the

[61] 332 P.3d 1016 (Wash. 2014).

[62] *Id.* at 1018.

[63] *Id.* at 1020.

[64] *Id.* at 1018 ("[The parties] both agree that [Sponsor] owes an ongoing support obligation under I-864").

> needs of one of the parties and the ability of the other party to pay.[65]

Indeed, this author is at a loss as as to what language in the Form I-864 or federal statute could be construed to imply a ceiling to spousal maintenance.

II.B.2 Issue Preclusion, Claim Preclusion

Procedural doctrines prohibit the litigation both of matters that have already been *actually* litigated and that *could* have been litigated. Courts have continued to allow beneficiaries to proceed with enforcement cases when the Affidavit of Support was raised – but claims not fully adjudicated – in a preceding divorce case. In *Du v. McCarthy*, a beneficiary attempted to raise the Form I-864 during a divorce trial, but was barred from offering testimony as the matter had not properly been brought before the court.[66] A magistrate judge for the Northern District of West Virginia held that because the matter had not been correctly raised in the divorce proceeding, there was no final judgment on the matter and the beneficiary was not barred from bringing her subsequent enforcement action.

By contrast, in *Yaguil v. Lee* a court for the Eastern District of California dismissed a complaint on res judicata grounds.[67] The beneficiary disputed only whether her federal complaint presented claims that were identical to those she previously raised in divorce proceedings. In the divorce case, the Beneficiary had presented the Form I-864 at a settlement conference, and asserted without evidence that the matter had later been "dropped." From the order in *Yaguil* it is fully unclear what came of the beneficiary's efforts to raise the Affidavit of Support in the divorce proceedings. Regardless, *Yaguil* imposes a harsh

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[65] 337 P.3d 72 (Kan.App. 2014) (internal citation and quotation omitted).

[66] No. 2:14-cv-100 (N.D. W. Vir. March 26, 2015) (report and recommendations). *See* Du v. McCarty, No. 2:14-CV-100 (N.D. W. Vir. Apr. 16, 2015) (order adopting report and recommendations).

[67] No. 2:14-cv-00110-JAM-DAD (E.D. Cal. Apr. 10, 2014) (order granting defendant's motion to dismiss).

result where a beneficiary may have raised the Affidavit in an ineffective manner in the preceding divorce case. It is unclear whether the beneficiary in *Yaguil* made a full-throated presentation of her rights before the family law court, or simply decided to enforce them in a different forum.

So should the beneficiary play it safe by simply not mentioning the Affidavit in divorce proceedings? Not so fast. The doctrine of claim preclusion can bar litigation of claims that could have been raised in an earlier proceeding. Courts remain split about the proper forum to enforce I-864 rights, some holding that they may be enforced via spousal maintenance.[68] If a beneficiary fails to raise the Affidavit in a divorce case, the sponsor could later argue that she should have resolved the matter there.

When counsel becomes involved in matters early enough, one option is to file the Form I-864 claim while the divorce case is still pending. If done this way, the Form I-864 case should be brought in state court, as a federal court would likely abstain from the matter while the divorce case is pending.[69] It would seem difficult for the sponsor to argue that the beneficiary should have used a divorce proceeding to enforce the Affidavit if she had already brought a separate contract action to do so.

III. Unresolved issues

III.A Prenuptial agreements

In *Erler v. Erler* – discussed above – the Ninth Circuit weighed in on whether a prenuptial agreement may waive support under the Form I-864.[70] The Ninth Circuit affirmed the trial court's view that "neither a divorce nor a premarital agreement may terminate an obligation of support."[71] This statement is important, since courts have disagreed about whether or not a sponsor and beneficiary can contractually agree

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[68] *Cf*. McLawsen (2012) *supra* note 1 at Section II.B.2.

[69] *Cf*. Pavlenco v. Pearsall, No. 13-CV-1953 (JS)(AKT), 2013 WL 6198299 (E.D.N.Y. Nov. 27, 2013) (memo. order) (discussing applications of *Younger* and *Colorado River* abstention).

[70] No. 14-15362 (9th Cir. June 8, 2016).

[71] *Erler*, No. 14-15362.

to waive enforcement of the Form I-864. The Ninth Circuit now joins a majority of courts in holding that a premarital agreement cannot waive a beneficiary's rights under the Form I-864.[72] The waiver issue received no analysis from the Ninth Circuit, and there would appear to be a question about whether the Court's statement is dicta. But in any event, *Erler* is another in a line of cases that at least strongly weigh in favor of the view that I-864 enforcement cannot be waived.

Taken at face value, *Erler* stands for an even more extreme proposition: no I-864 beneficiary could ever enter into an enforceable settlement agreement of her claims against a sponsor. The trial court in *Erler* rested its decision, in part, on the view that a beneficiary could not waive support rights, since the sponsor's contract is with the federal government, not the beneficiary.[73] In the experience of this author, many claims against I-864 sponsor are resolved either prior to filing a lawsuit, or at least in pre-trial stages of litigation. A typical move is for beneficiary is to release the sponsor from all future claims for support, either in exchange for a lump-sum payment or structured payments over a specified period of time. For such a settlement to function, the beneficiary must possess the legal authority to release the sponsor from support claims. In *Erler* the Ninth Circuit seems to say, "only five events can terminate the I-864 support duty, and premarital agreements are not one of them." Well, neither are settlement agreements. The Court, of course, was not presented with the enforceability of a litigation settlement agreement. Yet the decision leaves some added uncertainty on this issue.

In Maryland, a federal district court reached the same conclusion as in *Erler*, holding that I-864 support rights cannot be waived. In *Toure-Davis v. Davis*, the sponsor signed a nuptial waiver before signing the Affidavit of Support.[74] The Court held that by subsequently signing the Form I-864 the sponsor modified the nuptial contract. Moreover – as with

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[72] *Cf.* McLawsen (2014) *supra* note 1 at Section III.A.

[73] CV-12-02793-CRB, 2013 WL 6139721, at *2 (N.D. Cal. Nov. 21, 2013) (order denying plaintiff's motion for summary judgment and giving parties notice regarding possible summary judgment for defendant).

[74] No. WGC-13-916 (D. Md. March 28, 2014) (memo. op.).

Erler – Toure-Davis takes the view that I-864 rights are categorically non-waiveable:

> In consideration for allowing Defendant's immigrant wife to seek an adjustment of her status to a legal permanent resident, Defendant pledged to the U.S. Government, as the sponsor, that he will ensure his sponsored immigrant wife is provided for to maintain her income, at a minimum, of 125 percent of the Federal Poverty Guidelines. Defendant voluntarily, knowingly and willingly signed the Form I-864. *Defendant therefore cannot absolve himself of his contractual obligation with the U.S. Government by Plaintiff purportedly waiving any right to alimony or support via the ante-nuptial agreement*.[75]

As noted in a previous article, official commentary accompanying the Form I-864 regulations specifically stated that support obligations may be waived by a nuptial agreement.[76] The *Toure-Davis* Court pushed aside that commentary on the basis that it "does not constitute law."[77]

III.B Interpreting the I-864

Is a lawsuit to enforce the Form I-864 "just" a contact action, or does it also sound in federal law? This issue continues to be a source of confusion. In a federal enforcement case in the District of Minnesota, for example, a pro se plaintiff moved to strike the defendants' jury demand, arguing that the underlying federal statute does not create a right to trial by jury.[78] Rejecting that argument, the magistrate judge stated clearly that the causes of action were exclusively contractual in nature:

> The federal statute, 8 U.S.C. § 1183a, is not the basis for the cause of action, but expressly states that an affidavit must be executed by a sponsor and provides authorization

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[75] Emphasis added.

[76] McLawsen (2012) *supra* note 1, at text accompanying note 141 (citing Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732 (June 21, 2006)).

[77] *Toure-Davis*, end note 5.

[78] Dahhane v. Stanton, 15-1229 (MJD/JJK) (D. Minn. Aug. 4, 2015) (report and recommendation).

> for enforcement of a Form I-864 agreement as a contract. Breach of contract is a claim at law to which the Seventh Amendment right to a jury trial attaches.[79]

The court declined to rule on the motion to strike the jury demand, however, before seeing what claims and affirmative defenses survived discovery and summary judgment.

IV. Conclusion

Litigation continues to deliver consistent and positive results for I-864 beneficiaries. For immigrants who lack access to public benefits, and those with limited job qualifications, support under the I-864 can provide a crucial lifeline. No one gets rich from the Form I-864. But the support mandated by the contract can help an LPR survive while transitioning from poverty to self-sufficiency.

[79] *Id.*

Immigration Support Advocates

THE I-864 AFFIDAVIT OF SUPPORT

AN INTRO TO THE IMMIGRATION FORM YOU MUST LEARN TO LOVE/HATE

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A young woman, Saanvi, walks into your office. She is a PhD software engineer from India in the process of leaving her husband of four months, who helped her immigrate to the United States. Things simply haven't worked out. He earns substantially less than she did at the job she just left. She plans on looking for employment, but wants to know if she can get court-ordered support in the meanwhile, and also for down the road in case she is ever unemployed. How do you advise her?

By facilitating her immigration to the United States, Saanvi's husband entered into an enforceable contract to provide her with financial support. The level of support, while somewhat modest, must be provided for an indefinite period, potentially for the duration of Saanvi's life. She has the option of enforcing her right in state or federal court, and may get her attorney fees and costs for doing so. It is irrelevant that the marriage was short-lived, and that she has superior earning capacity. It may not even matter whether she could get another job if she chooses.

The immigration form underpinning this paradigm is the I-864, Affidavit of Support. Surprisingly, the form and its robust financial implications have received relatively scant attention within the domestic law bar.[1] An appreciation of the Affidavit of Support will motivate family law attorneys to diligently screen their clients for immigration scenarios. This article provides a brief introduction to the immigration law context wherein the form is used and describes the scope of the financial obligations it imposes (Section 1), then describes the legal tools available to a foreign national to enforce her rights (Section 2) and the legal defenses available to the U.S. sponsor (Section 3).[2]

I. Immigration law background

U.S. immigration law is a petition-based system. For someone wishing to move permanently to the country there is no general "line" to

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[1] *But see* Geoffrey A. Hoffman, *Immigration Form I-864 (Affidavit of Support) and Efforts to Collect Damages as Support Obligations Against Divorced Spouses — What Practitioners Need to Know*, 83 FLA. BAR. J. 9 (Oct. 2009) (articulately sounding the alarm bell).

[2] The issues discussed herein are expanded upon be a pair of articles by the author, which analyze all available U.S. case law concerning enforcement of the I-864, both available for download at http://tinyurl.com/cocz6qp. *Cf.* Greg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 BENDER'S IMMIGR. BULL. 1943 (Dec. 15, 2012) (hereinafter McLawsen, *Suing on the I-864*); Greg McLawsen, *Suing on the I-864 Affidavit of Support: March 2014 Update*, 19 BENDER'S IMMIG. BULL. 1943 343 (Apr. 1, 2014) (hereinafter McLawsen, *Suing on the I-864: March 2014 Update*).

get in. Nor is there such a thing as a garden-variety "work permit" for which to apply. Rather, the path to permanent residency generally begins with a U.S. business or individual petitioning for the foreign national[3] – think of this as a type of invitation from the U.S. entity or individual to the foreign national. The issues discussed in this paper arise in family-based petitions, where one relative – generally a spouse – petitions for a foreign national relative.

Any foreign national wishing to enter the U.S. is screen through a laundry list of statutory grounds of inadmissibility. These range from crime-related grounds to health-related grounds.[4] A long-standing ground of inadmissibility has barred an individual likely to become a "public charge."[5] This determination is made either by a consular officer at the time of a visa interview, or at the time the individual applies within the U.S. to become a permanent resident (i.e., receive a green card).[6] A variety of factors are considered in the public charge determination.[7] Since 1996, however, immigration petitioners have been required to promise financial support to certain classes of foreign nationals.[8] The tool by which this is accomplished is the subject of this article.

The I-864, Affidavit of Support[9] is an immigration form submitted by the U.S. immigration petitioner, guaranteeing to provide financial support to a foreign national beneficiary. The petitioner promises to maintain the intending immigrant at 125% of the Federal Poverty Guidelines ("Poverty Guidelines") and to reimburse government agencies

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[3] Since this is law of which we are speaking, exceptions naturally abound.

[4] *See* 8 U.S.C. § 1182.

[5] 8 U.S.C. § 1182(a)(4).

[6] *See id.* The determination is also made at the U.S. port of entry, though the public charge adjudication in family-based cases is chiefly done at the visa interview and residency application.

[7] 8 U.S.C. § 1182(a)(4)(B).

[8] Interim regulations for the I-864 were first published in 1997 and were finalized July 21, 2006. Affidavits of Support on Behalf of Immigrants, 62 Fed. Reg. 54346 (Oct. 20, 1997) (to be codified at 8 C.F.R. § 213.a1 *et seq*.) (hereinafter Preliminary Rules); Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732 (June 21, 2006) (same) (hereinafter Final Rules).

[9] *See* Form I-864, Affidavit of Support (rev'd Mar. 22, 2013), *available at* http://www.uscis.gov/files/form/i-864.pdf (last visited Jan. 8, 2015).

for any means-tested benefits paid to the noncitizen beneficiary.[10] The required support amounts to $14,588 annually ($1,216 per month) for a single-person household, plus $5,075 annually ($423 per month) for each additional household member.[11] The I-864 provides that the sponsor will be held personally liable if he fails to maintain support, and may be sued by either the beneficiary or by a government agency that provided means-tested public benefits.[12]

The I-864 is required in *all* cases where a U.S. citizen or permanent resident has filed an immigration petition for a foreign family member including for a spouse.[13] Any spousal petition adjudicated since 1996 will have required an I-864 prior to approval. The limited exceptions to this broad rule are beyond the scope of this article and are rare in application. Those applying for a fiancée visa are not required to produce a Form I-864 at the time they are processed by the consular post.[14] Once the foreign national fiancée enters the U.S., however, she must marry within 90 days and thereafter apply to "adjust status" to U.S. permanent resident. During this process she is then required to provide a Form I-864 from her sponsor.[15]

The Form I-864 is also required in a handful of employment-related contexts, wherein a U.S. employer has petitioned for the foreign national.[16] I-864 beneficiaries of employment-based petitions will not be readily identifiable by practitioners unfamiliar with immigration law. But the vast majority of I-864 scenarios arise in family-based petition processes. Any time an individual has achieved immigration status in the

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[10] Form I-864, *supra* note 9, at 6. *See also* 8 U.S.C. § 1183a(a)(1)(A) (same requirement by statute).

[11] *Annual Update of the HHS Poverty Guidelines*, 79 Fed. Reg. 3593, 3593 (Jan. 22, 2014).

[12] Form I-864, supra note 9, at 7. In lieu of tiptoeing around gendered pronouns, beneficiaries and sponsors will be assigned the feminine and masculine herein, respectively, as this represents the vast majority of cases discussed herein.

[13] 8 U.S.C. § 1182(a)(4)(C).

[14] Indeed, the consular post may not require the Form I-864 for a fiancée. 9 FAM § 40.41 Public Charge n.12.6.

[15] U.S. Dep't of State, Cable No. 98-State-112,510, *I-864 Affidavit of Support Update Number 16: Public Information Sheet* (no date provided).

[16] *Cf.* Charles Gordon et al., IMMIGRATION LAW AND PROCEDURE § 63.05 [5][b].

U.S. based on a family relationship a practitioner should presume the immigrant is the beneficiary of a Form I-864.

Practitioners should carefully distinguish between the Form I-864 and the Form I-134 Affidavit of Support.[17] The Form I-134 pre-dates the Form I-864 and was used in family-based cases prior to 1996; it is still used in fiancée visa cases. Unlike the Form I-864, courts have determined that the Form I-134 is *not* enforceable against an immigration sponsor.[18]

The sponsor's support duty is of indefinite duration. The responsibility lasts until the first occurrence of one of these five events: the beneficiary (1) becomes a U.S. citizen; (2) can be credited with 40 quarters of work; (3) is no longer a permanent resident *and* has departed the U.S.; (4) after being ordered removed seeks permanent residency based on a different I-864; or (5) dies.[19] It is settled that a couple's separation or divorce does not terminate the sponsor's duty.[20] Under U.S. immigration law a foreign national is under no obligation to become a citizen – a process called naturalization. Hence, the I-864 beneficiary could remain in the U.S. as a permanent resident for the duration of her life. At least one court has examined the accrual of work quarters for purposes of ending I-864 obligations, and concluded that quarters may be 'double stacked,' so as to credit the beneficiary with her own work

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[17] The Form I-134 *Affidavit of Support* was used prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009. *Cf.* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741 (1998) (discussing changes to the Affidavit of Support). The Form I-134 may still be used to overcome public charge inadmissibility for intending immigrants not required to file the I-864. *See* Instructions for Form I-134, Affidavit of Support (rev'd Feb. 19, 2014), *available at* http://www.uscis.gov/files/form/i-134instr.pdf (last visited Jan. 8, 2015).

[18] *See* Rojas-Martinez v. Acevedo-Rivera, 2010 U.S. Dist. LEXIS 56187 (D. P.R. June 8, 2010) (granting defendant's motion to dismiss; holding that I-134 was not an enforceable contract).

[19] Form I-864, *supra* note 9, p. 7. *See also* 8 U.S.C. § 1183a(a)(2), (3) (describing period of enforceability).

[20] Hrachova v. Cook, No. 5:09-cv-95-Oc-GRJ, 2009 U.S. Dist. LEXIS 102067, at *3 (M.D. Fla. Nov. 3, 2009) ("[t]he view that divorce does not terminate the obligation of a sponsor has been recognized by every federal court that has addressed the issue").

quarters as well as those of her sponsor husband.[21] On this approach support duties could terminate in five rather than ten years if both members of a couple are working.

In addition to the primary sponsor (i.e., the immigration petitioner) one or more additional individuals may have joint and several liability as to the I-864 support obligation. First, where the sponsor is unable to demonstrate adequate financial wherewithal, one or more additional "joint-sponsors" may be used to meet the required level.[22] Such joint sponsors may be any adult U.S. citizen or lawful permanent resident currently residing in the United States.[23] Joint sponsors typically are – but are not required to be – family or close friends of the primary sponsor. A joint sponsor executes a separate Form I-864, indicating herself as a joint rather than primary sponsor. Once submitted, the joint sponsor's liability is joint and several with the primary sponsor.[24]

Second, the primary sponsor may use income of qualifying household members to meet the requisite support level. In order to use such income the household member must execute a Form I-864A.[25] The household member becomes jointly and severally liable – and this paradigm has been found enforceable.[26]

Finally, it should be noted that in some scenarios it may be no small matter for counsel to lay hands on the I-864 executed by a would-be

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[21] Davis v. Davis, No. WD-11-006 (Ohio Ct. App. May 11, 2012), *available at* http://tinyurl.com/olyvac3 (last visited Jan. 9, 2015).

[22] 8 C.F.R. § 213a.2(c)(2)(iii)(C).

[23] 8 U.S.C. § 1183a(f)(1).

[24] *See*, *e.g.*, Matlob v. Farhan, Civil No. WDQ-11-1943, 2014 WL 1401924 (D.Md. May 2, 2014) (Memo. Op.) (following bench trial, holding joint sponsor jointly and severally liable for $10,908 in damages).

[25] *See* Form I-864A, Contract Between Sponsor and Household Member (rev'd Mar. 22, 2013), *available at* http://www.uscis.gov/sites/default/files/files/form/i-864a.pdf (last visited Jan. 8, 2015). Note that unlike the I-864, the I-864A does not set forth a complete recitation of the immigrant-beneficiary's enforcement rights under the I-864, such as the right to attorney fees. *Id.*, Page 3.

[26] Panchal v. Panchal, 2013 IL App (4th) 120532-U, No. 4-12-0532, 2013 Ill. App. LEXIS 1864, at *11 (Ill. App. Ct. 4th Dist. 2013). *See also* Liepe v. Liepe, Civil No. 12–00040 (RBK/JS), 2012 U.S. Dist. LEXIS 174246 (D.N.J. Dec. 10, 2012) (denying plaintiffs' summary judgment motion against household member where plaintiffs failed to establish that the defendant executed an I-864A.

defendant. Depending on the procedural posture of the immigration case, the signed I-864 will have been filed with U.S. Citizenship and Immigration Services or the Department of State. The beneficiary may request a copy of the executed form her immigration via a Freedom of Information Act (FOIA) request.[27] Yet because certain immigration records are protected by the Federal Privacy Act, portions of the I-864 – such as the sponsor's name and signature – may be redacted. At least one colleague reports having had had his request completely denied outright.[28] An alternative method of establishing the requisite factual record could be to call an immigration attorney as an expert at trial. The attorney could be qualified to testify to the proposition that the immigrant visa or permanent residency card could not have been issued unless the sponsor had executed an I-864.

If the sponsor and beneficiary were represented by an attorney in the immigration petition, it may be possible for the beneficiary to request a copy of the signed I-864 from that attorney. Considerable attention has been given within the immigration lawyer community to the conflicts of interest that may arise when an attorney represents both a sponsor and beneficiary.[29] It has long been common practice for a single attorney to represent the sponsor, drafting the I-864 for his signature, as well as the beneficiary. Some immigration attorneys take the conservative approach of asking the sponsor to either draft the I-864 form himself or else retain separate counsel, but the prevailing approach appears to be for the principal attorney to draft the form. In this event the I-864 is properly viewed as part of the beneficiary's client file, and in most jurisdictions

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[27] *Cf.* USCIS Freedom of Information Act and Privacy Act, http://tinyurl.com/mulssd6 (last visited Jan. 8, 2015).

[28] Email from Robert Gibbs, Founding Partner, Gibbs Houston Pauw, to the author (Aug., 6, 2013, 15:18 PST) (on file with author but containing confidential client information).

[29] *See*, *e.g.*,. Counterpoint: Cyrus Mehta, *Counterpoint: Ethically Handling Conflicts Between Two Clients Through the "Golden Mean"*, 12-16 BENDER'S IMMIGR. BULL. 5 (2007); Austin T. Fragomen and Nadia H. Yakoob, *No Easy Way Out: The Ethical Dilemmas of Dual Representation*, 21 GEO. IMMIGR. L.J. 521 (Summer 2007); Bruce A. Hake, *Dual Representation in Immigration Practice: The Simple Solution Is the Wrong Solution,* 5 GEO. IMMIGR. L.J. 581 (Fall 1991). *See also*, Doug Penn & Lisa York, *How to Ethically Handle an I-864 Joint Sponsor*, http://tinyurl.com/pp2h37t (AILA InfoNet Doc. No. 12080162) (posted No. 7, 2012).

the beneficiary client will have a proprietary right to obtain a copy of the form.

II. The mighty I-864 sword

Upon learning of the I-864, family law practitioners often respond with something akin to the five stages of grief and loss. First, practitioners respond with denial, refusing to believe our government would impose such a far-reaching support obligation on a U.S. citizen sponsor. Anger and indignation are then directed at the lawmakers who would impose such rules. Next comes a round of bargaining, where the lawyer looks for the escape valves that *must* exist somewhere. Since – as described below with respect to contract defenses – such escapes valves are few and far between, the reality of the legal landscape then sets in and settlement is discussed in earnest. This section describes the contours of the I-864 sword.

An example will help underscore that we are talking about a different sort of legal creature: the I-864 beneficiary has no duty to mitigate damages by seeking employment. The leading opinion on this proposition was handed down by Judge Richard Posner in the Seventh Circuit.[30] The court found that the Form I-864 itself, as well as the federal statute and regulations, were silent as to whether the beneficiary has a duty to seek employment.[31] Instead, the decisive factor was the clear statutory purpose behind the I-864: to prevent the noncitizen from becoming a public charge.[32] While the court's holding relied in part on federal common law,[33] state courts have likewise held that the I-864 beneficiary has no duty to mitigate damages by seeking employment.[34]

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[30] Liu v. Mund, 686 F.3d 418 (7th Cir. 2012).

[31] *Liu*, 686 F.3d 418.

[32] *Id.*, at 422. *But see* Ainsworth v. Ainsworth, No. 02-1137-A, 2004 U.S. Dist. LEXIS 28962, at *4 (M.D. La. Apr. 29, 2004) ("the entire purpose of the affidavit is to ensure that immigrants do not become a 'public charge'"), *recommendation rejected*, 2004 U.S. Dist. LEXIS 28961 (May 27, 2004).

[33] *Id.*, at 423, 421.

[34] *See*, *e.g.*, Love v. Love, 33 A.3d 1268 (Pa. Super. Ct. 2011). *But see* Mathieson v. Mathieson, No. 10–1158, 2011 U.S. Dist. LEXIS 44054, at *10, n. 3 (W.D. Penn., Apr. 25, 2011) (noting in dicta that the court would have held that income could be imputed to the beneficiary based on earning capacity); Barnett v. Barnett, 238 P.3d 594, 598

Let's explore what enforcement looks like at the ground level. There is no longer any question that I-864 beneficiaries have the legal ability to enforce their rights to support under the I-864 – they can and they do.[35] They have standing to do so as third party beneficiaries to the I-864 contract.[36] The only remaining quibbles are over the appropriate vehicles and forums to enforce those rights. It is most certainly false to shrug off the I-864 as a 'federal law issue' since enforcement may be had in "*any* appropriate court."[37] To summarize the options available: (1) the I-864 support obligations generally will *not* be enforced via a spousal maintenance order; (2) without known exception I-864 rights *may* be enforced via a contract claim in state courts; and (3) I-864 rights *generally may* be enforced in federal court, even absent diversity of parties (except in the Middle District of Florida).

The sponsor's support obligation commences at the moment the beneficiary becomes a permanent resident.[38] For a couple who has gone through the visa process at a U.S. consulate aboard, residency status commences when the foreign national enters the U.S. If the foreign national spouse was already present in the U.S. when they began the marriage-based immigration process, residency will commence after the couple completes the 'adjustment of status' process. In either event the residency period can be assessed by examining the beneficiary's I-551

(Alaska 2010) (holding that "[e]xisting case law" supported the conclusion that earning capacity should be imputed to an I-864 beneficiary).

[35] *See*, *e.g.*, Moody v. Sorokina, 40 A.D.2d 14, 19 (N.Y.S. 2007) (holding that trial court erred in determining I-864 created no private cause of action).

[36] *See*, *e.g.*, Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 45729, at *19 (D. Ind. May 27, 2005) (memo op.) (granting in part plaintiff's motion for summary judgment; rejecting argument that noncitizen could have failed to perform duties under the I-864, as there was no support for proposition that third-party beneficiary could breach a contract).

[37] 8 U.S.C. § 1183a(e) (emphasis added). *See also* 8 U.S.C. § 1183a(a)(1)(C) (the sponsor "agrees to submit to the jurisdiction of any federal or state court for the purpose of actions brought").

[38] *See* 8 C.F.R. § 213a.2(e) (support obligations commence when intending immigrant is granted admission as immigrant or adjustment of status); Chavez v. Chavez, Civil No. CL10-6528, 2010 Va. Cir. LEXIS 319 (Va. Cir. Crt. Dec. 1, 2010) (finding that "becoming a permanent resident" is the condition precedent).

residency card (i.e., "green card"), which serves as documentary evidence of the individual's residency status.[39]

The fact that the beneficiary has achieved residency status is the sole event required to trigger the I-864 support duty. It is not required, for example, that the beneficiary first receive means-tested public benefits.[40] The sponsor's obligation to repay public benefits is wholly separate from his income support responsibility.

Before recovery is possible, the beneficiary's household income must fall beneath 125% of the Poverty Guidelines, without which event there is no breach on the part of the sponsor.[41] If a beneficiary has an independent source of "income," the sponsor need pay only the difference required to bring the beneficiary to 125% of the Poverty Guidelines.[42] But what counts as income for this purpose? Courts have generally ignored (or overlooked?) the fact that the I-864 regulations define income by reference to federal income tax guidelines.[43]

Recall that the level of required support is tied to household size. The I-864 regulations expressly describe the individuals included in calculating household size, which includes the sponsor himself.[44] Does this mean the sponsor must pay the beneficiary support for a household of two, even if the beneficiary is living alone? The only court to carefully consider the issue has recognized that it must, "strike a balance between ensuring that the immigrant's income is sufficient to prevent her from

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[39] Possession of a facially valid residency card does not connote, per se, status as a permanent resident.

[40] Baines v. Baines, No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761 (Tenn. Ct. App. Nov. 13, 2009) (holding that such an argument was inconsistent with the "clear language" of the statute).

[41] *See*, *e.g.*, In re Marriage of Sandhu, 207 P.3d 1067 (Kan. Ct. App. 2009) (holding that beneficiary had no cause of action due to earnings over 125% of the Poverty Guidelines). *See also* Iannuzzelli v. Lovett, 981 So.2d 557 (Fla. Dist. Ct. App. 2008) (noting that beneficiary-plaintiff was awarded no damages at trial because she had failed to demonstrate "that she ha[d] been unable to sustain herself at 125% of the poverty level since her separation from the marriage").

[42] *Cheshire*, 2006 U.S. Dist. LEXIS 26602, at *17.

[43] 8 C.F.R. § 213a.1. *See also* Love v. Love, 33 A. 3d 1268, 1277 (Pa. Super. Ct. 2011) (noting the "narrow" definition of income under state domestic code). *Cf.* McLawsen, *Suing on the I-864*, *supra* note 2, § I.C.

[44] 8 C.F.R. § 213a.1.

becoming a public charge while preventing unjust enrichment to the immigrant."[45] Where the beneficiary is living with a third party, such as another family members, courts properly make a fact-based determination of the support (if any) being received by the beneficiary, rather than automatically imputing income.[46]

Every known case in which an I-864 beneficiary has recovered from a sponsor in state court has arisen in family law proceedings. Yet confusion has persisted over *how* the I-864 comes into play. Beneficiaries have pursued support both as a standalone contract cause of action, joined to a dissolution proceeding, and also as a basis for awarding spousal maintenance. As family law practitioners are well aware, when it comes to enforcement this is a distinction with a difference for the beneficiary.[47] While some courts have allowed I-864 obligations to be bootstrapped into spousal maintenance this appears to be the minority approach.

In *Love v. Love* a Pennsylvania trial court was reversed for refusing to "apply" the I-864 when setting a spousal support obligation.[48] The appeals court held that the I-864 merited deviation from the standard support schedule, though it did not specify which statutory factor merited the deviation.[49] An energetic dissent in *Love* argued that incorporating a contractual agreement into a support order violates constitutional prohibitions on imprisonment for debts, since jail is an enforcement mechanism available for support orders.[50] By contrast, in *Matter of Khan* an intermediate Washington State appeals court held that a trial court

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[45] Erler v. Erler, No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *21 (N.D. Cal. Nov. 21, 2013).

[46] *See*, *e.g.*, Villars v. Villars, 305 P.3d 321 (Alaska 2013) (rejecting trial court's finding that the beneficiary had received as "income" the entire earnings of another man with whom she had resided for part of the time period in question).

[47] Unlike contract judgments, spousal maintenance orders have special enforcement mechanisms in many states, making enforcement cheaper and easier. Furthermore, spousal maintenance – unlike payment on a contract judgment – is counted as income to the recipient for purposes of federal income tax, and is deductible for the payer.

[48] 33 A. 3d 1268 (Pa. Super. Ct. 2011). *See also* In re Marriage of Kamali, 356 S.W.3d 544, 547 (Tex. App. Nov. 16 2011) (holding that trial court erred in limiting support payments to an "arbitrary" 36-month period).

[49] *Id.*, at 1273. *See* Pa. R. C. P. 1910.16-5 (grounds for deviating from support guidelines), *available at* http://tinyurl.com/lf4qhh2 (last visited Jan. 8, 2015).

[50] *Id.*, at 1281 (Freedberg, J., dissenting).

did not abuse its discretion by limiting the duration of maintenance based on the I-864.[51] Among other rationales for its holding, the *Khan* Court was unable to locate a statutory hook that made I-864 obligations relevant to a spousal maintenance determination (which in Washington is governed by statute).[52] It may be largely a matter of a jurisdiction's spousal maintenance statute and case law as to whether the I-864 will serve as a basis for ordering maintenance.

When I-864 beneficiaries pursue support outside the context of dissolution proceedings it is typically via a federal district court action. While a family law practitioner may never have direct involvement in such a case, some background is important, as dissolution proceedings may substantially impact a client's financial rights in a federal action.

The vast majority of federal courts have easily concluded they possess federal question subject matter jurisdiction over a suit by an I-864 beneficiary against a sponsor.[53] The only current exception appears to be the Middle District of Florida.[54] Likewise, federal courts typically

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[51] 332 P.3d 1016 (Wash. App. Div. II 2014). *See also* Greenleaf v. Greenleaf, No. 299131, 2011 WL 4503303 (Mich. Ct. App., Sep. 29, 2011) (last visited Oct. 18, 2012) (holding that a lower court erred by incorporating the I-864 into a support order). *See also* Varnes v. Varnes, No. 13-08-00448-CV, 2009 WL 1089471 (Tex. App., Apr. 23, 2009) (noting it was undisputed that beneficiary was not entitled to spousal support based on I-864 under either of the two statutory grounds allowed by Texas law).

[52] *Id.* (stating the issue narrowly, that none of the factors concerned "one spouse's contractual obligation under federal immigration law").

[53] *See*, e.g., Pavlenco v. Pearsall, No. 13-CV-1953 (JS)(AKT), 2013 U.S. Dist. LEXIS 169092 (E.D.N.Y. Nov. 27, 2013) (memo. order); Liu v. Mund, 686 F.3d 418 (7th Cir. 2012); Montgomery v. Montgomery, 764 F. Supp. 2d 328, 330 (D. N.H. Feb. 9, 2011); Skorychenko v. Tompkins, 08-cv-626-slc, 2009 U.S. Dist. LEXIS 4328 (W.D. Wis. Jan. 20, 2009); Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, *1 (N.D. Ind. Oct. 25, 2005); Ainsworth v. Ainsworth, No. 02-1137-A, 2004 U.S. Dist. LEXIS 28961, at *4 (M.D. La., May 27 2004); Tornheim v. Kohn, No. No. 00-CV-5084 (SJ), 2002 U.S. Dist. LEXIS 27914, (E.D. N.Y. Mar. 26, 2002) ("Plaintiff's suit arises under the laws of the United States . . .").

[54] Vavilova v. Rimoczi, 6:12-cv-1471-Orl-28GJK, 2012 U.S. Dist. LEXIS 183714, at *9 (M.D. Fla. Dec. 10, 2012) (finding that Congress has not expressly exercised the Supremacy Clause to divest state courts of concurrent jurisdiction); Winters v. Winters, No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069, at *5 (M.D. Fla. Apr. 25, 2012) ("while the federal statute requires execution of the affidavit, it is the affidavit and not the statute that creates the support obligation"). *But see* Cheshire v.

conclude that I-864 sponsor-defendants have submitted to personal jurisdiction.[55] The Federal District Court for Utah departed from this view, however, holding that it lacked personal jurisdiction over a sponsor-defendant where the sponsor lacked minimum contacts with the forum state.[56] This holding is baffling, since in the I-864 contract itself the sponsor expressly submits to personal jurisdiction in any state or federal court.[57]

If I-864 claims are litigated mostly in federal court,[58] why should this be of concern to family law practitioners? Because failure to assert an I-864 claim in a dissolution could preclude a subsequent claim in federal court. Certainly there is a strong argument that issue preclusion will bar a subsequent claim where the I-864 *was in fact* adjudicated in a dissolution action. [59] In *Nguyen v. Dean*, a federal court dismissed a case on summary judgment where the plaintiff-beneficiary had previously argued to the family law court that spousal support should be ordered based on the Affidavit of Support obligation.[60]

Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602, at *1 (M.D. Fla. May 4, 2006) (stating that the court has jurisdiction pursuant to the I-864 statute).

[55] *See, e.g.,* Younis v. Rarooqi, 597 F. Supp. 2d 552, 554 (D. Md. Feb. 10, 2009) ("[t]he signing sponsor submits himself to the personal jurisdiction of any federal or state court in which a civil lawsuit to enforce the affidavit has been brought") (citing 8 U.S.C. § 1183a(a)(1)(C)).

[56] Delima v. Burres, No. 2:12–cv–00469–DBP, 2013 U.S. Dist. LEXIS 26995, at *12 (D. Utah Feb. 26, 2013). It appears the parties hired a Utah law firm to prepare immigration filings, including the I-864, but executed the Form in Montana.

[57] By signing the Form I-864, the sponsor also agrees to "submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against [the sponsor] to enforce [his/her] obligations under this Form I-864." Form I-864, at 7

[58] The choice of many beneficiaries to enforce the I-864 in federal rather than state court is somewhat puzzling. Practitioners may be inclined toward federal court on the partially-mistaken view that I-864 enforcement involves "federal law." The better understanding is that enforcement is a suit on a contract, precisely the type of dispute that a state court of general jurisdiction is competent to adjudicate.

[59] Procedural doctrines prohibit the litigation both of matters that have already been actually litigated and that could have been litigated. The former is referred to as issue preclusion, the latter as claim preclusion. *Cf.* 18 WRIGHT § 4406.

[60] No. 10–6138–AA, 2011 U.S. Dist. LEXIS 3803 (D. Or. Jan. 14, 2011) (granting defendant's motion for summary judgment). By contrast, issue preclusion did not

The more serious concern for family law practitioners is whether claim preclusion would bar a subsequent lawsuit where the beneficiary *should have* raised I-864 enforcement in the family law court. At least one court has suggested that a subsequent I-864 claim would be barred when the beneficiary should have discovered the claim at the time of a dissolution action.[61] Another has found that a subsequent claim was barred where the beneficiary presented argument concerning the I-864 in a dissolution action, but the issue was later dropped.[62] Other courts have been fairly liberal in allowing I-864 plaintiffs to avoid claim preclusion in subsequent actions.[63]

Without attempting to resolve the claim preclusion issue, may it suffice to say that family law practitioners should be vigilant to screen for clients who may be I-864 beneficiaries. Failing to spot that issue could have seriously detrimental effect on the client's financial rights.

Abstention doctrines may also bar federal litigation of I-864 claims when there is related state court activity, but such matters are beyond the scope of this article.[64]

The I-864 warns the sponsor: "If you are sued, and the court enters a judgment against you… [y]ou may also be required to pay the costs of

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prevent the plaintiff-beneficiary's federal court action in *Chang v. Crabill*, where the family law court stated that "[n]o request was made by the respondent for spousal maintenance of any kind." No. 1:10 CV 78, 2011 U.S. Dist. LEXIS 67501 (N.D. Ind. June 21, 2011).

[61] *Chang*, 2011 U.S. Dist. LEXIS 67501.

[62] Yaguil v. Lee, 2:14-cv-00110-JAM-DAD, 2014 WL 1400959 (E.D.Cal.,2014) (Order Granting Defendant's Motion to Dismiss).

[63] *See*, *e.g.*, Matter of Khan, 332 P.3d 1016 (Wash. App. Div. II 2014) (stating in dicta that the beneficiary would not be prevent from maintaining a subsequent suit, as "the trial court did not adjudicate an action for beach of the sponsor's I-864 obligation"); Yuryeva v. McManus, No. 01-12-00988-CV, 2013 Tex. App. LEXIS 14419, at *19 (Tex. App. Houston 1st Dist. Nov. 26, 2013) (memo. op.) (stating in dicta that an immigrant-beneficiary could bring a subsequent contract action on the I-864, despite failing to raise enforcement in the context of her divorce proceeding); Nasir v. Shah, No. 01-12-00988-CV, 2013 Tex. App. LEXIS 14419, at *19 (Tex. App. Houston 1st Dist. Nov. 26, 2013) (memo. op.) ("[w]hether or not plaintiff sought or was entitled to spousal support is irrelevant to defendants' [sic.] obligation to maintain plaintiff at 125% [Poverty Guidelines]").

[64] *Cf.* McLawsen, *Suing on the I-864: March 2014 Update*, *supra* note 2, § II.A.

collection, including attorney fees."[65] Indeed, courts have proved willing to award fees, subject to typical limitations of reasonableness.[66] Following the language of the I-864, the plaintiff-beneficiary is entitled to fees only if she prevails and a judgment is entered.[67] The beneficiary's attorney must be vigilant to segment fees in such a way it is clear which efforts went towards I-864 enforcement rather than collateral claims.[68] Especially where an I-864 issue arises in a divorce proceeding, practitioners are well-advised to carefully document fees specifically related to I-864 enforcement.

As a final kicker: both courts to consider the matter have held that I-864 obligations are non-dischargeable in bankruptcy, on the view they are tantamount to domestic support obligations.[69] Hence a judgment on an I-864 matter may follow the sponsor-defendant to the grave.

III. Defenses

Whether raised as an argument for spousal maintenance, or cause of action in its own right, the I-864 sponsor's obligation is fundamentally contractual in nature. Defendants have tested a wide array of traditional contract law defenses. In short, categorical defenses – directly challenging the I-864 as unenforceable – have been roundly rejected. Fact-specific defenses, chiefly fraud in the inducement, may be tenable, but require rigorous proof and have typically failed.

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[65] Form I-864, *supra* note 9, p. 7. *See also* 8 U.S.C. § 1183a(c) (remedies available to enforce the Affidavit of Support include "payment of legal fees and other costs of collection").

[66] *See*, *e.g.*, Sloan v. Uwimana, No. 1:11-cv-502 (GBL/IDD), 2012 U.S. Dist. LEXIS 48723 (E.D. Va. Apr. 4, 2012) (awarding fees in reliance on 8 U.S.C. § 1183a(c), subject to scrutiny for reasonableness pursuant to the Lodestar method).

[67] *See*, *e.g.*, Barnett v. Barnett, 238 P.3d 594, 603 (Alaska 2010) (holding that fees were appropriately denied in absence of judgment to enforce I-864); Iannuzzelli v. Lovett, 981 So.2d 557 (Fla. Dist. Ct. App. 2008) (holding that the fees were appropriately denied in absence of damages; note that action was based on a prior iteration of Form I-864).

[68] Panchal v. Panchal, No. 4-12-0532, 2013 Ill. App. LEXIS 1864 (Ill. App. Ct. 4th Dist. 2013) (holding that the plaintiff-beneficiary could recover fees for prosecuting a contract claim on the I-864, but not for a concurrently pending dissolution action).

[69] Matter of Ortiz, No. 6:11-bk-07092-KSJ, 2012 Bankr. LEXIS 5324 (Bankr. M.D. Fla. Oct. 31, 2012) (granting summary judgment to beneficiary); Hrachova v. Cook, 473 B.R. 468 (Bankr. M.D. Fla. 2012).

The government gets a boatload of value from the I-864 contract: the sponsor's promise to financially safeguard an immigrant and indemnify the government for the cost of public benefits. And in return the I-864 sponsor gets… what exactly? More than one sponsor has argued that the answer is "nothing," and that the agreement is void for lack of consideration.

While not a throw-away argument, it has not been a winner to date.[70] In short the 'return value' for the sponsor's promise is the government's agreement to allow the beneficiary to avoid categorical public charge inadmissibility. Recall that but-for the duly executed I-864 the beneficiary would be per se inadmissible to the U.S. The Form I-864 recites that, "The intending immigrant's *becoming a permanent resident* is the 'consideration' for the contract."[71] In other words, "your beneficiary isn't going to become a permanent resident unless you sign this agreement."

Sponsors have attempted to avoid I-864 liability by arguing they were fraudulently induced to sign Affidavits of Support. To date, all such known defenses have died at summary judgment. No known sponsor has yet succeeded on a fraud defense, either in motion practice or at trial. But it is clear that – on the right set of facts – a Sponsor could theoretically avoid liability by meeting the steep burden of proving up a fraud defense.

Anyone familiar with Sandra Bullock's *oeuvre* will be familiar with the scrutiny that faces couples going through the immigration process.[72] A sponsor can argue that he got duped into marrying the beneficiary, but that will be terribly hard to prove on summary judgment.[73] In

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[70] Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, at *6-7 (N.D. Ind. Oct. 25, 2005) ("The [sponsor] made this promise as consideration for the [beneficiary's] application not being denied on the grounds that she was an immigrant likely to become a public charge"); Baines v. Baines, No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761, at *13-14 (Tenn. Ct. App. Nov. 13, 2009); Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602, at *11-12 (M.D. Fla. May 4, 2006).

[71] Form I-864, *supra* note 9.

[72] *Cf. The Proposal* (Walt Disney Studios 2009). The pertinent reference can be located at http://tinyurl.com/pmuxuyq (last visited Jan. 8, 2014).

[73] *See, e.g.,* Farhan v. Farhan, Civil No. WDQ-11-1943, 2013 U.S. Dist. LEXIS 21702, at *3 (D. Md. Feb. 5, 2013) (conflicting evidence about subjective intent behind

rather far-fetched dicta, one federal court has suggested that a sponsor waives the contact defense of fraud if he fails to argue "allegations of fraud" in the prior dissolution action.[74]

An I-864 sponsor's financial obligations are substantial and last indefinitely, even where the relationship underlying the obligation was short-lived. In such circumstances, financial support duties under the I-864 may far outstrip the amount of alimony to which the immigrant-beneficiary would be entitled. Moreover, I-864 sponsors may lack full appreciation for the solemnity of their obligations at the time they execute a stack of immigration forms for their beneficiary family member. Accordingly, sponsors have argued to courts that the obligations imposed by the I-864 are so harsh as to render the agreement unconscionable.[75] To date, these arguments have failed.[76] One court opined that it was reasonable that the sponsor would want to support his wife in the immigration process, as well as financially (he

marriage, aside from the fact they had spent minimal time together and that the marriage had never been consummated, prevented summary judgment to I-864 defendant on defense of fraud). In *Carlbog v. Tompkins* the Sponsor alleged produced inadmissible translations of emails purporting to show that the I-864 beneficiary had designed a scam marriage. 10-cv-187-bbc, 2010 U.S. Dist. LEXIS 117252, at *8 (W.D. Wi., Nov. 3, 2010). But even if they had been admitted, the court held, the emails lacked sufficient particularity to pass summary judgment on the question of fraud. *See also* Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fl., May 4, 2006) (following trial, finding no evidence adequate to prove plaintiff-beneficiary had defrauded defendant-sponsor into signing Form I-864 with a false promise of marriage, despite early marital problems).

[74] Erler v. Erler, No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *11 (N.D. Cal. Nov. 21, 2013) (order denying plaintiff's motion for summary judgment and giving parties notice regarding possible summary judgment for defendant).

[75] A contract is rendered unenforceable if it was unconscionable at the time the agreement was entered into. *See* RESTATEMENT (2nd) § 208.

[76] Baines v. Baines, No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761 (Tenn. Ct. App. Nov. 13, 2009). *Cf.* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 12-20 BENDERS IMMIGR. BULL. 1 (2007), text accompanying notes 376-80 (arguing that sponsor may not understand responsibilities under Affidavit).

was doing so already).[77] Another noted the cautionary recitals in the I-864 form.[78]

A major unresolved issue is whether a noncitizen-beneficiary and sponsor may enter into a nuptial agreement that limits or eliminates the sponsor's duties to the noncitizen-beneficiary under the I-864.[79] The majority of courts to consider waivers of I-864 rights have found such agreements to be unenforceable, though the reasons for this holding are misguided.

To the extent straw-counting qualifies as legal analysis, the court count is three to one in favor of the proposition that I-864 obligations cannot be waived.[80] The rationale supporting this view includes: that I-864 rights are "imposed by federal law" an inherently non-waiveable;[81] that a prenuptial agreement is modified by subsequent execution of an I-864;[82] and that "a prenuptial agreement or other waiver by the sponsored immigrant" is not one of the five events that end I-864 obligations under federal regulations.[83] One court deployed the following syllogism: under federal law the government may accept only

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[77] *Id.*, at *16.

[78] Al-Mansour v Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864 (D. Md., Feb. 2, 2011) (rejecting argument that the I-864 was an unconscionable contract of adhesion).

[79] *Cf.* Shereen C. Chen, *The Affidavit of Support and its Impact on Nuptial Agreements*, 227 N.J. LAW. 35 (April 2004) (discussing I-864 in relation to Uniform Premarital Agreement Act).

[80] *Compare* Toure-Davis v. Davis, No. WGC-13-916, 2014 U.S. Dist. LEXIS 42522 (Dist. M.D. Mar. 28, 2014) *and* Erler v. Erler No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *1 (N.D. Cal. Nov. 21, 2013) *and* Shah v. Shah, Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596 (D.N.J. Jan. 14, 2014) (all holding that nuptial agreements failed to waive I-864 enforcement); *with* Blain v. Herrell, No. 10-00072 ACK-KSC, 2010 U.S. Dist. LEXIS 76257 (D. Haw. July 21, 2010) (stating in dicta that nuptial agreements may waive I-864 support).

[81] *Toure-Davis*, 2014 U.S. Dist. LEXIS 42522, at *23. *See also Erler*, 2013 U.S. Dist. LEXIS 165814, at *7(reasoning that the defendant-sponsor could not "unilaterally absolve himself of his contractual obligation with the government by contracting with a third party").

[82] *Toure-Davis*, 2014 U.S. Dist. LEXIS 42522, at *15; *Erler*, 2013 U.S. Dist. LEXIS 165814, at *7, n.1.

[83] *Shah*, 2014 U.S. Dist. LEXIS 4596, at *9.

an *enforceable* I-864 when the beneficiary immigrates; the government did accept *this* I-864; therefore regardless of the nuptial agreement *this* I-864 must be enforceable.[84]

Most confounding is the fact that these views run contrary to those of the Department of Homeland Security (DHS), the federal agency charged with implementation of the I-864. In the rulemaking process for the I-864 DHS itself opined that a beneficiary may elect to waive her right to enforcement of the I-864.[85] This is consistent with the widely-recited view that a foreign national is a third-party contract beneficiary to the I-864. Contract beneficiaries may elect to waive their rights if they wish. Congress could have – but did not – elect to exercise its plenary power to create a statutory cause of action against immigration petitioners. It chose instead to use a contract as the vehicle to ensure support, and private contract rights are subject to waiver.

IV. Conclusion

Around seven percent of U.S. marriages involve one or more foreign-born spouse.[86] In a career spanning potentially thousands of matrimonial matters, it is likely that a family law attorney will encounter one or more foreign-born parties. It is recommended that family law firms implement simple but strict protocols at the client intake stage to ensure they are screening for citizenship. Firms should assess both whether their client, as well as the opposing party, are U.S. citizens. If either party is foreign born a careful assessment should be made of how they secured immigration status in the United States. If status was secured through the spouse, it's time to review this article.

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[84] *Id.* at *11.

[85] Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732, 35740 (June 21, 2006) (but clarifying that a sponsor's duties to reimburse government agencies would remain unchanged).

[86] Luke Larsen and Nathan Walters, United States Census Bureau, *Married-Couple Households by Nativity Status: 2011* (Sep. 2013), *available at* http://www.census.gov/population/foreign/ (last visited Jan. 22, 2014).

UNDERSTANDING THE NEW DHS RULE ON PUBLIC CHARGE INADMISSIBILITY

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Understanding the New DHS Rule on Public Charge Inadmissibility

August 16, 2019

By Greg McLawsen[1]

On October 15, 2019, a new rule will take effect that fundamentally changes how the Department of Homeland Security makes public charge determinations. The rule significantly raises the standard for assessing an applicant's ability to remain self-sufficient. The Form I-864, Affidavit of Support, now will take the back seat as scrutiny shifts to the applicant and her Form I-944, Declaration of Self-Sufficiency.

The Department's Notice of Proposed Rulemaking (NPRM) was published on October 10, 2018.[2] The NPRM received 266,077 public comments, the "vast majority" of which opposed the proposed rule.[3] The final rule was published on August 14, 2019.[4] The document containing the final rule comes to a whopping 837 pages.[5] DHS estimates that it will take about 16-20 hours for an average person simply to read through the final rule.[6]

The rule takes effect at noon Eastern Time on October 15, 2019.[7] The rule is *not* retroactive and will apply only to applications filed after the rule takes effect.[8] Individuals with applications that have been filed, or are postmarked, prior to the effective date will not be subject to the final rule.[9]

At the time of writing, multiple lawsuits have already been filed to challenge the public charge rule.[10] Implementation of the rule may very well be enjoined before October 2019. Nonetheless, especially given the short time before the rule's effective date, practitioners are wise to act now.

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[2] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (Oct. 10, 2018) (hereinafter "NPRM").
[3] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41297 (Aug. 14, 2019) (hereinafter "Final Rule").
[4] *Id.*
[5] Once distilled into the format of the Federal Register it was "only" 217 pages. *Id.*
[6] Final Rule, 84 Fed. Reg., at 41301.
[7] *Id.* at 41292.
[8] *Id.* ("DHS will apply this rule only to applications and petitions postmarked (or, if applicable, submitted electronically) on or after the effective date. Applications and petitions already pending with USCIS on the effective date of the rule (i.e., were postmarked before the effective date of the rule and were accepted by USCIS) will not be subject to the rule.").
[9] *Id.*
[10] *See, e.g.*, City & County of San Francisco v. USCIS, 3:19-cv-4717 (N.D. Cal. Aug. 13, 2019).

The new DHS rule does not apply to consular processing cases through the Department of State (DOS). The public charge provisions of the Foreign Affairs Manual (FAM) were revised in January 2018.[11] Practitioners should remain vigilant for future changes that may align the FAM standards with those announced by DHS.

The DHS rule also does not bind the Department of Justice (DOJ) and Executive Office of Immigration Review (EOIR). DOJ is currently in the process of revising its own public charge regulations.[12] The specter is very real that if an adjustment of status applicant is determined to be inadmissible under the new DHS rule, she will then be served with a notice to appear under harsher DOJ rule relating to public charge.

A prior article analyzed the proposed public charge rule set forth in the NPRM.[13] That article summarized existing rule on public charge inadmissibility, so that rule will not be reviewed here.[14]

I. "Highlights" of the new rule.

Because this is a breaking issue that will impact almost all immigration lawyers, here are some essential take-aways:

- **Practitioners should get adjustment cases filed prior to October 15, 2019.** The new public charge rule will apply only to applications postmarked on or after noon EDT on October 15, 2019.[15] Wherever possible, practitioners should file cases before that date to avoid being subjected to scrutiny under the new rule.
- **Adjustment applications have fundamentally changed.** Public charge determinations will now become a genuine issue to contend with for all adjustment applications, especially with clients of modest means.
- **The I-864 is no longer enough to pass public charge inadmissibility.** Even in "simple" adjustment cases, merely submitting a valid Form I-864 is insufficient to overcome public charge inadmissibility. Lawyers will need to screen all applicants under the new multi-factor test.
- **Every applicant will be required to file a new Form I-944 to assess their ability to be self-sufficient.** This form will be longer and will require

[11] *Cf. DOS Issued Cable on Update to 9 FAM 302.8 Public Charge*, AILA Doc. 18012235 (Jan. 1, 2018).
[12] *Cf.* Yeganeh Torbati, *Exclusive: Trump administration proposal would make it easier to deport immigrants who use public benefits*, Reuters (May 3, 2019), *available at* https://reut.rs/2Mkp8lw.
[13] Greg McLawsen, *USCIS Proposes New Public Charge Rules: The Form I-864 will Become Table Stakes as Scrutiny Shifts to the Applicant*, 23 BENDER'S IMMIGRATION BULLETIN 1173 (Nov. 1, 2018).
[14] *Id.*, at 1173 *et seq.*
[15] 8 C.F.R. § 212.20.

more evidence than the Form I-864. It will scrutinize the applicant's work history and financial circumstances among other factors.

- **Applicants are *not* penalized if household members receive public benefits.** Abandoning an approach threatened by prior drafts of the public charge rule, the final version does not penalize applicants for benefits lawfully received by other household members.
- **Public charge *bonds* are back for the first time.** Although they have long been a theoretical possibility, DHS now has procedures to require applicants to post bonds to overcome public charge inadmissibility.

> **Practice pointer.** The most important thing that lawyers need to do differently in light of the final rule is to modify how they handle the screening of new clients. The new rule *changes* the substantive standard that is applied in public charge determinations, in addition to requiring new evidence. So, lawyers' attention should be focused on identifying prospective clients who will be likely to face a negative public charge determination under the new rule, or will be borderline cases. Those prospective clients need to be cautioned in writing about the risks of proceeding with an application if they choose to do so. This is especially the case in view of the fact that the DOJ is currently revising its rule on public charge-related removal. The stakes are high, and the time to look carefully at cases is at the intake stage, not in responding to a request for evidence six months later.

II. To whom does the new rule apply?

The main impact of the new rule will be felt by applicants for adjustment of status. Nonimmigrants seeking to change or extend their status are subject to the new rule but face a substantially reduced burden compared to adjustment applicants.[16] Likewise, the rule does not impose any new *procedure* at ports of entry, although the substantive admissibility standard announced in the rule does apply at ports.

> **Practice pointer.** The rule *does not* apply to consular processing cases. Immigrant visa applicants are not subject to the new standard announced in the rule and are not required to submit the Form I-944. Practitioners should remain vigilant for amendments to the Foreign Affairs Manual that may implement similar standards to those in the DHS rule. [17]

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[16] *See* Section II *infra*.

[17] 8 C.F.R. § 212.20 (the public charge standard in the rule applies to "an applicant for admission or adjustment of status to lawful permanent resident").

Some classes of adjustment applicants are statutorily exempt from public charge determinations. The numerically largest category of those exempt applicants are refugees and asylees.[18] Other exempt categories include:

- Amerasian immigrants;
- Afghan and Iraqi special visa interpreters;
- Cuban and Haitian entrants under section 202 of the Immigration Reform and Control Act of 1986;
- Applicants under the Cuban Adjustment Act;
- Applicants under the Nicaraguan Adjustment and Central American Relief Act;
- Applicants under the Haitian Refugee Immigration Fairness Act of 1998;
- Special immigrant juveniles;
- Applicants for Temporary Protected Status; and
- Most self-petitioners under the Violence Against Women Act.[19]

The rule is slightly confusing as applied to T-Visa holders applying for adjustment of status. The final rule states that DHS "may" waive public charge inadmissibility for T-Visa adjustment applicants.[20] The October 2018 proposed rule had stated that the T-Visa adjustment applicants could *apply* for a waiver of public charge inadmissibility.[21] DHS recognized that it would be inconsistent with the Violence Against Women Act to require T-Visa applicants to pro-actively apply for a waiver.[22]

In practice, the provision in the final rule hopefully entails that DHS will automatically waive public charge inadmissibility for T-Visa adjustment applicants without requiring any special showing from them.[23]

Note that the new DHS rule will not alter the adjudication of applications to remove the conditions on lawful permanent residence (Form I-751s) nor on applications for naturalization (N-400s). Those applications are not applications for admission, and hence grounds of inadmissibility do not apply. Neither I-751 for N-400 applicants will need to file the Form I-944.

> **Practice pointer.** What if your client was enrolled in Medicaid after being admitted as a refugee, and she is now trying to adjust status? The final rule is clear that those past benefits are treated differently

[18] 8 C.F.R. § 212.23(a).
[19] *Id.*
[20] 8 C.F.R. § 212.18(b)(2).
[21] Final Rule, 84 Fed. Reg. at 41298.
[22] *Id.*
[23] *Id.* ("T nonimmigrants applying for adjustment of status will no longer need to submit a waiver of inadmissibility for public charge purposes.").

due to the applicant's special status. The Medicaid that the applicant received while admitted as a refugee specifically *does not* qualify as "public benefit" use for the purpose of the later public charge determination.[24] So even if the applicant was enrolled in Medicaid for more than 12 months, this would not subject them to the "heavily weighted" negative factor for public benefits use.[25] Nonetheless, the rule carefully preserves the ability for DHS to consider past use of any program listed at 8 C.F.R. § 212.21(b). So it would appear that DHS could consider the Medicaid used by the applicant in refugee status, it is just that the past use would not subject the applicant to the "heavily weighted" factor.

Practice pointer. Customs and Border Protection (CBP) is organized under DHS. While CBP is bound by the final rule, the consequence of that may be limited. Foreign nationals presenting for inspection at ports of entry will *not* be required to submit a Form I-944.[26] So in practical terms, it is not the case that all foreign nationals will be extensively screened for public charge under the new standards. With that being said, for any applicant that does come to the attention of a CBP officer – for any reason – the new rule will apply to any subsequent admissibility determination that is made. Low-income individuals may wish to travel with documentation that would help them rebut public charge scrutiny, such as the evidence that would be filed with a Form I-944.

III. "Public charge" means more likely than not to get "public benefits."

As originally proposed in October 2018, the definition of "public charge" is now expressly tied to the receipt of "public benefits."[27] An immigrant 'likely to become a public charge' now means one who is likely to receive public benefits. Specifically:

> Public charge means an alien who receives one or more public benefits, as defined in paragraph (b) of this section, *for more than 12 months in the aggregate within any 36-month period* (such that, for instance, receipt of two benefits in one month counts as two months).[28]

The ultimate legal standard under the final rule requires a *prospective* determination: whether the applicants is "more likely than not at any time in the

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[24] 8 C.F.R. § 212.21(b)(8).
[25] *See* Section IV(B) *infra*.
[26] Final Rule, 84 Fed. Reg, at 41295.
[27] 8 C.F.R. § 212.21(a). *See* 83 Fed. Reg. at 51,289 (proposed 8 C.F.R. § 212.21(a)).
[28] Proposed 8 C.F.R. § 212.21(a) (emphasis added).

future" to receive public benefits.[29] The standard in the proposed rule was whether an applicant was simply "likely" to receive public benefits in the future.[30] So the ultimate question now before DHS adjudicators is this: is the applicant, at any point in the future, likely to receive public benefits for 12 months out of a 36-month period. The proposed standard was nonsensical, since there is of course a non-zero likelihood of anyone receiving public benefits, or inventing interplanetary space travel for that matter. Hence, the final rule clarifies that it must be *more likely than not* that an applicant will receive public benefits.

Given that the definition of public charge is now tied to enrollment in specified public benefit programs, one thing seems obvious. If the entire point of the public charge rule analysis is to gauge whether an intending immigrant is likely to enroll in Medicaid, DHS might need to know something about who can and cannot enroll in Medicaid. But the final rule specifically states that DHS will *not* trouble itself with the actual enrollment criteria for the programs it defines as public charge:

> Except as necessary to fully evaluate evidence provided in paragraph (b)(4)(ii)(E)(3) [pertaining to whether the applicant has applied for benefits] of this section, DHS will not specifically assess whether an alien qualifies or would qualify for any public benefit, as defined in 8 CFR 212.21(b).[31]

In other words, the entire focus of the new rule is to assess whether an applicant will, at some point in the future, enroll in one of the prohibited public benefit programs. Yet DHS will not take into consideration what the legal requirements are for enrolling in those programs.

On its own, this standard would be utterly impossible to adjudicate. How could an adjudicator possibly determine whether an applicant is likely to enroll in Medicaid for eight versus twelve months? The crux of public charge assessments, however, will be a new multi-factor totality of circumstances test set forth later in the Rule.[32] Practitioners are strongly encouraged to focus their energy on understanding the new multi-factor test, which contains many pitfalls for the unwary.

Expanding on the proposed rule, the final rule clarifies what it means to "receive" a public benefit.[33] "Receipt of public benefits" means when an agency actually provides the benefit.[34] It does *not* include merely applying for the benefit or being

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[29] NPRM, 83 Fed. Reg. at 51,254, 51,255 (proposed 8 C.F.R. § 212.21(c)).
[30] proposed 8 C.F.R. § 212.21(c).
[31] 8 C.F.R. § 212.21(a).
[32] 8 C.F.R. § 212.22.
[33] 8 C.F.R. § 212.21(e).
[34] *Id.*

certified to receive the benefit.[35] Nonetheless, the rule states that applying or being certified to receive public benefits "may suggest a likelihood of future receipt."[36] In other words, at the end of the day, it all counts against the applicant. The only firm exception to this is that an applicant may apply for *other individuals* without having that redound to the applicant's detriment.[37]

What programs count as "public benefits"? The final rule lists the following programs as those that are considered "public benefits:"[38]

1. Supplemental Security Income (SSI);
2. Temporary Assistance for Needy Families (TANF);
3. Any other federal, state or local cash benefit programs (i.e., general assistance);
4. Supplemental Nutrition Assistance Program (SNAP, i.e., food stamps);
5. Section 8 Housing Assistance under the Housing Choice Voucher Program;
6. Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation);
7. Medicaid; and
8. Public Housing under Section 9 of the U.S. Housing Act of 1937.

The Women, Infants and Children (WIC) supplemental nutrition program is *not* on the list of prohibited programs. The NPRM had also listed Medicare Part D (prescription drug coverage)[39] and "institutionalization for long-term care at government expense."[40] Neither of those is listed on the final rule as public benefit programs.[41] DHS chose to exclude Medicare Part D because it contains an "extensive work requirement."[42] DHS struck long-term institutionalization because the programs that it intended to target were already on the enumerated list (i.e., TANF, SSI and Medicaid).[43] Although the Administration had considered adding SCHIP to the list of prohibited programs, it is not included in the final rule.

The proposed rule contained a convoluted taxonomy of public benefit programs. Programs were divided into "monetizable" and "non-monetizable" benefits.[44]

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[35] *Id.*
[36] *Id.*
[37] *Id.* ("An alien's receipt of, application for, or certification for public benefits solely on behalf of another individual does not constitute receipt of, application for, or certification for such alien.").
[38] 8 C.F.R. § 212.21(b).
[39] NPRM, 83 Fed. Reg. at 51,290 (proposed 8 C.F.R. § 212.21(b)(2)(iii)).
[40] NPRM, 83 Fed. Reg. at 51,290 (proposed 8 C.F.R. § 212.21(b)(2)(ii)).
[41] *except for institutionalization for long-term care at government expense and Medicaid (noting that those programs were listed in the NPRM but not the final rule).
[42] Final Rule, 84 Fed. Reg. at 41297.
[43] *Id.* at 41378.
[44] *See* McLawsen at 1176 *et seq*

Depending on the classification of the program, DHS had different ways of defining a *de minimis* threshold, such that minimal use of the program would not trigger inadmissibility.

Fortunately, the final rule does away with the taxonomic maze. The *de minimis* threshold in the final rule is simply whether an individual was enrolled in the program for 12 or more aggregate months within a 36-month period.[45]

Three notable exemptions. The final rule carves out three notable exemptions for those who receive public benefits.

First, DHS exempts several categories of Medicaid enrollment. These exempt categories are:

- Emergency Medicaid;
- Services provided under the Individuals with Disabilities Education Act;
- School-based services;
- Benefits received by individuals under age 21; and
- Benefits received by pregnant women.[46]

The exception for youth and pregnant women had not been included in the proposed rule. As a practical matter, these exemptions may cover most foreign nationals who are enrolled in Medicaid. Apart from special categories, most foreign nationals do not qualify for Medicaid until they have held LPR status for five or more years.[47]

Second, the rule also exempts public benefits received by military families.[48] This applies to applicants who were in the service at the time they received benefits *or* who were in the service "at the time of filing or adjudication" of their immigration application.[49] The exemption applies both to applicants who themselves are in the service as well as applicants who are the spouse or child of a service member.[50]

Third, the rule exempts child applicants who will automatically acquire citizenship under section INA § 320.[51] That is, minor LPR children with one U.S. citizen parent

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[45] 8 C.F.R. § 212.22(a).
[46] 8 C.F.R. § 212.21(b)(5)(i)-(5)(iv).
[47] *See* 8 U.S.C. § 1641.
[48] 8 C.F.R. § 212.21(b)(7). The exemption includes those enlisted in the Armed Forces, those serving in active duty or in the Ready Reserves of the Armed Services, and their spouses and minor children. *Id.*
[49] *Id.*
[50] 8 C.F.R. § 212.21(b)(7)(iii).
[51] 8 C.F.R. § 212.21(b)(9). Also exempt are foreign-born children entering the United States to acquire a certificate of citizenship. 8 C.F.R. § 212.21(b)(9)(i); INA § 322.

who is resides in the U.S. with that parent.[52] The exemption also applies to adopted children residing with a U.S. parent.[53]

> **Practice pointer.** Many immigrant families may be inclined to "play it safe" and disenroll from public benefit programs. Practitioners should encourage their clients to look carefully at what programs they are enrolled in and, in the case of Medicaid, whether they fall into one of the exempt classes. Families should be encouraged not to jeopardize their well-being by disenrolling from benefits that do not, in fact, fall under the prohibited list set forth in the DHS rule.

When will immigrants be penalized for receiving public benefits? The list of prohibited public benefits programs is clear enough. But when will an applicant face a negative public charge determination specifically because of receiving public benefits?

First off, note that the final rule is prospective only. Use of public benefits *prior* to the new rule will be treated under the old public charge standard that has been in effect since 1999.[54] The programs that were considered under the old rule were: cash assistance for income maintenance, including SSI, TANF, state and local cash assistance programs that provide benefits for income maintenance (i.e., general assistance), Medicaid, and institutionalization for long-term care.[55] The rule is clear that, "DHS will not consider as a negative factor any other public benefits" received prior to the final rule.[56]

As discussed below, the core of the new public charge rule is a totality of circumstances test. Further, under that test there are four specific circumstances that are defined as "heavily weighted negative factors." One of these heavily weighted negative factors is if the immigrant has received public benefits, as defined in the final rule.[57] However, this applies only to public benefits received following publication of the final rule.[58]

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[52] INA § 320(a).
[53] INA § 320(b).
[54] 8 C.F.R. § 212.22(d).
[55] *Id.*
[56] *Id.*
[57] 8 C.F.R. § 212.22(c)(1).
[58] *Id.* Specifically, 60 days following its publication.

Notably, an applicant is *not* penalized if other household members have received public benefits.[59] The applicant is not imputed with negative consequences unless she is specifically listed as a beneficiary of the program.[60]

***De minimis* use of public benefits programs can still be weighed against an applicant.** Receiving public benefits for 12 or more months in a 36-month period makes an individual a public charge by definition.[61] But this does not mean that enrolling in the prohibited programs for a shorter prior of time is safe. In the preamble to the final rule, DHS notes:

> [Under the proposed rule] USCIS would have been unable to consider an alien's past receipt of public benefits below the threshold at all, even if such receipt was indicative, to some degree, of the alien's likelihood of becoming a public charge at any time in the future. Under this final rule, *adjudicators will consider and give appropriate weight to past receipt of public benefits below the single durational threshold described above in the totality of the circumstances*.

Under the final rule, DHS will consider whether the applicant has enrolled in any of the prohibited program *at all* – not just above the de minimis threshold.[62] The applicant will be required to disclose whether she has "applied for or received" prohibited public benefits.[63] DHS will consider evidence that the applicant "applied for or received" public benefits only *after* October 15, 2019.[64] *However*, it will consider evidence of whether the applicated "disenrolled or requested to be disenrolled" from public benefits *at any time*, including prior to publication of the final rule.[65]

III. Good news for nonimmigrants.

As originally proposed, the public charge rule would have fully applied to nonimmigrants. Applicants for change of and extension of status would have had to meet the same standard for overcoming public charge inadmissibility as adjustment applicants. Although applicants for change of and extension of status will be reviewed for public charge inadmissibility, the final rule lowers the bar for nonimmigrants.

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[59] Final Rule, 84 Fed. Reg. at 41292.
[60] *Id.*
[61] 8 C.F.R. § 212.21(a).
[62] 8 C.F.R. § 212.22(b)(4)(i)(E).
[63] 8 C.F.R. § 212.22(b)(4)(ii)(E)(1).
[64] *Id.*
[65] *Id.*

The multi-factor test for adjustment applicants – discussed extensively below – is prospective in nature, asking if the applicant is more likely than not to *ever* receive public benefits. For nonimmigrants, the standard is retrospective.[66] DHS will examine only whether the applicant received 12 months or more of public benefits *while in the nonimmigrant status*.[67] For that reason, so long as a nonimmigrant does not receive public benefits, she should be able to pass public charge scrutiny. Nonimmigrants are not required to file the Form I-944, Declaration of Self-Sufficiency, discussed below, with their application for change or extension of status.[68]

IV. The new totality of circumstances test for public charge determinations in adjustment of status applications.

Prior to the new rule, the focus of public charge determination has been the Form I-864, filed by one or more sponsors. Now, the focus shifts from the sponsor and onto the intending immigrant herself.

Adjustment of status applicants are now required to file a new Form I-944 Declaration of Self-Sufficiency.[69] This 19-page form examines a host of considerations about the applicant including her:

- Work history;
- Work skills and educational history;
- English language ability;
- Financial circumstances, including both assets *and* financial liabilities; and
- Applications for or receipt of public benefits.

The Form I-944 will be required as initial evidence for the adjustment application, so failure to file it will result "in a rejection or a denial of the Form I-485 without a prior issuance of a Request for Evidence or Notice of Intent to Deny."[70]

For the DHS tables summarizing which categories of foreign nationals are subject to public charge inadmissibility, as well as which must file the Form I-944, see Appendix 1.

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[66] Final Rule, 84 Fed. Reg. at 41298.
[67] 8 C.F.R. § 248.1(d)(4) (change of status); 8 C.F.R. § 214.1(a)(3)(iv) (extension of status).
[68] Final Rule, 84 Fed. Reg. at 41316.
[69] 8 C.F.R. § 245.4(b).
[70] Final Rule, 84 Fed. Reg. at 41323.

As discussed above, the crux of the proposed rule is to place scrutiny on the applicant,[71] far beyond whether he has submitted a valid and sufficient Form I-864. USCIS will require a new Form I-944 Declaration of Self-Sufficiency to gather the information it will use to examine the applicant's ability to be financially independent.[72] This section walks through the factors that DHS will now consider in support of its totality of circumstances test. It then turns to the "heavily weighted factors" that will per se trigger public charge inadmissibility.

DHS estimates the form will take 4.5 hours to complete.[73] By comparison, DHS believes that it takes 6.25 hours to complete the Form I-864.[74] It is the opinion of this author that the 4.5-hour estimate is, to be generous, on the low-end. Given that the Form I-944 is both longer and requires substantially more initial evidence than the Form I-864, it will likely take substantially *longer* to complete than the Form I-864.

> **Practice pointer.** Law firms should immediately consider how they need to revise their fee agreement to contend with the substantial time that will be required to draft the Form I-944. Until practitioners have enough collective experience to understand what will be required to complete the form, the most obvious solution is to charge on an hourly basis to complete the I-944. Given clients' strong preference for flat fees, practitioners might take an educated guess and revise their flat fee for adjustment cases. For firms taking this approach, it would be reasonable to charge – at the very least – their normal rate for a stand-alone joint sponsor I-864.

The documentation requirements on the Form I-944 are quite extensive. Applicants will need to provide evidence that includes:

- An IRS tax transcript for the most recent tax year, or a Form W-2 or Social Security Statement if the transcript is unavailable;
- Credit report;
- Documentation of any untaxed income;
- Proof of asset-ownership if needed, including a real estate appraisal from a *licensed* appraiser;
- Copies of policy pages for all health insurance policies, or documentation that applicant has enrolled;

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[71] This article uses the term "applicant" to refer to the individual about whom the public charge determination is made, as the proposed regulations would apply both to those seeking adjustment of status (intending immigrants) and also to applicants for change of nonimmigrant status.
[72] *See* NPRM, 83 Fed. Reg. at 51,254.
[73] Final Rule, 84 Fed. Reg. at 41483.
[74] NPRM, 83 Fed. Reg. at 51,255.

- Any "documentation that may outweigh any negative factors related to a medical condition" and
- Child support orders and/or custody agreement, for any children being supported who do not reside in the household.[75]

DHS will consider that evidence under a seven-factor totality of circumstances test. As discussed below, most of those seven factors in turn have subparts that set forth additional multi-factor subtests.

A. The totality of circumstances factors.

The final rule sets forth seven factors that will be considered by the USCIS adjudicator. These factors are in service of deciding the ultimate legal issue of whether the applicant is more likely than not to receive public benefits. For each factor, the rule identifies a "standard," which articulates how that factor is to be considered, and the evidence that will be considered in connection with the "standard." Most factors set forth multiple "standards" that deal with various facets of the factor. If this sounds complicated, that is because it is.

Factor 1 – Age. As in the proposed rule, the final rule unambiguously discriminates in favor of applicants who are of traditional working age, that is, between ages 18 and 65 to 67.[76] Under the proposed rule, DHS was to consider age primarily "in relation to employment or employability."[77] The final rule lists the individual's "ability to work" as one way in which age might make an individual more likely to receive public benefits.[78] Aside from ability to work, it is unclear how else age could be relevant.

The rule is simply bad news for applicants under age 18 and over age 65. Those individuals will ultimately be held to a higher standard than working-age applicants.[79]

> **Practice pointer.** Remember that the rule exempts minors who will automatically acquire citizenship by residing with a U.S. parent.[80]

Factor 2 – Health. When it comes to health, the final rule changes little. The final rule codifies that DHS will assess whether a medical condition would "interfere with

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[75] Form I-944 Instructions at 5-6 (tax transcript), 7 (credit report), 6 (untaxed income), 7 (health insurance), 6 (asset documentation), 8 (documentation of medical condition), 4 (child support orders,
[76] 8 C.F.R. § 212.22(b)(1)(i); 42 U.S.C. § 416(l)(2) (defining early retirement age). *See* NPRM, 83 Fed. Reg. at 51,291 (proposed 8 C.F.R. § 212.22(b)(1)(i)).
[77] NPRM, 83 Fed. Reg. at 51,179.
[78] 8 C.F.R. § 212.22(b)(1)(i).
[79] That is, since the age factor weighs against them, they necessarily face a higher burden with respect to the remaining factors.
[80] 8 C.F.R. § 212.21(b)(9).

the alien's ability to provide and care for himself, or herself, to attend school, or to work upon admission or adjustment of status."[81] Under the 1999 guidance from legacy INS, it was already the case that serious medical conditions were risk factors for public charge determinations, but the new rule gives renewed and systematic focus on health issues.

> **Practice pointer.** It is already common practice for immigration lawyers to review the G-639 medical report of any adjustment applicant. The new rule provides a strong incentive for that to become standard practice. Even at the client screening stage, however, lawyers should make it a standard practice to inquire about a client's health status.
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> **Practice pointer.** The instructions to the Form I-944 do not require applicants to file the Form G-639 as initial evidence for the Form I-944.[82] Many practitioners file the G-639 at the time of an adjustment interview to prevent its validity from expiring before then, as it likely would if filed simultaneously with the Form I-485. It appears that practitioners should be able to continue that approach without concern that the Form I-944 will be rejected.

Factor 3 – Family Status. Under the final rule DHS will consider an applicant's "family status," and by that the rule means *household size*.[83] And household *size* will be considered in relation to the household's financial resources.[84] The rule defines an applicant's household to include:

- The applicant;
- The applicant's spouse, if residing with the applicant;
- The applicant's children, if either residing with the applicant or if he is required to provide at least 50% of the child's financial support;
- Anyone other individual for whom the applicant is required to provide at least 50% of the individual's financial support.[85]

The larger the household, the greater the risk of an inadmissibility finding.

Factor 4 – Assets, resources and financial status.

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[81] 8 C.F.R. § 212.22(b)(2)(i).
[82] *See* Form I-944 Instructions, at 8.
[83] 8 C.F.R. § 212.22(b)(3)(i).
[84] 8 C.F.R. § 212.22(b)(4)(i)
[85] 8 C.F.R. § 212.21(d).

There are five different standards that DHS can rely upon in assessing an applicant's "assets, resources, and financial status."

First, DHS will consider whether the *household* has income at or about 125% of the Federal Poverty Guidelines (FPG), or 100% in the case of service member families.[86] This, of course, is the familiar standard to which Form I-864 sponsors are already held. The applicant is required to file an IRS tax transcript for all household members whose income is to be counted.[87] As to the applicant, the Form I-944 instructions provide only that she must provide the most recent year's returns, but the rule itself requires three years of returns.[88]

The applicant can also count income that was not reported on her federal income returns so long as it was not derived from an illegal source, such a drug dealing.[89] As discussed below, income from unauthorized employment may be counted. The applicant is required to provide "evidence" of the untaxed income.[90] This could be in the form of a child support order, or documentation of unemployment benefits.[91]

Second, if the applicant's household income is *less* than 125% FPG, DHS will examine whether the applicant has assets that make up for this shortfall.[92] As with the familiar rule with the Form I-864, assets will need to be equal to five times the difference between household income and 125% FPG, or three times in the case of immediate relatives.[93]

The treatment of assets is similar to those used with the Form I-864. Assets must be either cash or "easily" converted into cash.[94] Examples include:

- Checking and savings accounts;
- Annuities;
- Stocks and bonds;
- Certificates of deposit; and
- Retirement and educational accounts.[95]

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[86] 8 C.F.R. § 212.22(b)(4)(i)(A).
[87] 8 C.F.R. § 212.22(b)(4)(ii)(A)(1); Form I-944 Instructions, p. 5.
[88] *Compare* Form I-944 Instructions, p. 5 with 8 C.F.R. § 212.22(b)(5)(ii)(A) ("The alien must provide the following: (1) The last 3 years of the alien's tax transcripts from the U.S. Internal Revenue Service (IRS) of the alien's IRS Form 1040, U.S. Individual Income Tax Return…").
[89] Form I-944 Instructions, p. 6.
[90] *Id.*
[91] *See id.*
[92] 8 C.F.R. § 212.22(b)(4)(i)(B).
[93] 8 C.F.R. § 212.22(b)(4)(i)(B)(1) & (B)(2).
[94] 8 C.F.R. § 212.22(b)(4)(ii)(D).
[95] Form I-944 Instructions, at 6.

The applicant will need to file 12 months of statements for deposit accounts.[96] If the applicant relies on the value of a home, then she will need to obtain a licensed appraisal and document the amount "of all loans secured by a mortgage, trust deed, or other lien."[97]

Third, DHS will consider whether the applicant, "has sufficient household assets and resources to cover any reasonably foreseeable medical costs."[98]

Fourth, DHS will consider whether the applicant has "*any* financial liabilities."[99] The applicant is required to report her credit score on the Form I-944 and to file a copy of her *U.S.* credit report.[100] If the applicant has any negative credit history she may provide an explanation of that on the Form I-944.[101] If the applicant does not have a credit score – which is common for undocumented individuals – she is required to file evidence of that fact.[102] This will presumably be done by filing a copy of the null search results from having requested her credit report.

> **Practice pointer.** Practitioners will now want to screen a new client's credit score at the intake stage. Under the Fair Credit Reporting Act, individuals are entitled to one, but only one, free credit report per year. Thus, clients should be advised to retain a copy of the report when requested for the screening process. The rule does not identify a target credit score that is desirable. But for clients with poor scores, practitioners may wish to encourage them to delay their adjustment applications while taking proactive measures to improve their credit score. This might not be needed, however, where the remaining considerations such income weighed strongly in the applicant's favor.

Fifth, DHS considers whether the applicant has "*applied for*, been certified to receive, or received public benefits."[103] The applicant will have to certify on the Form I-944 whether or not this is the case.[104] If she answers in the affirmative, she will be required to produce documentation from the benefit-granting agency.[105]

Since I-864 sponsors are already required to show income at 125% FPG, what is the point of this provision in the new rule? The difference will be felt in cases requiring

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[96] *Id.*, at 7.
[97] Form I-944 Instructions, at 6.
[98] 8 C.F.R. § 212.22(b)(4)(i)(C).
[99] 8 C.F.R. § 212.22(b)(4)(i)(D).
[100] Form I-944 Instructions, at 7.
[101] *Id.*
[102] *Id.*
[103] 8 C.F.R. § 212.22(b)(4)(i)(E).
[104] Form I-944, pp. 8-11.
[105] Form I-944 Instructions, p. 10.

a joint sponsor. If the Form I-130 petition meets the income requirement of the Form I-864, then the applicant will make it past this aspect of the new rule. But if a joint sponsor is required for the case, this means per se that the household's income is below 125% FPG. To make matters worse, as explained below, DHS will now scrutinize the "likelihood" that Form I-864 sponsors will fulfill their support obligation.

> **Practice pointer.** Unlike the Form I-864, for purposes of the Form I-944 DHS *will* consider income from unauthorized employment.[106] Under the final rule, only income from "*illegal*" sources will not be considered, such as "drug sales, gambling, prostitution, or alien smuggling."[107] Furthermore, the income need not necessarily be reported on an applicant's federal income tax returns to be considered by DHS.[108] Note, however, that while unauthorized employment income counts towards the family's financial resources, it does *not* count towards income for the "heavily weighted" positive factor discussed below.[109]

Scrutiny of the applicant's financial situation will extend much further than is currently the case with I-864 sponsors. A sponsor normally is required only to list her current income and provide the most recent year's federal income tax returns.[110] Under the new rule, and applicant will need to make a much more thorough showing. Most notably, DHS will consider not only the positive aspects of the person's financial situation – income and assets – but will also examine the applicant's financial liabilities.[111]

Factor 5 – Education and skills. Along with an applicant's financial circumstances, the factor that will receive the most scrutiny from DHS is the person's perceived ability to maintain employment.[112] Before turning to how DHS will examine this factor, it is worth highlighting one piece of good news.

The proposed rule would have scrutinized the employment history of all applicants, without exception.[113] An obvious question that raises is, "what about families with a stay-at-home parent?" Fortunately, the new rule carved out some latitude for that

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[106] Final Rule, 84 Fed. Reg. at 41420.
[107] 8 C.F.R. § 212.22(b)(4)(i).
[108] Final Rule, 84 Fed. Reg. at 41420.
[109] 8 C.F.R. § 212.22(c)(2)(ii) (requiring authorized employment).
[110] Certainly, the situation for sponsor gets far more complicated when the sponsor has had a change income, receives irregular income from sources such as self-employment, or needs to rely on assets.
[111] 8 C.F.R. § 212.22(b)(4)(i)(D).
[112] *See* 8 C.F.R. § 212.22(b)(5)(i).
[113] NPRM, 83 Fed. Reg. at 51,291 (proposed 8 C.F.R. § 212.22(b)(5)).

situation. DHS will now consider whether the applicant is a "primary caregiver."[114] That refers to an individual "who is 18 years of age or older and has significant responsibility for actively caring for and managing the well-being of a child or an elderly, ill, or disabled person in the alien's household."[115] Primary caregivers by no means get an automatic pass. But the rule at least provides latitude for showing that an applicant's status as caregiver is why he lacks employment history.[116]

The evidence that will be examined with respect to this factor is substantial. DHS will consider,

- The applicant's past *three years* of IRS tax transcripts.[117]
- If the transcripts are unavailable, an explanation of why they are unavailable;
- Whether the applicant has a high school diploma or higher;
- Any occupational skills, certificates or licenses; and
- *Whether the applicant is proficient in English* and in other languages *in addition to* English.[118]

The English language factor was included in the proposed rule and has received relatively little attention from the immigration bar. Although the provision is buried in the rule as merely a factor for assessing work skills and ability, the potential impact of this provision is huge. It remains unclear how DHS will even assess an applicant's ability. N-400 applicants for naturalization, of course, are statutorily required to take a structured English language test at the time of their application interview.[119] It is unclear if DHS may adapt the English language test used for the N-400. If not, it may be even worse for applicants if adjudicators assess language ability in an unstructured way, based on their subjective impression of a person's English language skills.

In the preamble to the final rule, DHS carefully notes that the rule "is not mandating English proficiency for admissibility."[120] Rather,

> Proficiency in English is one positive aspect for purposes of the education and skills factor to establish an alien's ability to obtain or maintain employment and that the alien, therefore, would be self-

[114] 8 C.F.R. § 212.22(b)(5)(ii)(E).
[115] 8 C.F.R. § 212.21(f).
[116] 8 C.F.R. § 212.22(b)(5)(ii)(E).
[117] As noted above, there appears to be a discrepancy between the rule and the Form I-944 Instructions, as the later requires only the most recent year's tax transcript. Form I-944 Instructions, p. 5.
[118] 8 C.F.R. § 212.22(b)(5)(ii)(A)-(ii)(D).
[119] INA § 312(a)(1).
[120] Final Rule, 84 Fed. Reg. at 41432.

sufficient. Lack of English proficiency alone would not establish public charge inadmissibility, but would be one consideration in the totality of the circumstances.[121]

Factor 6 – Prospective immigration status and expected period of admission. The new rule applies not only to adjustment of status applicants, but also to those for change and extension of nonimmigrant status.[122] The multi-factor test allows DHS to consider the planned duration of the applicant's admission, which would leave open the possibility of less onerous scrutiny of those who do not plan to be in the country for very long.[123]

Factor 7 – Affidavit of Support. It is not a coincidence that the Affidavit of Support makes its appearance only at the very end of the multi-factor test. The basic theme of the final rule is this: the Form I-864 is now necessary but not sufficient to overcome public charge inadmissibility, and a valid Form I-864 merely gets an applicant to the starting point of a public charge determination.

Yet in addition to the new totality of circumstances test, the From I-864 itself will *also* be getting a new heightened scrutiny. Mirroring a similar provision in the FAM, the final rule provides that "DHS will consider the likelihood that the sponsor would *actually provide* the statutorily-required amount of financial support to the alien, and any other related considerations."[124]

By signing the Form I-864, the sponsor already attests under penalty of perjury that he will provide the required financial support to the applicant. And that promise is enforceable in state and federal courts. So, what additional factors determine whether the sponsor will "actually" provide the required support? Adjudicators will consider:

1. The sponsor's annual income, assets, and resources;
2. The sponsor's relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and
3. Whether the sponsor has submitted an affidavit of support with respect to other individuals.[125]

Applicants with joint sponsors stand to be heavily impacted by this new standard. A joint sponsor will normally not be residing with the applicant and the primary sponsor – otherwise the individual would execute a Form I-864A instead of the new

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[121] *Id.*
[122] 8 C.F.R. § 212.20.
[123] 8 C.F.R. § 212.22(b)(6)(i).
[124] 8 C.F.R. § 212.22(b)(7)(i) (emphasis added).
[125] 8 C.F.R. § 212.22(b)(7)(A). The provision appears to be erroneously numbered and should be 8 C.F.R. § 212.22(b)(7)(ii)(A).

Form I-864. So virtually by definition, a joint sponsor will be viewed as a negative factor under the final rule.

B. Heavily weighted negative and positive factors.

On top of the seven-part multi-factor test discussed above, the final rule identifies positive and negative "heavily weighted factors." These are specific circumstances that strongly weigh for or against a public charge determination, although the rule specifically says that a heavily weighted factor is a dispositive by itself.[126] That proviso notwithstanding, it is probably more or less accurate to think of these as per se grounds for a public charge determination.

In its preamble to the final rule, DHS is about as cagey as it can be about what heavily weighted factors actually are:

> The presence of a single positive or negative factor, or heavily weighted negative or positive factor, will never, on its own, create a presumption that an applicant is inadmissible as likely to become a public charge or determine the outcome of the public charge inadmissibility determination.

So, they are heavily weighted considerations. Just not *that* heavily.

Negative factors. There are four heavily weighted negative factors.

> **[First]** The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment.[127]

This must be read against the early provisions pertaining to skills and employment, including the carve-out for caregivers. But special considerations aside, lacking current or recent employment – or a demonstrable likelihood of future employment – will lead to a negative public charge determination.

> **Practice pointer.** For applicants who are unemployed but otherwise likely to pass muster with public charge, it may be easier for them to seek enrollment as a student than to find work. This could present a feasible solution to accomplish prior to submitting an adjustment of status application, so that they are not automatically subject to the first heavily weighted negative factor.

Practitioners should note that the heavily weighted consideration of employment is at the very top of the list, not receipt of public benefits. Scrutinizing work history

[126] 8 C.F.R. § 212.22(c).
[127] 8 C.F.R. § 212.22(c)(1)(i).

and ability is at the core of the new rule, and should be the focus of practitioners as well.

> **[Second]** The alien has received or has been certified or approved to receive one or more public benefits, as defined in § 212.21(b), for more than 12 months in the aggregate within any 36-month period, beginning no earlier than 36 months prior to the alien's application for admission or adjustment of status on or after October 15, 2019.[128]

Note that on its face this provision clearly relates only to receipt of public benefits *after publication of the final rule*. Past enrollment in programs that are now listed in the final rule does not fall under this heavily weighted factor.

> **[Third]** (A) The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work; and (B) The alien is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition.[129]

Again, this scrutiny of ongoing medical costs should be familiar, as it is already required under the 1999 guidance memorandum. Likewise, it was already the case that applicants would want to demonstrate their ability to provide for costly long-term treatment, so that much is essentially unchanged.

> **[Fourth]** The alien was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.[130]

Notably, this circumstance is limited to public charge findings by EOIR or the BIA and thus excludes those by a DHS adjudicator or by a consular officer. The proposed rule would have included all prior public charge determinations, including those by adjudicators.[131]

Positive factors. There are three heavily weighted positive factors.

> **[First]** The *alien's household* has income, assets, or resources, and support (excluding any income from illegal activities, e.g., proceeds from illegal gambling or drug sales, and any income from public

[128] 8 C.F.R. § 212.22(c)(1)(ii).
[129] 8 C.F.R. § 212.22(c)(1)(iii).
[130] 8 C.F.R. § 212.22(c)(1)(iv).
[131] NPRM, 83 Fed. Reg. at 51,292 (proposed 8 C.F.R. § 212.22(c)(1)).

> benefits as defined in § 212.21(b)) of at least 250 percent of the Federal Poverty Guidelines for the alien's household size…
>
> **[Second]** The *alien is authorized to work and is currently employed* in a legal industry with an annual income, excluding any income from illegal activities such as proceeds from illegal gambling or drug sales, of at least 250 percent of the Federal Poverty Guidelines for the alien's household size.[132]

The effect of these provisions seems clear. It moves the goal posts in terms of the income that a household will need in order to safely overcome public charge inadmissibility. The reality of the status quo was that a family was normally safe if it could show income at or above 125% FPG, because that was the level statutorily required for the I-864. The final rule makes clear that only households with double that income level are now "heavily weighted" in terms of positive public charge determination.

> **Practice pointer.** Household income of at least 250% FPG is now the new "safe zone" for public charge determinations. (Though, of course, other circumstances like expensive medical treatment could still create a public charge problem for middle class families). For that reason, adjustment applicants should be screened to see if they fall above this target income level, just as law firms should already be screening would-be I-864 sponsors to ensure that they are above 125% FPG. If practitioners are bashful about asking about prospective clients' exact income on screening questionnaires, they may at least want to add a yes/no question as to whether the family is above 250% FPG (listing those numbers, and explaining why the question is needed).
>
> **[Third]** The alien has private health insurance, except that for purposes of this paragraph (c)(2)(iii), private health insurance must be appropriate for the expected period of admission, and does not include health insurance for which the alien receives subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act, as amended.[133]

This third positive factor was added since the October 2018 NPRM. Could this third factor really be as broad as it suggests on its face? It would seem that any family with unsubsidized health insurance is well on its way to a positive public charge determination. The problem is that the provision exempts all health insurance purchased on the ACA's "marketplace." More specifically, families with household

[132] 8 C.F.R. § 212.22(c)(2)(i) & (2)(ii) (emphasis added).
[133] 8 C.F.R. § 212.22(c)(2)(iii).

income under 250% FPG are the ones who would qualify for the ACA plans that *do not* qualify for this positive factor. In other words, if the applicant's household income is above 250% FPG she qualifies for a positive factor based on the income alone; if her income is under 250% FPG then – if she has healthcare at all – it is probably a plan that does not qualify for positive consideration.

V. Public charge bonds – because if there's one thing that working families have it's an extra $8,100.

If an applicant is deemed to be too low-income to immigrate, what might we require of the applicant to overcome that determination? How about a big pile of money?

It was already the case that immigration agencies had statutory authority to require an applicant to post a bond to overcome public charge inadmissibility.[134] But in practice, this simply never happened. Before the final rule, DHS did not even have a procedure to accept public charge bonds if it wanted to.[135]

That changes now.

Applicants who are determined to be inadmissible under the new public charge rule will now be able to overcome that inadmissibility by posting a bond – but only if DHS invites them to do so.[136] Here is how the process works.

Who can post a bond? Bonds are available to applicants deemed inadmissible on *only* public charge grounds.[137] DHS also asserts full discretion as to whether or not to invite an applicant to submit a bond.[138] If the applicant has one or more of the heavily weighted negative factors discussed above, that will likely preclude him from receiving an invitation to submit a bond.[139]

How much will they be? Bonds will be *at least* $8,100.[140] That is marginally less than the $10,000 required by the proposed rule. As, for example, with the Federal Poverty Guidelines, this $8,100 minimum will be adjusted with the Consumer Price Index.[141] The DHS adjudicator will have discretion to decide what *type* of bond is

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[134] INA § 213. *See* AFM § 61.1; 9 FAM 302.8-2(B)(2)(g).
[135] 83 Fed. Reg. at 51,219.
[136] 8 C.F.R. § 213.1(a).
[137] *Id.*
[138] 8 C.F.R. § 213.1(b).
[139] *Id.*
[140] 8 C.F.R. § 213.1(c)(2).
[141] 8 C.F.R. § 213.1(c)(2).

required.[142] She will tell the applicant whether DHS requests a surety bond or a cash or cash equivalent.[143]

How does the applicant post the bond? The public charge bond will be submitted with a new Form I-945, Public Charge Bond, which will have a $25 filing fee.[144] The instructions and content of the I-945 are not yet available. Ominously, the rule asserts that the DHS adjudicator has the authority to require some manner of "other condition" on the bond "as appropriate for the alien and the immigration benefit being sought."[145] Similar to a Form I-864 sponsor, the bond obligor is required to notify DHS if the *immigrant* changes addresses.[146] Unlike the change-of-address rules for Form I-864 sponsors, there is no financial penalty if a bond obligor fails to timely notify DHS of a change in address.[147]

What is the condition of the bond? The purpose of the bond is to guard against the immigrant receiving prohibited public benefits. The rule provides that the applicant "may not receive public benefits… for more than 12 months in the aggregate within any 36-month period" prior to cancellation of the bond.[148] Hence, receiving public benefits for longer than 12 months would mean that the immigrant meets the definition of having become a public charge which would constitute a breach of the bond conditions.

When can the applicant get her bond back? The bond remains in effect until the applicant formally requests and obtains cancellation of the bond.[149] The request to cancel the public charge bond will be made on a new Form I-356, Request for Cancellation of Public Charge Bond, which has a $25 filing fee.[150] The Form I-356 may be filed only once the applicant has,

- Been an LPR for five years;
- Become a U.S. citizen;
- Permanently departed the U.S.;
- Obtained an immigration status not subject to public charge inadmissibility; or

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[142] 8 C.F.R. § 213.1(c)(1).
[143] *Id.*
[144] 8 C.F.R. § 103.7(b)(1)(i)(LLL).
[145] 8 C.F.R. § 213.1(e).
[146] *Id.* The change of address notification must be filed within 30 days. *Id.*
[147] *See id.*
[148] 8 C.F.R. § 213.1(d).
[149] 8 C.F.R. § 213.1(d); 8 C.F.R. § 213.1(g)(3).
[150] 8 C.F.R. § 103.7(b)(1)(i)(MMM).

- Died.[151]

To demonstrate voluntary "permanent departure" from the United States, the immigrant would need to file a Form I-407, Record of Abandonment of Lawful Permanent Resident Status.[152]

The obligor has the burden of demonstrating by a preponderance of the evidence that one of the bond-terminating events has occurred.[153] If DHS approves the cancellation request it will release the obligor from liability and return the security.[154]

The rule also allows DHS to cancel the bond, on a discretionary basis, even if neither the obligor nor immigrant has filed a Form I-356.[155] This could mean that DHS will automatically review bonds for cancellation as immigrants reach the 5-year anniversary of their residence status, though it is far from clear that DHS intends to do so.

Additionally, an original obligor or new obligor is permitted to submit a substitute bond.[156] If it is a new obligor who is submitting the substitute bond, she is required to assume all responsibilities of the original obligor.[157] The new obligor also assumes liability for any breach of the bond condition prior to filing the substitute bond.[158] If DHS accepts the substitute bond, it will then cancel the original bond.[159]

What is the interplay between the bond and Affidavit of Support? Form I-864 sponsors are liable for repaying the cost of any means-tested public benefits received by the immigrant during the sponsorship period.[160] Unlike the public charge bond, I-864 sponsors are responsible for repaying *any* cost of means-tested benefits – there is no 12-month threshold.[161] Also, the Form I-864 sponsorship period potentially lasts longer than the public charge bond, since five years of residence status is not a terminating event for the Form I-864.[162] All this means that a Form I-864 sponsor who also serves as a bond obligor could face liability on *both* the bond and also the Form I-864. She could lose her bond if the immigrant

[151] 8 C.F.R. § 213.1(d); 8 C.F.R. § 213.1(g)(1).
[152] 8 C.F.R. § 213.1(g)(2).
[153] 8 C.F.R. § 213.1(g)(4).
[154] 8 C.F.R. § 213.1(g)(5).
[155] 8 C.F.R. § 213.1(g)(3).
[156] 8 C.F.R. § 213.1(f)(1).
[157] *Id.*
[158] *Id.*
[159] 8 C.F.R. § 213.1(f)(2).
[160] *See* 8 C.F.R. § 213a.4.
[161] 8 C.F.R. § 213a.2(e)(2).
[162] *Id.*

received more than 12 months of public benefits, and the government could sue her for the cost of the benefits.

The practical effect is more leverage for the government. Note that this gives adjudicators extraordinary leverage over families with modest financial means. An adjudicator who is disinclined to grant can determine that an applicant is on just the wrong side of public charge inadmissibility, and then require the applicant to post a substantial bond in order to proceed.

VI. Conclusion

There is certainly a significant chance that courts will enjoin the new public charge rule before its October 15, 2019 effective date. Given the sweeping changes in the rule, however, practitioners are wise to prepare immediately for the rule's implementation.

Lawyers' primary response to the rule should be in how they screen and counsel new clients. In the words of one law professor, the laws and the facts have a nasty habit of deciding cases. Here, the law has changed, and we will need to identify would-be applicants likely to end up on the wrong side of inadmissibility. Rather than changing our approach to advocacy, the rule changes how we counsel clients about whether they should apply for adjustment at all.

Starting immediately, lawyers will want to modify their intake questionnaires to consistently screen for the factors that will be assessed via the Form I-944. Sample questions include:

- Have you *ever* applied for any form of public assistance (e.g., food stamps, medical assistance, etc.)?
- What is your current age?
- Do you have any medical conditions?
- Have you experienced any medical conditions in the past that you may require treatment for in the future?
- Do you currently receive treatment for any mental health matters, or have you received such treatment in the past?
- Please list everyone who lives at your home and explain how they are related to you.
- Are you the primary caregiver for a child or individual with a disability?
- Are you currently employed?
- What is your current income?
- What is the highest education level that you have obtained?
- Please describe your employment history over the past five years.
- If known, what is your credit score?
- Do you have any debts?

- Has a court ever entered a judgment against you requiring you to pay money?
- On a scale of 1 (no ability) to 7 (fluent), how would you describe your English language ability?
- Have you received any formal certificates or taken classes in the English language?

Prospective clients should be asked to bring a copy of their credit report to initial consultations. Because individuals are eligible for only one free credit report per year, that report should be saved in their client file for later use on the I-944.

In addition to intake procedures, lawyers should also review their fee agreements. Many firms already use agreements that – for flat rate changes – exclude work that is required due to changes in law. That disclaimer should be expanded to accommodate the Form I-944. Even though the Form I-944 and its instructions are now available, it is difficult to gauge how much time will be required to actually complete the document. Likewise, the DHS rule could be partially enjoined by a court, changing what components of the Form I-944 remain in effect. For that reason, it seems reasonable for fee agreements to specify that work on the Form I-944 is done on an hourly basis.

When digesting the new rule, practitioners are encouraged *not* to focus primarily on the newly prohibited public benefit programs. Certainly, those working in non-profit organizations and for very low-income clientele will need to scrutinize their clients' records of receiving *and applying for* public benefits. But the net cast by the new rule captures far more than only those families who applied for public benefits. Practitioners most certainly should not treat an applicant as "safe" merely because she has never applied for such benefits.

The facts, as they relate to a prospective client's public charge admissibility, largely are what they are. Few individuals are probably holding back on their earning ability. But English language ability and credit score are two areas where improvement may be feasible. Lawyers may want to encourage clients to enroll in English language courses, or accept financial counseling, to bolster their presentation prior to an interview. In weaker cases, clients may wish to delay their adjustment application while they improve on these factors.

Finally, practitioners should be mindful of how answers on the Form I-944 might later redound to the detriment of their clients. Adjustment applications will be strongly incentivized to put their best foot forward on the Form I-944, making their financial circumstances look as cheery as possible. Exaggerations could lead to a misrepresentation finding at the adjustment interview, or if caught at a later date, render the client's acquisition of LPR status unlawful, preventing subsequent naturalization. Clients should be made to understand that they cannot afford to exaggerate their salary history or other aspects of the Form I-944, as doing so could

have disastrous consequences. Done not allow your clients to win the public charge battle only to lose the immigration war.

Appendix

DHS-published tables summarizing application of public charge inadmissibility and designating which applicants must file the Form I-944

4. Summary of Applicability, Exemptions, and Waivers

The following tables provide a summary of all nonimmigrant and immigrant classification and whether they are subject to the public charge inadmissibility determination and submit an I-944 or are subject to the public benefit condition for extension of stay and change of status nonimmigrants.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
A-1 - Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family A-2 - Other Foreign Government Official or Employee, or Immediate Family INA 101(a)(15)(A), 22 CFR 41.21	No. Not applicable as admitted for Duration of Status, 8 CFR 214.1(c)(3)(v)	Yes. Files I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
A-3 - Attendant, Servant, or Personal Employee of A-1 or A-2, or Immediate Family INA 101(a)(15)(A), 22 CFR 41.21	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes. INA 102; 22 CFR 41.21(d)(3)
B-1 -Temporary Visitor for Business B-2 - Temporary Visitor for Pleasure * not admitted under Visa Waiver Program INA 101(a)(15)(B)	Yes. Files Form I-539, 8 CFR 214.1(c)(2), 8 CFR 214.2(b)(1)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
C-1 - Alien in Transit C-1/D - Combined Transit and Crewmember Visa INA 101(a)(15)(C) and (D), INA 212(d)(8)	No. 8 CFR 214.1(c)(3)(ii)	No. 8 CFR 248.2(a)(2), except for change to T and U, 8 CFR 248.2(b) using Form I-914 or I-918	Not Applicable as not eligible for extension of stay or change of status

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
C-2 - Alien in Transit to United Nations Headquarters District Under Section 11.(3), (4), or (5) of the Headquarters Agreement INA 101(a)(15)(C) and (D), INA 212(d)(8)	No. Not applicable as admitted for Duration of Status. 8 CFR 214.1(c)(3)(ii)	No, 8 CFR 248.2(a)(2), except for change to T and U, 8 CFR 248.2(b) using Form I-914 or I-918	No. 22 CFR 41.21(d)
C-3 - Foreign Government Official, Immediate Family, Attendant, Servant or Personal Employee, in Transit INA 101(a)(15)(C) and (D), INA 212(d)(8)	No. 8 CFR 214.1(c)(3)(ii)	No, 8 CFR 248.2(a)(2), except for change to T and U, 8 CFR 248.2(b) using Form I-914 or I-918	No. 22 CFR 41.21(d)
CW-1 - Commonwealth of Northern Mariana Islands Transitional Worker Section 6(d) of Public Law 94–241, as added by Section 702(a) of Public Law 110–229. 8 CFR 214.2(w)	Yes. Files Form I-129CW, 8 CFR 214.1(c)(2) and 8 CFR 214.2(w)(17)	Yes. Files Form I-129CW, 8 CFR 248.1(a); 8 CFR 214.2(w)(18)	Yes.
CW-2 - Spouse or Child of CW-1	Yes. Files Form I-539, 8 CFR 214.1(c)(2) and 8 CFR 214.2(w)(17)(v)	Yes. Files Form I-539, 8 CFR 248.1(a); 8 CFR 214.2(w)(18)	
D - Crewmember (Sea or Air) D-2 - Crewmember departing from a different vessel than one of arrival INA 101(a)(15)(D)	No. 8 CFR 214.1(c)(3)(iii)	No, 8 CFR 248.2(a)(2), except for change to T and U, 248.2(b) using Form I-914 or Form I-918	Yes.
E-1, E-2 - Treaty Trader (Principal) INA 101(a)(15)(E)	Yes. Files Form I-129, 8 CFR 214.1(c)(1); 8 CFR 214.2(e)(20)	Yes, Files Form I-129, 8 CFR 248.1(a), 8 CFR 214.2(e)(21)(i)	Yes.
E-1, E-2 - Treaty Trader, Spouse or Child INA 101(a)(15)(E)	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 214.2(e)(21)(ii),	Yes.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
E-2-CNMI - Commonwealth of Northern Mariana Islands Investor (Principal) Section 6(c) of Public Law 94–241, as added by Section 702(a) of Public Law 110–229.8 CFR 214.2(e)(23)	Yes. Files Form I-129, 8 CFR 214.2(e)(23)(xii)	Yes. Files Form I-129,8 CFR 248.1(a), 8 CFR 214.2(e)(23)(xiii)	Yes.
E-2-CNMI - Commonwealth of Northern Mariana Islands Investor, Spouse or Child Section 6(c) of Public Law 94–241, as added by Section 702(a) of Public Law 110–229. 8 CFR 214.2(e)(23)(x)	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
E-3 - Australian Treaty Alien coming to the United States Solely to Perform Services in a Specialty Occupation	Yes. Files Form I-129, 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
E-3D - Spouse or Child of E-3 E-3R - Returning E-3 INA 101(a)(15)(E)(iii)	Yes. Files I-539, 8 CFR 214.1(c)(1) and (2)	Yes. Files I-539, 8 CFR 248.1(a)	Yes.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
F-1 - Student in an academic or language training program (principal) INA 101(a)(15)(F).	Yes, only if the F-1 requesting reinstatement to F-1 status or if the F-1 received a date-specific admission to attend high school and is now seeking an extension to D/S to attend college. 8 CFR 214.1(c)(3)(v); 8 CFR 214.2(f)(7); 8 CFR 214.2(f)(16)	Yes. Files Form I-539, 8 CFR 248.1(a),	Yes.
F-2 - Spouse or Child of F-1 INA 101(a)(15)(F).	No, not applicable as admitted for Duration of Status. 8 CFR 214.1(c)(3)(v); 8 CFR 214.2(f)(3)	Yes. Files Form I-539, 8 CFR 214.2(f)(3)	Yes.
G-1 - Principal Resident Representative of Recognized Foreign Government to International Organization, Staff, or Immediate Family G-2 - Other Representative of Recognized Foreign Member Government to International Organization, or Immediate Family G-3 - Representative of Nonrecognized or Nonmember Foreign Government to International Organization, or Immediate Family G-4 - International Organization Officer or Employee, or Immediate Family INA 101(a)(15)(G).	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. 22 CFR 41.21(d)

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
G-5 - Attendant, Servant, or Personal Employee of G-1 through G- 4, or Immediate Family.	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
H-1B - Alien in a Specialty Occupation, Fashion Models of Distinguished Merit and Ability, and workers performing services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project INA 101(a)(15)(H)(i)(b); Section 222 of Pub. L. 101-649.	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129.8 CFR 248.1(a)	Yes.
H-1B1 - Chilean or Singaporean National to Work in a Specialty Occupation INA 101(a)(15)(H)(i)(b1).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129. 8 CFR 248.1(a)	Yes.
H-1C[236] - Nurse in health professional shortage area INA 101(a)(15)(H)(i)(c).	Yes. Filed Form I-129, 8 CFR 212.2(h)(4)(v)(E)	Yes. Filed Form I-129, 8 CFR 212.2(h)(4)(v)(E)	Yes.
H-2A- Temporary Worker Performing Agricultural Services Unavailable in the United States INA 101(a)(15)(H)(ii)(a).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129	Yes.
H-2B - Temporary Worker Performing Other Services Unavailable in the United States INA 101(a)(15)(H)(ii)(b).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129	Yes.

[236] This classification can no longer be sought as of December 20, 2009. See the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Pub. L. 109-423.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
H-3 - Trainee INA 101(a)(15)(H)(iii)	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-539	Yes.
H-4 - Spouse or Child of Alien Classified H1B/B1/C, H2A/B, or H–3 INA 101(a)(15)(H)(iv).	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539. 8 CFR 248.1(a)	Yes.
I - Representative of Foreign Information Media, Spouse and Child INA 101(a)(15)(I).	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539	Yes.
J-1 - Exchange Visitor J-2 - Spouse or Child of J1 INA 101(a)(15)(J).	No, not applicable, as generally admitted for Duration of Status[237] 8 CFR 214.1(c)(3)(v)	Yes, subject to receiving a waiver of the foreign residence requirement, if necessary, Files I-539. 8 CFR 248.2(a)(4); may apply for change to T and U, using for Form I-914 or I-918, 8 CFR 248.2(b)	Yes.
K-1 - Fiance(e) of United States Citizen K-2 - Child of Fiance(e) of U.S. Citizen INA 101(a)(15)(K).	No. 8 CFR 214.1(c)(3)(iv)	No. 8 CFR 248.2(a)(2) except for change to T and U, 248.2(b) using Form I-914 or I-918	Not Applicable
K-3 - Spouse of U.S. Citizen awaiting availability of immigrant visa K-4 - Child of K-3 INA 101(a)(15)(K).	Yes. Files Form I-539, 8 CFR 214.1(c)(2) and 8 CFR 214.2(k)(10)	No. 8 CFR 248.2(2) except for change to T and U, 248.2(b) using Form I-914 or I-918	Yes.

[237] J nonimmigrant who are admitted for a specific time period are not eligible for an extension of stay.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
L-1 - Intracompany Transferee (Executive, Managerial, and Specialized Knowledge Personnel Continuing Employment with International Firm or Corporation) INA 101(a)(15)(L).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
L-2 - Spouse or Child of Intracompany Transferee	Yes. Files I-539 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
M-1 - Vocational Student or Other Nonacademic Student INA 101(a)(15)(M).	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539. Not eligible if requesting F-1, 8 CFR 248.1(c)(1)	Yes.
M-2 - Spouse or Child of M-1 INA 101(a)(15)(M).	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539	Yes.
N-8 - Parent of an Alien Classified SK3 (Unmarried Child Employee of International Organization) or SN-3 N-9 - Child of N-8 or of SK-1 (Retired Employee International Organization), SK-2 (Spouse), SK-4 (surviving spouse), SN-1 (certain retired NATO 6 civilian employee), SN-2 (spouse) or SN-4 (surviving spouse) INA 101(a)(15)(N).	Yes. Files Form] I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(e)	Yes.
NATO-1 - Principal Permanent Representative of Member State to NATO (including any of its Subsidiary Bodies) Resident in the U.S. and Resident Members of Official Staff;	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
Secretary General, Assistant Secretaries General, and Executive Secretary of NATO; Other Permanent NATO Officials of Similar Rank, or Immediate Family Art. 12, 5 UST 1094; Art. 20, 5 UST 1098.			
NATO-2 - Other Representative of member state to NATO (including any of its Subsidiary Bodies) including Representatives, Advisers, and Technical Experts of Delegations, or Immediate Family; Dependents of Member of a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement or in Accordance with the provisions of the "Protocol on the Status of International Military Headquarters"; Members of Such a Force if Issued Visas Art. 13, 5 UST 1094; Art. 1, 4 UST 1794; Art. 3, 4 UST 1796.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
NATO-3 - Official Clerical Staff Accompanying Representative of Member State to NATO (including any of its Subsidiary Bodies), or Immediate Family Art. 14, 5 UST 1096.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
NATO-4 - Official of NATO (Other Than Those Classifiable as NATO1), or Immediate Family Art. 18, 5 UST 1098.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
NATO-5 - Experts, Other Than NATO Officials Classifiable Under NATO 4, Employed in Missions on Behalf of NATO, and their Dependents Art. 21, 5 UST 1100.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
NATO-6 - Member of a Civilian Component Accompanying a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement; Member of a Civilian Component Attached to or Employed by an Allied Headquarters Under the "Protocol on the Status of International Military Headquarters" Set Up Pursuant to the North Atlantic Treaty; and their Dependents Art. 1, 4 UST 1794; Art. 3, 5 UST 877.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
NATO 7 - Attendant, Servant, or Personal Employee of NATO 1, NATO 2, NATO 3, NATO 4, NATO 5, and NATO 6 Classes, or Immediate Family Arts. 12–20, 5 UST 1094–1098	Yes. Files Form I-539, 8 CFR 214.2(s)(1)(ii).	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
O-1 - Alien with Extraordinary Ability in Sciences, Arts, Education, Business or Athletics or Extraordinary Achievement in the Motion Picture or Television Industry O-2 - Essential Support Workers Accompanying and Assisting in the Artistic or Athletic Performance by O-1 INA 101(a)(15)(O).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
O-3 - Spouse or Child of O-1 or O-2 INA 101(a)(15)(O).	Yes. Files Form I-539, 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
P-1 - Internationally Recognized Athlete or Member of Internationally Recognized Entertainment Group P-2 - Artist or Entertainer in a Reciprocal Exchange Program P-3 - Artist or Entertainer in a Culturally Unique Program INA 101(a)(15)(P). P-1S/P-2S/P-3S – Essential Support Workers 8 CFR 214.2(p)	Yes. Files Form I-129, 8 CFR 213.1(c)(3)(i)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
P-4 - Spouse or Child of P-1, P-2, or P-3 INA 101(a)(15)(P).	Yes. Files Form I-539, 8 CFR 214.1(c) (1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
Q-1 - Participant in an International Cultural Exchange Program INA 101(a)(15)(Q)(i).	Yes. Files Form I-129, 8 CFR 213.1(c)(3)(i)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
R-1 - Alien in a Religious Occupation INA 101(a)(15)(R).	Yes. Files Form I-129, 8 CFR 213.1(c)(3)(i)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
R-2 - Spouse or Child of R-1 INA 101(a)(15)(R).	Yes. Files Form I-539, 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
S-5 - Certain Aliens Supplying Critical Information Relating to a Criminal Organization or Enterprise S-6 - Certain Aliens Supplying Critical Information Relating to Terrorism S-7 - Qualified Family Member of S-5 or S-6 INA 101(a)(15)(S).	No. 8 CFR 213.1(c)(3)(vi)	No. 8 CFR 248.2(2) except for change to T and U, 248.2(b) using Form I-914 or I-918	Yes.
T-1 - Victim of a severe form of trafficking in persons INA 101(a)(15)(T).	Yes. Files Form I-539. INA § 214(o)(7)(B); 8 CFR 214.11(l)(1) and (2); 8 CFR 214.1(c)(2).	Yes. Files Form I-539, 8 CFR 248.1(a).	No.
T-2 - Spouse of T-1 T-3 - Child of T-1 T-4 - Parent of T-1 under 21 years of age T-5 - Unmarried Sibling under age 18 of T-1 T-6 - Adult or Minor Child of a Derivative Beneficiary of a T-1 INA 101(a)(15)(T).	Yes. Files Form I-539. INA 214(o)(7)(B); 8 CFR 214.1(c)(2)	Yes. Files Form Files I-539, 8 CFR 248.1(a)	No.
TN - NAFTA Professional INA 214(e)(2)	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form Files I-129, 8 CFR 248.1(a)	Yes.
TD - Spouse or Child of NAFTA Professional INA 214(e)(2)	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.

Table 2. Summary of Nonimmigrant Categories Subject to Public Benefits Condition			
Category	**Eligible to apply for Extension of Stay (i.e., May File Form I-129 or Form I-539)***	**Eligible to apply for Change of Status (i.e., May File Form I-129 or I-Form 539)***	**Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)**
U-1 - Victim of criminal activity U-2 - Spouse of U-1 U-3 - Child of U-1 U-4 - Parent of U-1 under 21 years of age U-5 - Unmarried Sibling under age 18 of U-1 under 21 years of age INA 101(a)(15)(U).	Yes. Files Form I-539, 8 CFR 214.1(c)(2); 8 CFR 214.14(g)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	No.
V-1 - Spouse of a Lawful Permanent Resident Alien Awaiting Availability of Immigrant Visa V-2 - Child of a Lawful Permanent Resident Alien Awaiting Availability of Immigrant Visa V-3 - Child of a V-1 or V-2 INA 101(a)(15)(V)(i) or INA 101(a)(15)(V)(ii). INA 203(d).	Yes. Files Form I-539, 8 CFR 214.1(c)(2); 8 CFR 214.15(g)(3)	Yes. Files Form I-539, 8 CFR 248.1(a); 214.15(g)(3)	Yes.
W-B - Visa Waiver for visitor for business, W-T - visitor for pleasure, Visa Waiver Program INA 217	No. 8 CFR 214.1(c)(3)(i) and 214.1(c)(3)(viii)	No, except for change to T and U, using Form I-914 or I-918; INA 248.2(b)	Not Applicable
* Includes questions on Form I-129 and Form I-539 about receipt of public benefits since the nonimmigrant status was approved. Whether the alien must file and I-129 or an I-539 depends on the status the alien is applying to change to or extend. If more than one person is applying using the I-539 application, the Form I-539A, Supplemental Information for Application to extend/Change Nonimmigrant Status, is submitted to provide all of the requested information for each additional applicant listed.			

Table 3. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications[238]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Immediate Relatives of U.S. citizens including spouses, children and parents[239]	Yes. INA 212(a)(4)	Required. INA 212(a)(4)(C)
Family-Based First Preference: Unmarried sons/daughters of U.S. citizens and their children[240]	Yes. INA 212(a)(4)	Required. INA 212(a)(4)(C)
Family-Preference Second: Spouses, children, and unmarried sons/daughters of alien residents[241]	Yes. INA 212(a)(4)	Required. INA 212(a)(4)(C)

[238] Applicants who filed a Form I-485 prior to December 19, 1997 are exempt from the Affidavit of Support requirement. *See* Pub. L. 104-208, div. C., section 531(b), 110 Stat. 3009-546, 3009-675 (Sept. 30, 1996); 8 CFR 213a.2(a)(2)(i) (adjustment applicants) and 213a.2(a)(2)(ii)(B) (applicants for admission). Aliens who acquired citizenship under section 320 of the Act upon admission to the United States are exempt from submitting an affidavit of support. *See* 8 CFR 213a.2(a)(2)(ii)(E); Child Citizenship Act, Pub. L. 106-395, section 101, 114 Stat. 1631, 1631 (Oct. 30, 2000) (amending INA section 320). In addition, the surviving spouses, children, and parents of a deceased member of the military who obtain citizenship posthumously are exempt from a public charge determination. *See* National Defense Authorization Act For Fiscal Year 2004, Pub. L. 108-136, section 1703(e), 117 Stat. 1392, 1695 (Nov. 24, 2003). An alien who meets the conditions of new 8 CFR 212.23(a)(18), (19), (20), or (21) (e.g., certain T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) are exempt from the public charge inadmissibility ground and the affidavit of support requirement, and therefore do not need to File Form I-944 or Form I-864 regardless of what category the alien adjusts under.

[239] Including the following categories: IR-6 Spouses; IR-7 Children; CR-7 Children, conditional; IH-8 Children adopted abroad under the Hague Adoption Convention; IH-9 Children coming to the United States to be adopted under the Hague Adoption Convention; IR-8 Orphans adopted abroad; IR-9 Orphans coming to the United States to be adopted; IR-0 Parents of adult U.S. citizens. Note children adopted abroad generally do not apply for adjustment of status.

[240] Including the following categories: A-16 Unmarried Amerasian sons/daughters of U.S. citizens F-16 Unmarried sons/daughters of U.S. citizens; A-17 Children of A-11 or A-16; F-17 Children of F-11 or F-16; B-17 Children of B-11 or B-16.

[241] Including the following categories: F-26 Spouses of alien residents, subject to country limits; C-26 Spouses of alien residents, subject to country limits, conditional; FX-6 Spouses of alien residents, exempt from country limits; CX-6 Spouses of alien residents, exempt from country limits, conditional; F-27 Children of alien residents, subject to country limits; C-28 Children of -C-26, or C-27, subject to country limits, conditional; B-28 Children of, B-26, or B-27, subject to country limits; F-28 Children of F-26, or F-27, subject to country limits; C-20 Children of C-29, subject to country limits, conditional; B-20 Children of B-29, subject to country limits; F-20 Children of F-29, subject to country limits; C-27 Children of alien residents, subject to country limits, conditional; FX-7 Children of alien residents, exempt from country limits; CX-8 Children of CX-7, exempt from country limits, conditional; FX-8 Children of FX-7, or FX-8,

Table 3. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications[238]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Family Preference Third: Married sons/daughters of U.S. citizens and their spouses and children [242]	Yes. INA 212(a)(4)	Required. INA 212(a)(4)(C)
Family Preference Fourth: Brothers/sisters of U.S. citizens (at least 21 years of age) and their spouses and children[243]	Yes. INA 212(a)(4)	Required. INA 212(a)(4)(C)
Fiancé[244] * admitted as nonimmigrant K-1/K2	Yes. INA 212(a)(4)	Required. INA 212(a)(4)(C)
Amerasians based on preference category -born between December 31, 1950 and before October 22, 1982.[245]	Yes. INA 212(a)(4)	Exempt. Amerasian Act, Pub. L. 97-359 (Oct. 22, 1982).

exempt from country limits; CX-7 Children of alien residents, exempt from country limits, conditional; F-29 Unmarried sons/daughters of alien residents, subject to country limits; C-29 Unmarried children of alien residents, subject to country limits, conditional.

[242] Including the following categories: A-36 Married Amerasian sons/daughters of U.S. citizens; F-36 Married sons/daughters of U.S. citizens; C-36 Married sons/daughters of U.S. citizens, conditional; A-37 Spouses of A-31 or A-36; F-37 Spouses of married sons/daughters of U.S. citizens; C-37 Spouses of married sons/daughters of U.S. citizens, conditional; B-37 Spouses of B-31 or B-36; A-38 Children of A-31 or A-36, subject to country limits; F-38 Children of married sons/daughters of U.S. citizens; C-38 Children of C-31 or C-36, subject to country limits, conditional; B-38 Children of B-31 or B-36, subject to country limits.

[243] Includes the following categories: F-46 Brothers/sisters of U.S. citizens, adjustments; F-47 Spouses of brothers/sisters of U.S. citizens, adjustments; F-48 Children of brothers/sisters of U.S. citizens, adjustments.

[244] Includes the following categories: CF-1 Spouses, entered as fiance(e), adjustments conditional; IF-1 Spouses, entered as fiance(e), adjustments.

[245] Includes the following categories: Immediate Relative AR-6 Children, Amerasian, First Preference: A-16 Unmarried Amerasian sons/daughters of U.S. citizens; Third Preference A-36 Married Amerasian sons/daughters of U.S. citizens; See INA 204(f). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

Table 3. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications[238]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Amerasians, born in Vietnam between 1/1/62-1/1/76 Immediate Relative : AM-6, AR-6 Children Amerasians under Amerasian Homecoming Act, Pub. L. 100-202 (Dec. 22, 1987)[246] - born between 1/1/1962-1/1/1976	No. (I-360 and adjustment) Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202	Exempt. Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202
IW-6 Spouses, widows or widowers	Yes. INA 212(a)(4)	Exempt. 8 CFR 204.2 and 71 FR 35732.
Immediate Relative VAWA applicant, including spouses and children[247]	No. INA 212(a)(4)(E)	Exempt. INA 212(a)(4)(E)
First Preference VAWA B-16 Unmarried sons/daughters of U.S. citizens, self-petitioning B-17 Children of B-16	No. INA 212(a)(4)(C)(i)	Exempt. INA 212(a)(4)(C)(i)
Second Preference VAWA applicant, including spouses and children[248]	No. INA 212(a)(4)(C)(i)	Exempt. INA 212(a)(4)(C)(i)

[246] Includes the following categories: AM-1 principal (born between 1/1/1962-1/1/1976); AM-2 Spouse, AM-3 child; AR-1 child of U.S. citizen born Cambodia, Korea, Laos, Thailand, Vietnam. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[247] Includes the following categories: IB-6 Spouses, self-petitioning; IB-7 Children, self-petitioning; IB-8 Children of IB-1 or IB-6; IB-0 Parents battered or abused, of U.S. citizens, self-petitioning.

[248] Includes the following categories: B-26 Spouses of alien residents, subject to country limits, self-petitioning; BX-6 Spouses of alien residents, exempt from country limits, self-petitioning; B-27 Children of alien residents, subject to country limits, self-petitioning; BX-7 Children of alien residents, exempt from country limits, self-petitioning; BX-8 Children of BX-6, or BX-7, exempt from country limits; B-29 Unmarried sons/daughters of alien residents, subject to country limits, self-petitioning.

Table 3. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications[238]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Third Preference VAWA Married son/daughters of U.S. citizen, including spouses and children[249]	No. INA 212(a)(4)(C)(i)	Exempt. INA 212(a)(4)(C)(i)
* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), permanent departure of the alien, or otherwise as outlined in proposed 8 CFR 213.1(g), if the alien did not receive any public benefits as defined in the proposed rule.		

Table 4. Applicability of INA 212(a)(4) to Employment-Based Adjustment of Status Applications[250]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**

[249] Includes the following categories: B-36 Married sons/daughters of U.S. citizens, self-petitioning B-37 Spouses of B-36, adjustments; B-38 Children of B-36, subject to country limits; Third Preference VAWA; B-36 Married sons/daughters of U.S. citizens, self-petitioning; B-37 Spouses of B-36, adjustments B-38 Children of B-36, subject to country limits; Third Preference VAWA; B-37 Spouses of B-36, adjustments; B-38 Children of B-36, subject to country limits.

[250] An alien who meets the conditions of new 8 CFR 212.23(a)(18), (19), (20), or (21) (e.g., certain T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) are exempt from the public charge inadmissibility ground and the affidavit of support requirement, and therefore do not need to File Form I-944 or Form I-864 regardless of what category the alien adjusts under.

Table 4. Applicability of INA 212(a)(4) to Employment-Based Adjustment of Status Applications[250]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
First Preference : Priority workers[251]	Yes, in general.[252] INA 212(a)(4)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5% or more)[253] in filed Form I-140. INA 212(a)(4)(D), 8 CFR 213a
Second Preference: Professionals with advanced degrees or aliens of exceptional ability[254]	Yes in general.[255] INA 212(a)(4)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5% or more) in filed Form I-140. INA 212(a)(4)(D), 8 CFR 213a

[251] Includes the following categories: E-16 Aliens with extraordinary ability; E-17 Outstanding professors or researchers; E-18 Certain Multinational executives or managers; E-19 Spouses of E-11, E-12, E-13, E-16, E-17, or E-18; E-10 Children of E-11, E-12, E-13, E-16, E-17, or E-18.

[252] If the alien is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5% or more), and the alien, at both the time of filing and adjudication of the Form I-485, also falls under a category exempted under INA section 212(a)(4)(E), 8 U.S.C. 1182(a)(4)(E), (e.g., T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) the alien does not need to file Form I-944 (but is still required to file Form I-864).

[253] Relative means a husband, wife, father, mother, child, adult son, adult daughter, brother, or sister. Significant ownership interest means an ownership interest of five percent or more in a for-profit entity that filed an immigrant visa petition to accord a prospective employee an immigrant status under section 203(b) of the Act. *See* 8 CFR.213a.1.

[254] Includes the following categories: E-26 Professionals holding advanced degrees; ES-6 Soviet scientists E-27 Spouses of E-21 or E-26; E-28 Children of E-21 or E-26.

[255] If the alien is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (five percent or more), and the alien, at both the time of filing and adjudication of the Form I-485, also falls under a category exempted under INA section 212(a)(4)(E), 8 U.S.C. 1182(a)(4)(E), (e.g., T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) the alien does not need to file Form I-944 (but is still required to file Form I-864).

Table 4. Applicability of INA 212(a)(4) to Employment-Based Adjustment of Status Applications[250]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Third: Skilled workers, professionals, and other workers[256]	Yes in general.[257] INA 212(a)(4)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5% or more) in filed Form I-140. INA 212(a)(4)(D), 8 CFR 213a
Fifth: I-526 Immigrant Petition by Alien Entrepreneur (EB-5)[258] INA 203(b)(5), 8 CFR 204.6	Yes. INA 212(a)(4)	Not Applicable[259]
* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), permanent departure of the alien, or upon the fifth year of the alien's anniversary of the adjustment of status, or, if the alien, following the initial grant of lawful permanent resident status, obtains a status that is exempt from the public charge ground of		

[256] Includes the following categories: EX-6 Schedule - A worker; EX-7 Spouses of EX-6; EX-8 Children of EX-6; E-36 Skilled workers; E-37 Professionals with baccalaureate degrees; E-39 Spouses of E-36, or E-37; E-30 Children of E-36, or E-37; EW-8 Other workers; EW-0 Children of EW-8; EW-9 Spouses of EW-8; EC-6 Chinese Student Protection Act (CSPA) principals; EC-7 Spouses of EC-6; EC-8 Children of EC-6.

[257] If the alien is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5% or more), and the alien, at both the time of filing and adjudication of the Form I-485, also falls under a category exempted under INA section 212(a)(4)(E), 8 U.S.C. 1182(a)(4)(E), (e.g., T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) the alien does not need to file Form I-944 (but is still required to file Form I-864).

[258] Includes the following categories: C-56 Employment creation, not in targeted area, adjustments, conditional E-56 Employment creation; I-56 Employment creation, targeted area, pilot program, adjustments, conditional; T-56 Employment creation, targeted area, conditional; R-56 Investor pilot program, not targeted, conditional; C-57 Spouses of C-51 or C-56, conditional; E-57 Spouses of E-51 or E-56; I-57 Spouses of I-51 or I-56, conditional; T-57 Spouses of T-51 or T-56, conditional; R-57 Spouses of R-51 or R-56, conditional; C-58 Children of C-51 or C-56, conditional; E-58 Children of E-51 or E-56; I-58 Children of I-51 or I-56, conditional; T-58 Children of T-51 or T-56, conditional; R-58 Children of R-51 or R-56, conditional.

[259] EB-5 applicants are Form I-526, Immigrant Petition by Alien Entrepreneur, self-petitioners. The regulation at 8 CFR 213a.1 relates to a person having ownership interest in an entity filing for a prospective employee and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

Table 4. Applicability of INA 212(a)(4) to Employment-Based Adjustment of Status Applications[250]		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
inadmissibility, and provided that the alien did not receive any public benefits as defined in the proposed rule.		

Table 5. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Special Immigrant (EB-4)- Religious Workers[260] 8 CFR 204.5(m); INA 101(a)(27)(C)	Yes. INA 212(a)(4)	Not Applicable[261]
Special Immigrant (EB-4) – International employees of US government abroad[262] INA 101(a)(27)(D), 22 CFR 42.32(d)(2)	Yes. INA 212(a)(4)	Not Applicable[263]

[260] Includes the following categories: SD-6 Ministers; SD-7 Spouses of SD-6; SD-8 Children of SD-6; SR-6 Religious workers; SR-7 Spouses of SR-6; SR-8 Children of SR-6.

[261] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers (for example, a religious institution), would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

[262] Includes the following categories: SE-6 Employees of U.S. government abroad, adjustments; SE-7 Spouses of SE-6; SE-8 Children of SE-6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[263] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers (for example, the U.S. armed forces), would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

Table 5. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Special Immigrant (EB-4) Employees of Panama Canal[264] 22 CFR 42.32(d)(3); INA 101(a)(27)(E), INA 101(a)(27)(F), and INA 101(a)(27)(G)	Yes. INA 212(a)(4)	Not Applicable[265]
Special Immigrant (EB-4) - Foreign Medical School Graduates[266] INA 101(a)(27)(H), INA 203(b)(4)	Yes. INA 212(a)(4)	Not Applicable[267]

[264] Includes the following categories: SF-6 Former employees of the Panama Canal Company or Canal Zone Government; SF-7 Spouses or children of SF-6; SG-6 Former U.S. government employees in the Panama Canal Zone; SG-7 Spouses or children of SG-6; SH-6 Former employees of the Panama Canal Company or Canal Zone government, employed on April 1, 1979; SH-7 Spouses or children of SH-6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[265] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers generally would not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

[266] Includes the following categories: SJ-6 Foreign medical school graduate who was licensed to practice in the United States on Jan. 9, 1978; SJ-7 Spouses or children of SJ-6; Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[267] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

Table 5. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Special Immigrant (EB-4) -Retired employees of International Organizations including G-4 International Organization Officer[268] International Organizations (G-4s international organization officer/ Retired G-4 Employee)[269] INA 101(a)(27)(I) and INA 101(a)(27)(L) ; 8 CFR 101.5; 22 CFR 42.32(d)(5); 22 CFR 41.24;22 CFR 41.25	Yes. INA 212(a)(4)	Not Applicable[270]
Special Immigrant (EB-4) -SL-6 Juvenile court dependents, adjustments	No. SIJ are exempt under 245(h).	Not Applicable. INA 245(h)
Special Immigrant (EB-4)- U.S. Armed Forces Personnel[271] INA 101(a)(27)(K)	Yes. INA 212(a)(4)	Not Applicable[272]

[268] Includes the following categories: SK-6 Retired employees of international organizations; SK-7 Spouses of SK-1 or SK-6; SK-8; Certain unmarried children of SK-6; SK-9 Certain surviving spouses of deceased international organization employees.

[269] Includes SN-6 Retired NATO-6 civilian employees; SN-7 Spouses of SN-6; SN-9; Certain surviving spouses of deceased NATO-6 civilian employees; SN-8 Certain unmarried sons/daughters of SN-6.

[270] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

[271] Includes the following categories: SM-6 U.S. Armed Forces personnel, service (12 years) after 10/1/91 SM-9 U.S. Armed Forces personnel, service (12 years) by 10/91; SM-7 Spouses of SM-1 or SM-6; SM-0 Spouses or children of SM-4 or SM-9; SM-8 Children of SM-1 or SM-6.

[272] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

Table 5. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Special Immigrant - International Broadcasters[273] INA 101(a)(27)(M) ; 8 CFR 204.13	Yes - INA 212(a)(4)	Not Applicable[274]
Special Immigrant (EB-4) - Special immigrant interpreters who are nationals of Iraq or Afghanistan[275]	No. Section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006, as amended; Public Law 109–163—Jan. 6, 2006, Section 1244(a)(3) of the National Defense Authorization Act for Fiscal Year 2008, as amended ; Pub. L. 110–181 (Jan. 28, 2008) Section 602(b) of the Afghan Allies Protection Act of 2009, as amended section (a)(2)(C), Pub. L. 111-8 (Mar. 11, 2009)	Exempt. Section 602(b)(9) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8, 123 Stat. 807, 809 (March 11, 2009) which states that INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) do not apply to special immigrant Iraq and Afghan nationals who were employed by or on behalf of the U.S. government (for Section 602(b) and 1244 adjustment applicants who were either paroled into the United States or

[273] Includes the following categories: BC-6 Broadcast (IBCG of BBG) employees; BC-7 Spouses of BC-1 or BC-6; BC-8 Children of BC-6.

[274] For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

[275] Includes the following categories: SI-6 Special immigrant interpreters who are nationals of Iraq or Afghanistan; SI-6, SI-7, SI-8 - spouse and child of SI-6; SQ-6 Certain Iraqis and Afghans employed by U.S. Government SQ-6, SQ-7, SQ-8 Spouses and children of SQ-6; SI-6 Special immigrant interpreters who are nationals of Iraq or Afghanistan; SI-7 Spouses of SI-1 or SI-6; SI-8 Children of SI-1 or SI-6.

Table 5. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
		admitted as nonimmigrants). See Section 1(c) of Pub. L. 110-36, 121 Stat. 227, 227 (June 15, 2007), which amended Section 1059(d) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, 119 Stat. 3136, 3444 (January 6, 2006) to state that INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) do not apply to Iraq or Afghan translator adjustment applicants.
* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, if the alien did not receive any public benefits as defined in the proposed rule.		

Table 6. Applicability of INA 212(a)(4) to Refugee, Asylee, and Parolee Adjustment of Status Applications

Category	Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?*	INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?
Asylees[276]	No. INA 209(c)	Exempt. INA 209(c)
Indochinese Parolees from Vietnam, Cambodia, and Laos IC-6 Indochinese refugees (Pub. L. 95-145 of 1977) IC-7 Spouses or children of Indochinese refugees not qualified as refugees on their own	No. Section 586, Pub. L. 106-429 (Nov. 6, 2000)	Exempt. Section 586, Pub. L. 106-429 (Nov. 6, 2000)
Polish and Hungarian Parolees (Poland or Hungary who were paroled into the United States from November 1, 1989 to December 31, 1991)[277]	No. Title VI, Subtitle D, Section 646(b), Pub. L. 104-208; 8 CFR 245.12	Exempt. Title VI, Subtitle D, Section 646(b), Pub. L. 104-208; 8 CFR 245.12
Refugees[278]	No. INA 207(c)(3); INA 209(c)	Exempt. INA 207; INA 209(c)
Cuban-Haitian Entrant under IRCA- CH-6, CH-7[279]	No. Section 202, Pub. L. 99-603, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a.	Exempt. Section 202, Pub. L. 99-603, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a.

[276] Including the following categories: AS-6 Asylees; AS-7 Spouses of AS-6; AS-8 Children of AS-6; SY-8 Children of SY-6; GA-6 Iraqi asylees; GA-7 Spouses of GA-6; GA-8 Children of GA-6.

[277] Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

[278] Includes the following categories: RE-6 Other refugees (Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (Mar. 17, 1980)); RE-7 Spouses of RE-6; RE-8 Children of RE-6; RE-9 Other relatives.

[279] Note that this program has a sunset date of two years after enactment, however, some cases may still be pending.

Table 6. Applicability of INA 212(a)(4) to Refugee, Asylee, and Parolee Adjustment of Status Applications		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
HRIFA - Principal HRIFA Applicant who applied for asylum before December 31, 1995[280]	No. Section 902 Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.	Exempt. Section 902 Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.
* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, if the alien did not receive any public benefits as defined in the proposed rule.		

Table 7. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? ***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
Diplomats Section 13	Yes. Section 13 of Public Law 85-316 (September 11, 1957), as	Exempt, by statute, as they are not listed in INA 212(a)(4) as a category that requires

[280] Includes the following categories: 1995 - HA-6 Principal HRIFA Applicant; Spouse of HA-6, HA-7 and Child of HA-6, HA-8; Unmarried Son or Daughter 21 Years of Age or Older of HA-6, HA-9 Principal HRIFA Applicant paroled into the United States before December 31, 1995- HB-6; Spouse of HB-6, HB-7; Child of HB-6, HB-8; Unmarried Son or Daughter 21 Years of Age or Older of HB-6 HB-9; Principal HRIFA Applicant who arrived as a child without parents in the United States HC-6; Spouse of HC-6, HC-7; Child of HC-6, HC-8; Unmarried Son or Daughter 21 Years of Age or Older of HC-6, HC-9; Principal HRIFA Applicant child who was orphaned subsequent to arrival in the United States HD-6, Spouse of HD-6, HD-7; Child of HD-6, HD-8; Unmarried Son or Daughter 21 Years of Age or Older of HD-6, HD-9 Principal HRIFA Applicant child who was abandoned subsequent to arrival and prior to April 1, 1998 - HE-6; Spouse of HE-6, HE-7; Child of HE-6, HE-8; Unmarried Son or Daughter 21 Years of Age or Older of HE-6, HE-9. Note that this program has a sunset date of March 31, 2000; however, dependents may still file for adjustment of status.

Table 7. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? ***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
	amended by Public Law 97-116 (December 29, 1981); 8 CFR 245.3.	Form I-864.
Individuals Born in the U.S. under Diplomatic Status (NA-3) 8 CFR 101.3	Yes. INA 212(a)(4)	Exempt. 8 CFR 101.3
Diversity, DV-1 diversity immigrant, spouse and child	Yes. INA 212(a)(4)	Exempt, by statute, as they are not listed in INA 212(a)(4) as a category that requires Form I-864. Diversity visas are issued under INA 203(c) which do not fall under INA 212(a)(4)(C) or (D).
W-16 Entered without inspection before 1/1/82 W-26 Entered as nonimmigrant and overstayed visa before 1/1/82. Certain Entrants before January 1, 1982	Yes. INA 212(a)(4) (except for certain aged, blind or disabled individuals as defined in 1614(a)(1) of the Social Security Act). INA 245A(b)(1)(C)(i) and (a)(4)(a)) – application for adjustment 42 U.S.C. 1382c(a)(1). Special Rule for determination of public charge - See INA 245A(d)(2)(B)(iii).	Exempt, by statute as they are not listed in INA 212(a)(4) as a category that requires an Form I-864

Table 7. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? ***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
T, T-1 victim, spouse, child, parent, sibling INA 101(a)(15)(T), INA 212(d)(13)(A)	No. INA 212(a)(4)(E).	Exempt, by statute as they are not listed in INA 212(a)(4) as a category that requires Form I-864. Adjustment of status based on T nonimmigrant status is under INA 245(l) which does not fall under INA 212(a)(4)(C) or (D).
American Indians - INA 289	No. INA 289	Exempt. INA 289
Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983) KIC - Kickapoo Indian Citizen KIP - Kickapoo Indian Pass	No. Pub. L. 97-429 (Jan. 8, 1983)	Exempt. Pub. L. 97-429 (Jan. 8, 1983)
S (Alien witness or informant)	Yes, but there is a waiver available - INA 245(j); INA 101(a)(15)(S); 8 CFR 214.2(t)(2); 8 CFR 1245.11 (Waiver filed on Form I-854, Inter-Agency Alien Witness and Informant Record)	Exempt. INA 245(j); INA 101(a)(15)(S); 8 CFR 214.2(t)(2); 8 CFR 1245.11 (Waiver filed on Form I-854, Inter-Agency Alien Witness and Informant Record)
Private Immigration Bill providing for alien's adjustment of status	Dependent on the text of the Private Bill.	Dependent on the text of the Private Bill.

Table 7. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? ***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
NACARA (202)[281] Principal NC-6, (NC 7-9) spouse and children	No. Section 202(a), Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.	Exempt. Section 202(a), Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.
NACARA 203 Cancellation of removal (Z-13) Battered spouses or children (Z-14) Salvadoran, Guatemalan and former Soviet bloc country nationals (Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA))	No. Section 203, Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.	Exempt. Section 203, Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.
Lautenberg, LA-6[282]	No. Section 599E, Pub. L. 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255.	Exempt. Section 599E, Pub. L. 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255.
Registry, Z-66 - Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions	No. INA 249 of the Act and 8 CFR part 249	Exempt. INA 249 of the Act and 8 CFR part 249
U, U-1 Crime Victim, spouse, children and parents, and siblings under INA 245(m)	No. INA 212(a)(4)(E)	Exempt. INA 212(a)(4)(E)
Temporary Protected Status (TPS)	No. 8 CFR 244.3(a)[283]	Exempt. 8 CFR 244.3(a)[284]

[281] Note that this program has a sunset date of April 1, 2000; however, some cases may still be pending.
[282] Note that this program sunset date of September 30, 2014, only applies to parole. Eligible applicants may still apply for adjustment of status.
[283] INA section 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii), authorizes USCIS to waive any section 212(a) ground, except for those that Congress specifically noted could not be waived.
[284] *See* INA section 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii).

Table 7. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible		
Category	**Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? ***	**INA 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?**
* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, if the alien did not receive any public benefits as defined in the proposed rule.		

G. Definitions

1. Public Charge

Comment: A commenter stated that the lack of a public charge definition is an issue that must be resolved because immigration is an important feature of America's culture and public policy, heightening the importance of having a consistent definition.

Response: DHS agrees that it is important to define public charge in the rulemaking – public charge is a term that has appeared in U.S. Federal immigration law since at least 1882, but has never been defined by Congress or in regulation. The rule provides a definition for public charge and DHS believes that prior to this rule there has been insufficient guidance on how to determine if an alien who is applying for admission or adjustment of status is likely to become a public charge at any time in the future.

Comment: Commenters stated that the proposed definition of public charge is "without precedent and contrary to the discretion provided to DHS under statute." A commenter stated that the proposed public charge definition relies on outdated case law, and that the 1999 Interim Field Guidance is preferable to the proposed rule, for three reasons. First, the commenter argued that the proposed rule undermined DHS's stated

20-2537
New York v. DHS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2020
(Submitted: August 19, 2020 Decided September 11, 2020)

Docket No. 20-2537

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, STATE OF VERMONT, MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, (ARCHDIOCESE OF NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SECRETARY CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DIRECTOR KENNETH T. CUCCINELLI II, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES OF AMERICA,

Defendants-Appellants.

Before: LEVAL AND LYNCH, *Circuit Judges*.*

In appealing from a preliminary injunction granted to the plaintiffs by the United States District Court for the Southern District of New York (Daniels, *J.*), the defendant Department of Homeland Security ("DHS") moves to stay the preliminary injunction pending resolution of this appeal. We conclude that the moving party has demonstrated

* Circuit Judge Peter W. Hall, originally a member of the panel, is currently unavailable, and the motion is being adjudicated by the two available members of the panel, who are in agreement. *See* 2d Cir. IOP E(b).

likelihood of success on the merits as we doubt that the district court had jurisdiction to issue the preliminary injunction while this Court was considering an appeal from a prior, virtually identical preliminary injunction. Accordingly, we stay the preliminary injunction pending further order of this Court by the panel charged with deciding its merits.

Judith N. Vale, Senior Assistant Solicitor General, State of New York, New York, NY (Letitia James, Attorney General, Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, Matthew Colangelo, Chief Counsel for Federal Initiatives, Elena Goldstein, Deputy Bureau Chief, Civil Rights, Ming-Qi Chu, Section Chief, Labor Bureau, State of New York, New York, NY, William Tong, Attorney General, State of Connecticut, Hartford, CT, Thomas J. Donovan, Jr., Attorney General, State of Vermont, Montpelier, VT, James E. Johnson, Corporation Counsel, City of New York, New York, NY, *on the brief*), *for Plaintiffs-Appellees State of New York, City of New York, State of Connecticut, State of Vermont.*

Jonathan H. Hurwitz, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY (Andrew J. Ehrlich, Elana R. Beale, Robert J. O'Loughlin, Daniel S. Sinnreich, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, Ghita R. Schwarz, Brittany Thomas, Baher A. Azmy, Center for Constitutional Rights, New York, NY, Susan E. Welber, Kathleen Kelleher, Susan Cameron, Hasan Shafiqullah, The Legal Aid Society of New York, New York, NY, *on the brief*), *for Plaintiffs-Appellees Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services, (Archdiocese of New York), Catholic Legal Immigration Network, Inc.*

Gerard Sinzdak, Appellate Staff Attorney, Civil Division, United States Department of Justice, Washington, DC (Joseph H. Hunt, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, DC, Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, Daniel Tenny, Joshua Dos Santos, Appellate Staff Attorneys, Civil Division, United States Department of Justice, Washington, DC *on the brief*), *for Defendants-Appellants United States Department of*

Homeland Security, Acting Secretary Chad F. Wolf, United States Citizenship and Immigration Services, Acting Director Kenneth T. Cuccinelli, United States of America.

William E. Havemann, Office of General Counsel, United States House of Representatives, Washington, DC (Douglas N. Letter, General Counsel, Todd B. Tatelman, Principal Deputy General Counsel, Megan Barbero, Josephine Morse, Adam A. Grogg, Office of General Counsel, United States House of Representatives, Washington, DC, Robert M. Loeb, Thomas M. Bondy, Peter E. Davis, Orrick, Herrington & Sutcliffe LLP, Washington, DC, Rene Kathawala, Orrick, Herrington & Sutcliffe LLP, New York, NY, *on the brief*), *for Amicus Curiae* United States House of Representatives, *in support of Plaintiffs-Appellees*.

PER CURIAM:

On January 27, 2020, the Supreme Court stayed a preliminary injunction issued by the United States District Court for the Southern District of New York (George B. Daniels, *J*.) that had enjoined the Department of Homeland Security ("DHS") from implementing a final rule setting out a new agency interpretation of our immigration law that expands the meaning of "public charge" in determining whether a non-citizen is admissible to the United States. While the appeal of that preliminary injunction was pending before us, the district court issued a new, nationwide, preliminary injunction preventing DHS from enforcing that same rule based on its finding that the COVID-19 pandemic heightened the need for the stay. The initial issue here is whether the district court had jurisdiction to enter a second preliminary injunction, given the then pending appeal of the first injunction. Because DHS has demonstrated likelihood of success on the merits, given our doubt that

the district court had jurisdiction to enter the preliminary injunction while its prior, virtually identical injunction was pending appeal before this Court, we grant DHS's motion to stay.

PROCEDURAL HISTORY

This case involves a challenge to the implementation of a DHS rule that introduced a new framework for determining the admissibility of non-citizens to the United States, expanding the meaning of the "public charge" ground of inadmissibility, *see* 8 U.S.C. § 1182(a)(4), to include significantly more people than would have been found inadmissible under previous administrative understandings of that ground. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("the Rule" or "the Final Rule"). In October 2019, the district court enjoined DHS from implementing the Rule anywhere in the United States, in a set of orders in two now consolidated cases. *New York v. Dep't of Homeland Sec.*, No. 19-cv-7777 (S.D.N.Y.); *Make the Road New York v. Cuccinelli*, No. 19-cv-7993 (S.D.N.Y.). Several other district courts, in the District of Maryland, the Northern District of Illinois, the Northern District of California, and the Eastern District of Washington, issued similar preliminary injunctions prohibiting DHS's enforcement of the Rule nationwide. *See CASA de Maryland, Inc. v. Trump*, No. 19-cv-2715 (D. Md.); *Cook Cty. v. Wolf*, No. 19-cv-6334 (N.D. Ill.); *City and Cty. of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.); *California v. Dep't of Homeland Sec.*, No. 19-cv-4975 (N.D. Cal.); *Washington v. Dep't of Homeland Sec.*, No. 19-cv-5210 (E.D. Wash.).

DHS appealed the October 2019 preliminary injunctions, and a motions panel of this Court denied its motion to stay the injunctions pending its appeal. *New York v. U.S. Dep't of Homeland Sec.*, No. 19-3591, 2020 WL 95815 (2d Cir. Jan. 8, 2020). While that appeal was pending in this Court, the Supreme Court granted DHS's application for a stay of the injunction:

> [The] October 11, 2019 orders granting a preliminary injunction are stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Second Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Dep't of Homeland Sec. v. New York, --- U.S. ---, 140 S. Ct. 599, 206 L.Ed.2d 115 (2020). With the district court's preliminary injunctions thus stayed, the Rule went into effect nationwide.

In April 2020, the Plaintiffs asked the Supreme Court to modify its stay of the injunction during the pendency of the national emergency caused by the COVID-19 virus. The Supreme Court denied the request but suggested an alternative route to potential relief, noting that "[t]his order does not preclude a filing in the District Court as counsel considers appropriate." *Dep't of Homeland Sec. v. New York*, --- S. Ct. ---, 206 L.Ed.2d 847, 2020 WL 1969276, at *1 (Apr. 24, 2020).

The Plaintiffs returned to the district court. Notwithstanding that the court had already granted a preliminary injunction against implementation of the Rule, the merits of which were on appeal before this Court, and which had been stayed by the Supreme Court,

the Plaintiffs filed a new motion for a preliminary injunction. They argued that the COVID-19 pandemic dramatically increases the public harm caused by the Rule, because the Rule deters non-citizens from getting tested for COVID-19 or seeking treatment, thus impeding efforts to prevent COVID-19's spread, and puts the non-citizens themselves at a particular risk given that they make up a significant portion of the work force in essential industries that have continued to work throughout the pandemic and been disproportionately impacted by COVID-19. DHS opposed the motion, asserting that the district court lacked jurisdiction to issue a preliminary injunction while DHS's appeal of the initial preliminary injunction was before this Court.

The district court issued a new injunction on July 29, 2020, concluding that the Rule "impedes public efforts . . . to stem the spread of the disease." *New York v. U.S. Dep't of Homeland Sec.*, No. 19-cv-7777, 2020 WL 4347264, at *10 (S.D.N.Y. July 29, 2020). It found that it had jurisdiction to issue another preliminary injunction despite "[o]verlapping legal issues" with the prior injunction then pending on appeal before us, because of the new COVID-19-related evidence and because the district court is better suited to make factual findings and provide narrowly tailored relief than an appellate court. *Id*. at *9. It opined that this new, nationwide preliminary injunction did not contravene the Supreme Court's stay of the initial preliminary injunction, reasoning that there was "no indication that the Supreme Court disagreed with [its] analysis of the merits," and that the Supreme Court's stay was issued "on a significantly different factual record." *Id*. Although the district court concluded that it had jurisdiction to issue a new preliminary injunction, it

acknowledged the possibility that we might have a different opinion and explained that "[s]hould the Second Circuit determine that this Court does not presently have jurisdiction to issue this injunction and remand[ ] this case for the purpose of further considering the Plaintiffs' present motion, this Court would issue a preliminary injunction based on factual findings as set forth herein." *Id*. at *14.

Just days later, on August 4, 2020, we ruled on DHS's appeal of the initial preliminary injunctions entered in October 2019. *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020). Addressing only those preliminary injunctions, we affirmed the district court's rulings in part. We agreed with the district court that the Plaintiffs are likely to succeed on the merits of their claim that the Rule is arbitrary and capricious, that the Plaintiffs had shown that they would suffer irreparable injury if the Rule's implementation was not enjoined, and that the public interest favored a preliminary injunction given DHS's acknowledgment that the Rule "will likely result in '[w]orse health outcomes, including increased prevalence of obesity and malnutrition, . . . [i]ncreased prevalence of communicable diseases, . . . [i]ncreased rates of poverty and housing instability[,] and [r]educed productivity and educational attainment.'" *Id*. at 87 (quoting 83 Fed. Reg. at 51,270). Although we therefore upheld the preliminary injunctions blocking the Rule, we narrowed the scope of the injunctions to the States within this Circuit – New York, Connecticut, and Vermont – each of which had joined in this suit and demonstrated that it and its citizens would suffer irreparable injury from the Rule. We noted the skepticism of the Supreme Court toward nationwide injunctions in these very

cases, *see Dep't of Homeland Sec. v. New York*, 140 S. Ct. at 599-601 (Gorsuch, *J.*, concurring in the grant of stay), and concluded that, to the extent that the issuance of such injunctions would in some cases be appropriate, the "issuance of unqualified nationwide injunctions is a less desirable practice where, as here, numerous challenges to the same agency action are being litigated simultaneously in district and circuit courts across the country. It is not clear to us that, where contrary views could be or have been taken by courts of parallel or superior authority, entitled to determine the law within their own geographical jurisdictions, the court that imposes the most sweeping injunction should control the nationwide legal landscape." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 88. Thus, we found no need for a broader injunction, particularly given the Supreme Court's stay, which remains in effect "not only through our disposition of the case, but also through the disposition of DHS's petition for a writ of certiorari, should DHS seek review of this decision." *Id*.

DHS now appeals the district court's second nationwide preliminary injunction. Currently before us is its motion to stay the new injunction and allow the Rule to remain in effect during our consideration of this new appeal.

DISCUSSION

The factors relevant in assessing a motion for a stay pending appeal are the applicant's "strong showing that he is likely to succeed on the merits," irreparable injury to the applicant in the absence of a stay, substantial injury to the nonmoving party if a stay is issued, and the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The first

two factors are the most critical, but a stay "is not a matter of right, even if irreparable injury might otherwise result"; rather, a stay is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of discretion." *Id*. at 433-34 (internal quotation marks omitted).

In our view, DHS has shown that it is likely to succeed on the merits, primarily because we doubt that the district court had jurisdiction to issue the July 29 preliminary injunction while the appeal of its virtually identical prior preliminary injunction was pending before this Court. We also doubt whether the nationwide application of the injunction was proper in light of the considerations we set forth in *New York v. Dep't of Homeland Sec.*, which was not available to the district court at the time it issued the second injunction. Finally, we conclude that DHS has shown irreparable injury from the district court's prohibition on effectuating the new regulation.

The filing of a "timely and sufficient notice of appeal" divests the district court of jurisdiction "as to any matters involved in the appeal" or "as to the matters covered by the notice." *Leonhard v. U.S.*, 633 F.2d 599, 609-10 (2d Cir. 1980); *accord Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989)). In our view, the Supreme Court's response to Plaintiffs' April 2020 motion to lift or modify the stay of the initial preliminary injunction, that its "order does not preclude a filing in the District Court as counsel considers appropriate," *Dep't of*

Homeland Sec. v. New York, 2020 WL 1969276, at *1, does not mean the district court was vested with jurisdiction.

We have held that "once a notice of appeal has been filed, a district court may take actions only 'in aid of the appeal or to correct clerical errors.'" *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. E. Air Lines, Inc.*, 847 F. 2d 1014, 1017 (2d Cir. 1988) (quoting *Leonhard*, 633 F.2d at 609-10)). We are not persuaded by the district court's reliance on instances where we have found district courts had jurisdiction during the pendency of an appeal. In *Webb v. GAF*, 78 F.3d 53 (2d Cir. 1996), for example, we dismissed an appeal of a preliminary injunction as moot, when during the pendency of the appeal of the preliminary injunction, the district court decided pending post-trial motions in accordance with jury determinations, and made a dispositive ruling on the merits of the case that rendered the injunction permanent. *See Webb*, 78 F.3d at 53-56. *Webb* is not analogous to the instant case: There the district court proceeded with the case on the merits, which resulted in a permanent injunction that mooted the preliminary relief that was the subject of the appeal; here, in contrast, the district court undertook to reconsider the very preliminary injunction that was under review in this Court, and simply provided new reasons to justify the preliminary relief itself.

Nor, in our view, does *International Ass'n of Machinists and Aerospace Workers, AFL-CIO*, support the district court's exercise of jurisdiction. There, we held that where an appeal of an injunction is pending, Federal Rule of Civil Procedure 62 grants the district court specific authority to "suspend, modify, restore, or grant an injunction during the

pendency of the appeal," but that the Rule should be "narrowly interpreted to allow district courts to grant only such relief as may be necessary to preserve the status quo." 847 F.2d at 1018 (quoting Fed. R. Civ. P. 62(c)). Here, the district court did not attempt to preserve the status quo. In January, the Supreme Court stayed the initial preliminary nationwide injunctions in their entirety "pending disposition of the Government's appeal in the United States Court of Appeals for the Second Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. at 599. The district court's injunction thus disrupted the status quo by imposing an injunction where the Supreme Court had stayed the preexisting injunctions.

Nor did our August 4, 2020, ruling on the merits of the district court's October 2019 preliminary injunction retroactively cure the district court's apparent lack of authority. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (stating that the filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal"). Our ruling addressed the merits of the original preliminary injunction that had been stayed by the Supreme Court. Our ruling affirmed the grant of preliminary relief but limited its scope. We did not address – nor did the district court – the jurisdictional impact of the Supreme Court's stay pending a timely petition by the Government for a writ of certiorari. We did, however, modify the injunction to limit its reach to the three plaintiff states that make up this Circuit. Whether or not the pandemic affects the balance of equities favoring preliminary relief, it is not

obvious that the effects of the pandemic bear on the considerations that led us to modify the district court's initial injunction.

Accordingly, we conclude that DHS has shown a likelihood of success on the merits based primarily on the district court's apparent lack of jurisdiction to issue the preliminary injunction during the appeal of its prior, virtually identical injunction (coupled with DHS's showing of irreparable harm resulting from its inability to enforce its regulation).

CONCLUSION

For the foregoing reasons, it is ORDERED that the district court's July 29, 2020 grant of a preliminary injunction is STAYED pending further order of this Court. The merits of this appeal will be considered by another panel of this Court. The views expressed herein on the question whether the district court had jurisdiction to enter the order appealed from and on the nationwide scope of the injunction are intended solely as informing our assessment of whether the moving party demonstrated likelihood of success on the merits and are not intended to bind the merits panel on that question.

Greg McLawsen, Esq.

Greg McLawsen is an attorney based in Washington State who represents plaintiffs in lawsuits to enforce rights under the Form I-864, Affidavit of Support. Through partnerships with local lawyers, he represents clients in all 50 states. Greg is the author of numerous articles about I-864 enforcement lawsuits and routinely speaks on the topic around the country.

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Lisa D. Ramirez is a California State Bar Immigration and Nationality Law Specialist and notably one of the first women and the first Spanish speaking specialist in Orange County. She is a founding partner of U.S. Immigration Law Group, LLP where her practice focuses on I-9 investigations and audits, establishing compliance programs for companies, and obtaining various visas for professional athletes, artists, scientists, and religious workers. Additionally, she supports family-based immigration through petitions and waivers, naturalization, and removal defense in Federal Immigration Court.