

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).