Recovering Immigration Financial Support

The definitive guide to enforcing the I-864, Affidavit of Support

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This book is for sale at http://leanpub.com/immigration

This version was published on 2015-07-01

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Introduction

If there is a single immigration law issue that family law attorneys must understand it is the Form I-864, Affidavit of Support. This form may require your U.S. citizen client to pay financial support to a foreign national spouse for the rest of his life. 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.[1] The form may require payment of financial support for an unlimited period of time, even when a marriage was short lived.

The I-864 will have been filed in any marriage-based immigration process.[2] The document is required for a noncitizen to overcome inadmissibility due to a likelihood of becoming a "public charge."[3] Unlike its unenforceable predecessor,[4] the I-864 purports to be a binding contract between a U.S. citizen "sponsor" and the U.S. government.[5].

A note regarding gendered pronouns. In lieu of alternating gendered pronouns, as is this author's customary practice, the following convention will be used in this manuscript, beneficiaries and sponsors will be assigned the feminine and masculine, respectively.

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[1] *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).

[2] NO. WGC-13-916, 2014 U.S. Dist. LEXIS 42522 (Dist. M.D. Mar. 28, 2014).

[3] *Id.*at 2-3.

[4] *Id.*at 4.

[5] *Id.*at 15.

Chapter 1 – Where does the I-864 come from?

Context overview

U.S. immigration law is a petition-based system. For someone wishing to move permanently to the country there is no general "line" to 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[6] – think of this as a type of invitation from the U.S. entity or individual to the foreign national. The issues discussed in this book 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 screened through a laundry list of statutory grounds of inadmissibility. These range from crime-related grounds to health-related grounds.[7] A long-standing ground of inadmissibility has barred an individual likely to become a "public charge."[8] 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).[9] A variety of factors are considered in the public charge determination.[10] Since 1996, however, immigration petitioners have been required to promise financial support to certain classes of foreign nationals.[11] The tool by which this is accomplished is the subject of this book – the I-864, Affidavit of Support. As with all U.S. immigration forms, the current version of the I-864[12] can be downloaded free of charge on the USCIS website[13].

The I-864, Affidavit of Support is an immigration form submitted by the U.S. immigration sponsor, guaranteeing to provide financial support, if needed, to the foreign national beneficiary. As discussed below, it is an enforceable contract, as to which the immigrant has standing as third party beneficiary to bring suit in a competent tribunal. The sponsor promises to maintain the intending immigrant at 125% of the Federal Poverty Guidelines (hereinafter "Poverty Guidelines") and to reimburse government agencies for any means-tested benefits paid to the noncitizen beneficiary.[14] This is

[6] *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).

[7] NO. WGC-13-916, 2014 U.S. Dist. LEXIS 42522 (Dist. M.D. Mar. 28, 2014).

[8] *Id.*at 2-3.

[9] *Id.*at 4.

[10] *Id.*at 15.

[11] *Id.*at 16.

[12] *Id.*at 23.

[13] http://uscis.gov

[14] *Id.*at 23.

a substantial level of support: $14,714 annually ($1,226 per month) for a single-person household; $5,200 annually ($433 per month) for each additional household member.[15] 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.[16] 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.[17]

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 a spouse.[18] Any immigration petition filed since 1996 for a spouse will have required an I-864 prior to approval. The limited exceptions to this broad rule are beyond the scope of this book and are rare in application.

Those applying for a fiance visa are not required to produce a Form I-864 at the time they are processed by the consular post.[19] 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.[20]

The I-864 is also required in a handful of employment-related contexts, where a U.S. employer has petitioned for the foreign national.[21] 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 beneficiaries arise in family-based petition processes. Any time an individual has achieved immigration status in the U.S. based on a family relationship one should assume the immigrant is the beneficiary of an I-864.

Practitioners should carefully distinguish the Form I-*134* Affidavit of Support.[22] Unlike the Form I-864, courts have determined that the Form I-134 is not enforceable against an immigration sponsor.[23] 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 and other non-immigrant (i.e., temporary) visa cases. (Although a fiancée visa leads immediately to the opportunity to apply for permanent residency, following marriage to the U.S. petitioner, the visa is classified as non-immigrant).

[15]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).

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

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

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

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

[20]*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.[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).

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

[22]*Id.*

[23]*Id.*at 11.

Chapter 2 – Understanding the I-864 as a contract.

The I-864 sponsor makes two enforceable promises to the United States government. First, he promises to maintain the intending immigrant at 125% of the Federal Poverty Guidelines ("Poverty Guidelines").[24] The Form I-864 expressly provides:

> If an intending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed, then, until your obligations under the Form I-864 terminate, you must... Provide the intending immigrant any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household size (100 percent if you are the petitioning sponsor and are on active duty in the U.S. Armed Forces and the person is your husband, wife, unmarried child under 21 years old).[25]

This is a substantial level of support. Under 2015 Poverty Guidelines for it would require support of $14,713 annually ($1,226 per month) for a single individual, adding $5,200 annually for each additional family member.[26]

Second, the I-864 sponsor promises to reimburse the cost of any means-tested public benefits paid to the beneficiary.[27] If a Federal, State or local agency provides such benefits to the I-864 sponsor, the sponsor may be sued for the cost of the benefits.[28] This second promise within the Form I-864 is beyond the scope of this manuscript. Anecdotally it appears agencies rarely pursue sponsors for the costs of means-tested benefits.

The remainder of this Chapter deals with the details of the sponsor's contractual duties to the I-864 beneficiary.

Duration of obligation

The sponsor's support duty is of indefinite duration, lasting until the first occurrence of five events set forth in the I-864. Under the terms of the I-864, only five specified events end the sponsor's support obligations: the beneficiary

[24] *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).

[25] NO. WGC-13-916, 2014 U.S. Dist. LEXIS 42522 (Dist. M.D. Mar. 28, 2014).

[26] *Id.*at 2-3.

[27] *Id.*at 4.

[28] *Id.*at 15.

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 [i.e., deported] seeks permanent residency based on a different I-864; or
5. dies.[29]

It is settled that a couple's separation or *divorce does not terminate the sponsor's duty.*[30]

Conditions precedent. A condition precedent is an event that must occur before an obligor has a duty to perform on a contract.[31] Courts have grappled with several possible preconditions to a beneficiary's right to sue on the I-864.

A beneficiary must have achieved lawful permanent resident (LPR) status in order to sue for support. The federal regulations clearly state that support obligations commence when the beneficiary becomes an LPR.[32] Additionally, 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.[33] 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.

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.[34] 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."[35] 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…"[36] Comparing the paragraphs, it is clear that receipt of means-tested benefits is a pre-condition only to an agency seeking reimbursement, not to an action by the noncitizen-beneficiary for support.

Terminating obligation - quarters of work. Of the five events that terminate a sponsor's obligations] under the I-864 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

[29] *Id.*at 16.

[30] *Id.*at 23.

[31] *Id.*at 23.

[32] 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).

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

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

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

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

purposes of determining when a sponsor's support duty has terminated.[37] 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.[38] Were a beneficiary and sponsor both gainfully employed, support duties could terminate in five rather than ten years.

Defenses.

Sponsors have tested a variety of traditional contract law defenses in I-864 lawsuits: courts have rejected all categorical defenses to the I-864 actions generally; fact-specific defenses pose an extremely steep burden and have almost always failed.

Lack of consideration (illusory contract).

If a party to a would-be 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.[39] Thus in order to constitute a binding contract, both parties to the I-864 – the Sponsor and the U.S. government – must be committing themselves to delivering some sort of value to the other party. The consideration provided by the Sponsor is clear: his pledge to provide substantial financial support under the terms of the I-864. But exactly what commitment is pledged by the government in exchange for the Sponsor's support?

Since its initial promulgation in 1997, the wording of the I-864 form has been tweaked to alter the exact return promise made by the government.[40] In a prior iteration, the Form recited that the Sponsor's promise was made in exchange for allowing the intending immigrant to overcome 'public charge inadmissibility:[41]

> *I submit this affidavit of support in consideration of the sponsored immigrant(s) not being found inadmissible to the United States under section 212(a)(4)(C) (or 212(a)(4)(D) for an employment-based immigrant) and to enable the sponsored immigrant(s) to overcome this ground of inadmissibility.*[42]

As discussed above, under the Immigration and Nationality Act, most foreign nationals are inadmissible to the U.S. if they are determined likely to become a public charge, that is, a drain

[37] *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.[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).

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

[39] *Id.*

[40] *Id.*at 11.

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

[42] *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).

on public resources. The respected immigration scholar-practitioner, Charles Wheeler, has pointed out that this return promise may be illusory.[43] The operative provisions of the immigration statute reserve to an immigration officer the discretion to find a noncitizen inadmissible on public charge grounds regardless of a properly executed I-864.[44] Hence, it appears the government's return promise on the I-864 was to waive public charge inadmissibility… unless it elected not to.

No court, however, has held that the government's promise on the prior iteration of the Form I-864 was illusory. The language quoted above shows two conjunctive promise by the government: the first is to exempt the beneficiary from the statutory provisions, under which non-citizens are categorically inadmissible unless they present an executed I-864; the second is to allow the beneficiary to overcome public charge inadmissibility. The second of these two promises is vulnerable to Mr. Wheeler's critique, as the immigration authorities can – and do – determine that non-citizens are inadmissible on public charge grounds despite having presented I-864s. But the first promise – allowing the beneficiary to overcome a *per se* basis for denial by lacking an I-864 – does represent a thing of value. A federal district court, in *Stump v. Stump*, readily concluded that the government's promise was non-illusory.[45] Subsequent iterations of the I-864, beginning in September 2011, have changed the recital of consideration made in exchange for the Sponsor's pledge of financial support. The Form now reads, "The intending immigrant's becoming a permanent resident is the 'consideration' for the contract."[46] Courts have yet to address whether the revised Form is vulnerable to attack as lacking consideration.

Fraud.

Sponsors have attempted to avoid I-864 liability by arguing they were fraudulently induced to sign Affidavits of Support. Thus far all such defenses or counterclaims have died at summary judgment. No 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.

In *Farhan v. Farhan* the husband-sponsor asserted that the immigrant-beneficiary married him solely for immigration purposes.[47] 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.[48] The parties disagreed, however, about the subjective intent behind the marriage and the cause of its breakdown. Because of the factual dispute over the immigrant-beneficiary's intent to deceive, the sponsor's motion for summary judgment was denied. Since a fraud defense will turn

[43] Shah v. Shah, Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596, at 11(D.N.J. Jan. 14, 2014).

[44] 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).

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

[46] See, e.g., supra at text accompanying notes 69-75.] Where a prenuptial agreement waives a beneficiary's rights under the Affidavit, is it unenforceable as against public policy?[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").

[47] *Id.* at 1019.

[48] *Id.*

on the subjective intentions of the immigrant-beneficiary, it would seem virtually impossible for a sponsor-defendant to prevail at summary judgment.[49]

In dicta, one federal district court has suggested that a defendant-sponsor waived the defense of fraud by failing to assert fraud in a prior dissolution action.[50] In *Erler v. Erler*, the district court held that the defendant-sponsor had failed to provide "sufficient" evidence of fraud at summary judgment.[51] 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." As discussed in below, other 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. *Erler* suggests the possibility that a sponsor, too, may face preclusion if he fails to raise the issue of fraud in a divorce proceeding.

Unconscionability.

As discussed above, 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 often lack full appreciation for the solemnity of their obligations at the time they execute a stack of immigration forms for their beneficiary family member.[52] In this environment, sponsors have argued to courts that the obligations imposed by the I-864 are so harsh as to render the agreement unconscionable.[53] To date, these arguments have failed.

Baines v. Baines is the leading case discussing the alleged unconscionability of the Affidavit of Support.[54] In *Baines*, 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, presenting

[49] *Id.*

[50] *Id.* at 1020.

[51] 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).

[52] *See, e.g.*, Varnes, supra note 120,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").

[53] *See* Howard Rich, *The Stunning, Sudden Reversal of Economic Freedom in America* (Sep. 25, 2012),

[54] 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, *supra*, at 7. *Cf.* Younis v. Farooqi, 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).

him with the Hobson's choice of signing the form or losing contact with his wife.[55] Yet considering the exchange at the time it was made, the Court found it reasonable that the sponsor would want to support his wife in the immigration process, as well as financially (he was doing so already).[56]

Indeed, in prenuptial contracts couples routinely commit to substantial financial obligations – even duties of personal performance… or non-performance[57] – yet these agreements are generally enforceable.[58] 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.[59] Note that any fact pattern severe enough to rise to the level of unconscionability would likely raise questions not only relating to the bonafides of the marriage, but of deportable fraud.[60]

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.[61] 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.[62]

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.[63] This was a battle lost at trial – the appellate court refused to reweigh the evidence, ending the argument.

Calculation of 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

[55] *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-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).

[56] *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).

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

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

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

[60] *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) ("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").

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

[62] *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")

[63] 8 U.S.C. § 1183a(a)(1)(C).

year at issue against the 125% of Poverty Guideline threshold for that year.[64] But the devil, naturally, is in the details.

Income

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]."[65] 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.[66] 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. regulations define income by reference to federal income tax liability.[67] 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.[68]

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.[69] In *Nasir v. Shah* the Court held that the plaintiff-beneficiary was not entitled to additional support to make up for personal debts.[70] 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.[71]

In *Nasir v. Shah* - a separate action federal district court in California - the court briefly considered whether an immigrant-beneficiary's unemployment insurance payments qualified as "income" for purposes of offsetting his sponsors' I-864 support obligations.[72] The immigrant-beneficiary provided no authority for his argument that such payments are not income, and the court instead followed the defendant citation to Internal Revenue Service (IRS) guidelines, characterizing such payments as taxable income.[73] The court correctly interpreted the term income by referencing IRS guidelines, as

[64] *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)).

[65] 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).

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

[67] *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").

[68] *Id.*,at 8.

[69] *Id.*,at 6.

[70] 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").

[71] 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). In *Vavilova v. Rimoczi*, the magistrate 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."*Id.*, at 7-8.

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

[73] *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)).

the regulations underlying the I-864 expressly make that cross-reference.[74] As discussed throughout this Chapter 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.

Household size

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.[75] 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.[76] Instead, the Department of Health and Human Services defers to programs that rely on the Guidelines for administering various benefits.[77] Indeed, the I-864 regulations do provide a definition of household size,[78] but the definition is made "for the express purpose of determining whether the intending sponsor's income is sufficient to suppose the intending immigrant."[79] 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.[80]

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.[81]

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[74] *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).

[75] 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).

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

[77] *Id.*,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?

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

[79] *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).

[80] 8 C.F.R. § 213a.1.

[81] *Id.*

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.[82] 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[83] since, among other reasons, the Guidelines make clear that household definition is context-specific.[84] 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.[85] 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."[86]

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."[87] Where an immigrant "lives alone, or only temporarily with others, she should receive payments based on a one-person household."[88] 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.[89]

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.[90]

In *Villars v. Villars*, the Supreme Court of Alaska addressed another aspect of calculating the requisite support level.[91] 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.[92] The annually-published Guidelines are identical for the contiguous 48 states, but higher for the states of Alaska and Hawaii.[93] When the beneficiary later alleged the sponsor had fallen behind with his support obligations, a trial was held.[94]

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

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

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

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

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

[87]*Id.*

[88]*Id.*

[89]*Id.*

[90]*Id.*

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

[92]*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., 424 U.S. 800.

[93]*Id.*at 9.

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

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).[95] While the INA does not expressly set forth this approach,[96] 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.[97]

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.[98] Rather, the court delved into a careful analysis of precisely what financial benefits the record demonstrated that she had received.[99] As the record was not adequately clear on this account, a remand was required to assess the appropriate amount to offset the sponsor's support payments.[100] 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.

Duty to mitigate

In *Liu v. Mund*, the Seventh Circuit held that an I-864 beneficiary has no duty to mitigate damages by seeking employment.[101] Though not actually a "duty" as such, a party generally "cannot recover damages for a loss that he could have avoided by reasonable efforts."[102] While not the first case to consider the issue, *Liu* is the most thorough treatment to date.[103] 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.[104] 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.[105] Instead, the decisive analytical factor was the clear statutory purpose behind the I-864: to prevent the noncitizen from becoming a public charge.[106] 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."[107]

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[95] *Id.*

[96] *Id.*

[97] *Cf.* 18 WRIGHT § 4406.

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

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

[100] *Id.* at 327.

[101] *See, e.g.*, Nasir v. Shah, No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207, at*15 (S.D. Ohio Sept. 21, 2012) ("[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]").

[102] 2:14-cv-00110-JAM-DAD, 2014 WL 1400959 (E.D.Cal.,2014) (Order Granting Defendant's Motion to Dismiss).

[103] *Id.*at 2.

[104] *Id.*

[105] *Id.*

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

[107] *Id.*

In *Liu* the government, as amicus, argued the Court should look to the common law duty to mitigate.[108] 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.[109] Neither of those analytic moves are guaranteed to find traction elsewhere. States generally do have common law doctrines imposing a duty to mitigate damages,[110] and this duty includes using reasonable efforts to seek employment – in the case of wrongful discharge, for example.[111] Moreover, other federal courts have looked to the common law doctrine in the state where the federal action was brought.[112] 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.[113]

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.[114] In *Love v. Love*, the Superior Court of Pennsylvania followed similar moves to the Seventh Circuit in *Liu*.[115] Noting the lack of definition for "income" under the INA, the *Love* Court noted the "narrow" definition under state domestic code and the Code of Federal Regulations.[116] 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."[117] 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.[118]

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."[119] 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.[120] Following the language of the Affidavit, the plaintiff-

[108] *Id.*

[109] 332 P.3d 1016 (Wash. App. Div. II 2014).

[110] *Id.* at 1020. As phrased, the court's statement is non-responsive to concerns over claim preclusion, as the doctrine attaches to claims that might have been litigated rather than those which in fact were litigated.

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

[112] No. 1:10 CV 78, 2011 U.S. Dist. LEXIS 67501,at 11 (N.D. Ind. June 21, 2011).

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

[114] 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).

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

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

[117] *Id.*at 8.

[118] 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).

[119] 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).

[120] 8 C.F.R. § 213a.2(b)(1).

beneficiary is entitled to fees only if she prevails and a judgment is entered.[121] 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.[122] In Panchal, the appellate court upheld the trial judge's decision to reduce fees awarded to a plaintiff-beneficiary.[123] 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.[124] 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.

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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[121] *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).

[122] 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).

[123] 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.

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

Chapter 3 - Enforcing the I-864

Every court to consider the issue has held that an I-864 beneficiary has standing to bring a contract lawsuit against her sponsor for financial support. 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.[125] 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.[126]

I-864 beneficiaries have their choice of forums in which to enforce their rights. 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.[127] While personal jurisdiction appears to have posed little trouble,[128] a number of procedural issues have arisen for noncitizen-beneficiaries seeking to litigate against sponsors. State courts have unanimously found subject matter jurisdiction over a claims by I-864 beneficiaries against their citizen sponsors.[129] 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.[130] 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.

Proving up the contract.

The context in which the I-864 is executed has proved a logistical hurdle for litigants seeking to prove the existence of the enforceable contract.[131] 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. 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 (hereinafter FOIA) request. As a practical matter, however, this may pose a challenge, given the lengthy processing times for FOIA requests to the USCIS.[132] 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

[125] *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).

[126] NO. WGC-13-916, 2014 U.S. Dist. LEXIS 42522 (Dist. M.D. Mar. 28, 2014).

[127] *Id.*at 2-3.

[128] *Id.*at 4.

[129] *Id.*at 15.

[130] *Id.*at 16.

[131] *Id.*at 23.

[132] *Id.*at 23.

personal records of the immigrant-beneficiary.[133] 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.

Where 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 as to the conflicts of interest that may arise when an attorney represents both a sponsor and beneficiary.[134] It has 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 the beneficiary client will have a proprietary right to obtain a copy of the form.

Spousal maintenance

Some courts have allowed I-864 financial obligations to be bootstrapped into spousal maintenance, although this appears to be the minority approach. 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.[135] 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.[136] Another difference might be the ability to discharge a contract judgment in bankruptcy proceedings. For a discussion of discharge of I-864 debts in bankruptcy proceedings see below.

In *Love v. Love* a Pennsylvania trial court was reversed for refusing to "apply" the I-864 when setting a spousal support obligation.[137] 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.[138] The trial court had relied on a state precedent opinion for the proposition that contractual agreements

[133] 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).

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

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

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

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

[138] *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.[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).

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 the option to pursue either.[139] 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.[140] Note that some state courts have held that the proscription on debt imprisonment is inapplicable to enforcement of spousal maintenance.[141]

By contrast, in *Greenleaf v. Greenleaf* a Michigan court held that a lower court erred by incorporating the I-864 into a support order.[142] Under Michigan law, support awards are made in equity on consideration of 14 enumerated factors. [143] 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.[144]

Similarly, in *Matter of Khan* an intermediate Washington State appeals court held that a trial court did not abuse its discretion by limiting the duration of maintenance based on the I-864.[145] In *Matter of Khan* the trial court considered the I-864 and ordered temporary maintenance of $2,000 expressly based on existence of the I-864.[146] The beneficiary appealed, arguing that the trial court should not have limited the duration of the support, since it was based on the I-864 obligation which lasts potentially indefinitely. Instead, she argued, the courts should have based the duration based on the five events stated in the I-864 that end the support obligation.[147]

The court of appeals disagreed with the beneficiary, citing three reasons for why it was not appropriate to use alimony to enforce the I-864 support duty. First, the court found there was no conflict between state alimony rules and the I-864 obligations. Rather, the court held that state-ordered alimony are independent obligations.[148] Second, the court looked at the Washington statute governing alimony and found that none of the factors concerned "one spouse's contractual obligation under federal immigration law."[149] Third – and very importantly for I-864 beneficiaries – the court rejected the concern that the beneficiary could not bring a separate suite to enforce the support obligation.[150] Other courts have found that a beneficiary cannot bring a separate lawsuit for I-864 support after arguing for such support in a divorce case. But the *Khan* court specifically held that the beneficiary could bring a different lawsuit to enforce her I-864 rights because the divorce court

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

[140]*Id.*

[141]*Id.*at 11.

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

[143]*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).

[144]Shah v. Shah, Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596, at 11(D.N.J. Jan. 14, 2014).

[145]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).

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

[147]See, e.g., supra at text accompanying notes 69-75.] Where a prenuptial agreement waives a beneficiary's rights under the Affidavit, is it unenforceable as against public policy?[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").

[148]*Id.* at 1019.

[149]*Id.*

[150]*Id.*

"did not adjudicate an action for breach of the sponsor's I-864 obligation."[151]

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.[152] 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.

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.[153] 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.

Federal court

The vast majority of federal courts have held that they possess subject matter jurisdiction to hear claims by I-864 beneficiaries. 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.[154] 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."[155] 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.[156] Moreover, even in cases where the issue has not been addressed expressly, it is safe to presume that other federal courts have reached the same

[151] *Id.* at 1020.

[152] 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).

[153] *See, e.g.*, Varnes, supra note 120,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").

[154] *See* Howard Rich, *The Stunning, Sudden Reversal of Economic Freedom in America* (Sep. 25, 2012),

[155] 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, *supra*, 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).

[156] *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-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).

conclusion *sub silentio*, as there is an affirmative obligation for a tribunal to ensure it has subject matter jurisdiction.[157]

Personal jurisdiction

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.[158] 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.[159] 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.[160] 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.[161] The magistrate summarily concluded 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."[162]

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.[163] 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."[164] 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."[165] 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.

[157] *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).

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

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

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

[161] *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) ("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").

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

[163] *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")

[164] 8 U.S.C. § 1183a(a)(1)(C).

[165] *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)).

Subject matter jurisdiction

Departing from other decisions in the same district,[166] in *Winters v. Winters* a federal court in Florida concluded that it lacked subject matter jurisdiction over an I-864 contract action against a sponsor.[167] 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.[168] 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.[169] 8 U.S.C. § 1183a(e)(I) speaks only of jurisdiction in an "appropriate court," without specifying expressly that federal tribunals would be "appropriate."[170]

Winters was later embraced by a second magistrate judge for the Middle District of Florida, in *Vavilova v. Rimoczi*, who held that federal courts lack federal question subject matter jurisdiction over suits by I-864 beneficiaries.[171] 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.[172] The view endorsed by *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.[173] The court in *Pavlenco v. Pearsall* cited only to previous federal decisions that had reached the same view.[174]

Abstention doctrines

In contrast to the prevailing view that federal courts possess subject matter jurisdiction over private suits on the I-864 federal tribunals have been vigilant against collateral attacks on state court judgments.[175]

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

[166]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).

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

[168]*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").

[169]*Id.*,at 8.

[170]*Id.*,at 6.

[171]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). In *Vavilova v. Rimoczi*, the magistrate 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."*Id.*, at 7-8.

[172]*Id.*, at 9.

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

[174]*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)).

[175]*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).

state court.[176] 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 action.[177] Even if the state court action was based on a family law statute, incorporating the I-864 obligation into a spousal support order, the federal court action may be barred based on the I-864, not a separate federal statute.[178] Yet a district court in New Hampshire reached a contrasting result deploying abstention doctrine.[179] 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."[180]

Pavlenco v. Pearsall provides one of the better discussions to date of federal abstention doctrines in the context of I-864 enforcement.[181] 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.[182] 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 pertaining to the I-864.[183] 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.[184]

Under "*Younger* abstention," a federal court will decline to hear a matter where there is concurrent litigation in a state tribunal.[185] 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.[186]

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.[187] The court determined that

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[176]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).

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

[178]*Id.*,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?

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

[180]*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).

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

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

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

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

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

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

[187]*Id.*

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.[188] Moreover, the court noted that the mere existence of a parallel state court action does not implicate *Younger* abstention.[189]

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.[190] Under *Colorado River*, a federal court must consider:

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.[191]

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.[192] 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. Second, the court noted the advanced stage of the state court litigation (approximately a week before trial).[193] 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.[194] 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 resolution offered by state courts; indeed, some I-864 matters could be efficiently brought in small claims court.

[188] *Id.*

[189] *Id.*

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

[191] *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., 424 U.S. 800.

[192] *Id.*at 9.

[193] *Id.*

[194] *Id.*

Issue, 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.[195]

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. As discussed above, the federal court also may lack subject matter jurisdiction over such an action under the *Rooker-Feldman* doctrine. 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.[196] 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."[197]

Could a contract action be barred by claim preclusion (f.k.a. res judicata) because the plaintiff-beneficiary *could have* litigated the matter in a prior dissolution case? While some courts have dismissed this possibility off handedly,[198] In *Yaguil v. Lee* the foreign national wife asserted her right to financial support during state court divorce proceedings.[199] It is not clear that the I-864 was mentioned in the divorce pleadings, but the beneficiary did so in a "statement of issues" filed in the divorce action. She wrote, "[s]ince the separation (19[ ]months) my sponsor Mr. Gary Lee failed to comply the I-864[sic]."[200] In argument before the federal court the beneficiary asserted that the I-864 issue was "apparently dropped" in the divorce action, though it appears there was no citation to the record to assert this claim.[201] The federal court, finding evidence that the I-864 claims had been previously raised, concluded there was identity of the claims, and that res judicata applied.[202]

Likewise, 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.[203] 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."[204] The beneficiary did not, however, specifically request that the trial court "enforce" the I-864 support duty.[205] 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.

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[195] *Cf.* 18 WRIGHT § 4406.

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

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

[198] *See, e.g.*, Nasir v. Shah, No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207, at*15 (S.D. Ohio Sept. 21, 2012) ("[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]").

[199] 2:14-cv-00110-JAM-DAD, 2014 WL 1400959 (E.D.Cal.,2014) (Order Granting Defendant's Motion to Dismiss).

[200] *Id.*at 2.

[201] *Id.*

[202] *Id.*

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

[204] *Id.*

[205] *Id.*

Similarly, in *Matter of Khan* – a direct appeal from a dissolution order – the appellant/beneficiary raised possible claim preclusion as a reason the dissolution court should have awarded maintenance based on the I-864, as she might later be hampered from bringing a separate enforcement suit.[206] But the *Khan* court stated clearly, albeit in dicta, that he 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."[207] Finally, in *Nasir v. Shah* a federal district 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]."[208]

By contrast, in *Chang v. Chang* a federal district court in Oregon ruled that the issue of claim preclusion 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).[209] 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.[210] 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.

Collectability of debt.

Discharge in bankruptcy

All courts to consider the matter have held that I-864 obligations are non-dischargeable in bankruptcy. Bankruptcy Courts have ruled that judgments predicated on the I-864 are non-dischargeable domestic support obligations.[211]

[206] 332 P.3d 1016 (Wash. App. Div. II 2014).

[207] *Id.* at 1020. As phrased, the court's statement is non-responsive to concerns over claim preclusion, as the doctrine attaches to claims that might have been litigated rather than those which in fact were litigated.

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

[209] No. 1:10 CV 78, 2011 U.S. Dist. LEXIS 67501,at 11 (N.D. Ind. June 21, 2011).

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

[211] 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).

Fair Debt Collections Act

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).[212] A provision in the FDCA caps the maximum amount of wage garnishment at 25 percent of an individual's "aggregate disposable earnings."[213] 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 the individual is also supporting a spouse or dependent.[214] The appeal failed on the facts, as the sponsor-defendant did not show the actual order for wage garnishment.[215] Bankruptcy courts have treated I-864 support judgment as non-dischargeable domestic support obligations.[216] 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.

Joint sponsors and household members

Joint Sponsors - Form I-864. In addition to the primary sponsor (i.e., the immigration petitioner) one or more additional individuals commonly have joint and several liability on the I-864 obligation. First, where the sponsor is unable to demonstrate adequate finances to provide the required support, additional "joint-sponsors" may be used to meet the required level.[217] Such joint sponsors may be any U.S. citizen or lawful permanent resident currently residing in the United States.[218] Joint sponsors typically – but are not required to be – family or close friends of the primary sponsor. A joint sponsor executes an additional 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.[219]

Household Members - Form I-864A. 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.[220] The I-864A allows a 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. 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.Rather, the I-864A purports

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

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

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

[215] *Id.*at 8.

[216] 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).

[217] 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).

[218] 8 C.F.R. § 213a.2(b)(1).

[219] *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).

[220] 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).

to incorporate by reference the sponsor's duties under the I-864.[221] Two cases have explored the liability of household members who execute Form I-864A.

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.[222] The husband-sponsor was a full-time student, and lived at his father's house along with his beneficiary-wife.[223] 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.[224] The plaintiffs' summary judgment motion was denied, their having failed to establish that the defendant executed the I-864A.[225] As the motion was poorly documented with respect to evidence of the executed contract,[226] Liepe should not be taken as an indication that an I-864A signer holds no liability. The issue in *County of San Bernardino Child Support Division v. Gross* was whether I-864 support could be considered income under California's child support statute (the court held it could), but the appeals court noted an earlier trial court order "confirming that, despite the divorce proceedings, the [joint sponsor's I-864] was enforceable."[227]

[221] 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.

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

[223] *Id.*at 3.

[224] *Id.*

[225] *Id.*at 3.

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

[227] 2013 WL 3828777 (Cal. App. 4 Dist. July 23, 2013).

Chapter 4 - Nuptial agreements & waivers.

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.[228] The majority of courts to consider waivers of I-864 rights have found such agreements to be unenforceable, though for reasons discussed below that view is misguided.

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.[229] The agreement was signed approximately one year before the U.S. citizen spouse executed an I-864 for his then-wife.[230] 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.[231] 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.[232] The Court easily concluded that the noncitizen-beneficiary was entitled to waive her rights under the I-864.[233] 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."[234]

In *Toure-Davis v. Davis*, the plaintiff/beneficiary was a citizen of Ivory Coast who married the U.S. citizen defendant on July 29, 1998.[235] On the day of marriage the parties signed an ante-nuptial agreement.[Id.at 2.] The agreement set forth a general waiver, whereby both parties agreed broadly not to seek financial support from each other, were the marriage to end.[236] The agreement contained no language specific to the I-864. Defendant later petitioned for Plaintiff's lawful permanent residency in the U.S. and in the process executed an I-864. After the parties separated, a state court action followed which resulted in a settlement wherein Plaintiff received certain financial support. The federal district court action then followed, in which Plaintiff sought a damages award for I-864 support.[237]

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[228] *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).

[229] No. 10-00072 ACK-KSC, 2010 U.S. Dist. LEXIS 76257, at *1-2 (D. Haw. July 21, 2010).

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

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

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

[233] *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").

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

[235] NO. WGC-13-916, 2014 U.S. Dist. LEXIS 42522 (Dist. M.D. Mar. 28, 2014).

[236] *Id.*at 2-3.

[237] *Id.*at 4.

The court rejected arguments by the defendant/sponsor that the plaintiff had waived her right to financial support, citing both a narrow and broad basis for its holding. First, the defendant argued that Plaintiff had waived her right to collect financial support under the I-864 by signing the ante-nuptial agreement. The District Court rejected this argument first because of the timing of the agreement. Since the agreement was signed before execution of the I-864, the court reasoned that the ante-nuptial agreement was modified by execution of the I-864.[238] Since Plaintiff is a third-party beneficiary to the I-864, the reasoning goes, execution of that form gave her new contractual rights against the Defendant, and those rights modified the previously agreed-upon rights from the ante-nuptial agreement.[239]

Second – and far more broadly – the *Toure-Davis* court appears to suggest that I-864 rights are by nature non-waiveable. Stating that that the obligation of support is "imposed by federal law," the court noted that the purpose of the obligations is to prevent the beneficiary from becoming a public charge.[240] Hence, the "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."[241]

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."[242] 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."[243] 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.[244] These facts distinguished *Blain v. Herrell*, in which the premarital agreement was executed after the I-864.[245] 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."[246] 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.[247]

The District Court for New Jersey reached the same conclusion as the *Erler* court in *Shah v. Shah.*[248] 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

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[238] *Id.*at 15.

[239] *Id.*at 16.

[240] *Id.*at 23.

[241] *Id.*at 23.

[242] 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).

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

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

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

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

[247] *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.[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).

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

duty, as it failed to specifically embrace those rights. 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.[249] 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."[250] The language quoted is where the Immigration and Nationality Act mandates creation of the document that became the I-864,[251] which replaced the unenforceable I-134.[252] 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,[253] 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.

It is ultimately unclear why I-864 contractual rights could not be waived by agreement. 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 her right to sue the sponsor to enforce an affidavit of support."[254] 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.[255] 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.

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[249] *Id.*

[250] *Id.*at 11.

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

[252] *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).

[253] Shah v. Shah, Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596, at 11(D.N.J. Jan. 14, 2014).

[254] 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).

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