



Immigration Support Advocates

**SUING ON THE FORM I-864  
AFFIDAVIT OF SUPPORT  
DECEMBER 2016 UPDATE**

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

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

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

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

<sup>2</sup> Visit [www.i-864.net](http://www.i-864.net) → Resources.

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

## I. Contract Issues

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

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

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

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

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<sup>4</sup> 14-cv-03420-PAB-NYW (D. Col. May 2, 2016) (discovery order).

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

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

#### **I.A. Duration of obligation**

It is said that bad facts make bad law. Perhaps the only thing that makes worse law is pro se litigants.<sup>7</sup>

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

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

<sup>6</sup> Fed. R. Civ. Pro. 34 (emphasis added).

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

<sup>8</sup> No. 12-4648 (RBK/KMW) (N. N.J., Oct. 30, 2015).

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

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

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

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

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

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

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<sup>9</sup> *Id.* (emphasis added, internal citation omitted).

<sup>10</sup> 8 C.F.R. § 216.1 (“A conditional permanent resident is an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act. . .”).

<sup>11</sup> *Id.*

conditional basis for a period of two years.”<sup>12</sup> For a foreign national filing an I-751 petition, LPR status is hers to lose, not to gain.<sup>13</sup>

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

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

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

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

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

<sup>15</sup> E060475 (Cal. App., 4th Dist., 2nd Div. Aug. 6, 2015).

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

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

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

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<sup>16</sup> *Id.* (citing INA § 213A(a)(3)(A)).

<sup>17</sup> *See id.*

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

<sup>19</sup> 109 A.3d 221 (2015).

<sup>20</sup> *Id.* at 223, 227-28.

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

### **I.B. Defenses**

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

### **I.C. Damages**

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

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<sup>21</sup> F.B. v. M.M.R., 120 A.3d 1062 (Pa. Super. 2015).

<sup>22</sup> Commonly asserted defenses include (in no particular order): estoppel, statute of frauds, duress, fraud (typically fraud in the inducement), unconscionability, waiver, res judicata, unclean hands, and “equity.”

<sup>23</sup> See Fed. R. Civ. Pro. 11.

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

<sup>25</sup> No. COA16-53 (N.C. Dec. 6, 2016)

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

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

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

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

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

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<sup>26</sup> 686 F.3d 418, 422 (7th Cir. 2012).

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

<sup>28</sup> See McLawsen (2012) *supra* note 1 at Section I.C.

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

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

<sup>31</sup> 8 C.F.R. § 213a.1.

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

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

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

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

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

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<sup>32</sup> No. COA16-53 (N.C. Dec. 6, 2016).

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

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

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

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

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

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

<sup>34</sup> 336 P.3d 701, 712 (Ala. 2014).

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

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

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

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

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

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

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<sup>36</sup> No. WGC-13-916 (D. Md. March 4, 2014) (memo. op.).

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

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

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

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

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

The Ninth Circuit rejected the idea that household size could be measured by the actual "post petition" household.<sup>40</sup> Instead,

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

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

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

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<sup>39</sup> See *Erlor v. Erlor*, CV-12-02793-CRB, 2013 WL 6139721 (N.D. Cal. Nov. 21, 2013).

<sup>40</sup> That is, the number of individuals actually residing at the dwelling.

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

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

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

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

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

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

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

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

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

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<sup>45</sup> No. WGC-13-916 (D. Md. March 4, 2015) (memo. op.).

<sup>46</sup> *Santana v. Hatch*, 15-cv-89-wmc (W.D. Wis. Apr. 29, 2016) (opinion and order).

<sup>47</sup> *See, e.g., id.*

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

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

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

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

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

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

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

## II. Procedural Issues

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

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

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<sup>50</sup> *Id.* (“If Congress intended to allow defendants to recover attorney’s fees pursuant to § 1183a(c), either under a dual standard or an evenhanded approach, this Court would have expected it to include a prevailing party provision”).

<sup>51</sup> *Gross v. Gross*, E057575 (Cal. App., 4th Dist., 2nd Div. Dec. 4, 2014).

<sup>52</sup> *Id.*

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

## II.A. Federal Court

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

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

## II.B State Court

[Reserved]

### II.B.1 Maintenance (“Alimony”) Orders

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

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<sup>54</sup> See 11 U.S.C. § 101(14A) (defining domestic support obligations).

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

<sup>56</sup> *In re Williams*, 15-10056-BAH (BK D. N.H. Jan. 7, 2016).

<sup>57</sup> For an earlier discussion of the doctrines of *Younger* and *Colorado River* abstention, see *Pavlenko v. Pearsall*, No. 13-CV-1953 (JS)(AKT), 2013 WL 6198299 (E.D.N.Y. Nov. 27, 2013) (memo. order).

<sup>58</sup> *Levin v. Barone*, No. 14-cv-00673 (AJN) (S.D. N.Y. Jan. 28, 2016) (order).

<sup>59</sup> Cf. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

<sup>60</sup> Cf. McLawsen (2012), *supra* note 1, § II.B.1.

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

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

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

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

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<sup>61</sup> 332 P.3d 1016 (Wash. 2014).

<sup>62</sup> *Id.* at 1018.

<sup>63</sup> *Id.* at 1020.

<sup>64</sup> *Id.* at 1018 (“[The parties] both agree that [Sponsor] owes an ongoing support obligation under I-864”).

needs of one of the parties and the ability of the other party to pay.<sup>65</sup>

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

## II.B.2 Issue Preclusion, Claim Preclusion

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

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

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<sup>65</sup> 337 P.3d 72 (Kan.App. 2014) (internal citation and quotation omitted).

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

<sup>67</sup> No. 2:14-cv-00110-JAM-DAD (E.D. Cal. Apr. 10, 2014) (order granting defendant’s motion to dismiss).

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

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

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

### **III. Unresolved issues**

#### **III.A Prenuptial agreements**

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

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<sup>68</sup> Cf. McLawsen (2012) *supra* note 1 at Section II.B.2.

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

<sup>70</sup> No. 14-15362 (9th Cir. June 8, 2016).

<sup>71</sup> *Erler*, No. 14-15362.

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

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

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

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<sup>72</sup> Cf. McLawsen (2014) *supra* note 1 at Section III.A.

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

<sup>74</sup> No. WGC-13-916 (D. Md. March 28, 2014) (memo. op.).

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

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

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

### **III.B Interpreting the I-864**

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

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

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<sup>75</sup> Emphasis added.

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

<sup>77</sup> *Toure-Davis*, end note 5.

<sup>78</sup> *Dahhane v. Stanton*, 15-1229 (MJD/JJK) (D. Minn. Aug. 4, 2015) (report and recommendation).

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

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

#### **IV. Conclusion**

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

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<sup>79</sup> *Id.*