Immigration Support Advocates

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

**© Greg McLawsen (2014)**

***This paper was published at:***

**19 Bender's Immigr. Bull. 343 (Apr. 1, 2014)**

**Immigration Support Advocates**
**1201 Pacific Ave., Suite 600**
**Tacoma, WA 98402**
**1-844-557-3646**

www.i-864.net

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

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

---

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

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

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

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

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

## I. Contract Issues

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

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

[5] McLawsen, *supra* note 3.

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

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

[8] *See infra*, Section II.

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

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

---

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

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

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

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

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

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

---

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

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

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

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

[16] *Id.*

[17] *Id.*

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

[19] *Id.* at *3.

[20] *Id.*

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

### I.A. Duration of obligation

[Reserved]

### I.B. Defenses

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

---

[21] *Id.* at *3.

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

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

[24] *See id.*

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

[26] *Id.* at *3.

[27] *Id.*

[28] *Id.*

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

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

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

---

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

[30] *Id.* at *10.

[31] *Id.* at *11.

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

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

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

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

### I.C. Damages

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

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

[36] *Id.* at *8.

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

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

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

[40] *Id.* at *14.

[41] *Id.*

[42] 8 C.F.R. § 213a.1.

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

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

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

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

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

---

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

[44] 8 C.F.R. § 213a.1.

[45] *Id.*

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

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

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

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

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

---

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

[49] *Id.* at *18.

[50] *Id.*

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

[52] *Id.*

[53] *Id.* at *21.

[54] *Id.*

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

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

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

---

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

[56] *Id.* at 323.

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

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

[59] *Id.* at 325.

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

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

[62] *Id.* at 326.

[63] *Id.*

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

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

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

---

[64] *Id.* at 327.

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

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

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

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

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

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

## II. Procedural Issues

### II.A. Federal Court

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

---

[70] *Id.* *4.

[71] *Id.*

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

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

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

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

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

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

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

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

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

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

[78] 8 U.S.C. § 1183a(a)(1)(C).

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

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

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

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

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

---

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

[82] *Id.* at *9.

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

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

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

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

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

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

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

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

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

---

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

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

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

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

[91] *Id.*

[92] *Id.*

[93] *Id.*

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

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

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

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

---

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

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

[97] *Id.*

[98] *Id.*

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

## II.B State Court

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

[Reserved]

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

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

## III. Unresolved issues

### III.A Prenuptial agreements

---

[99] *Cf.* 18 WRIGHT § 4406.

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

[101] *Id.*

[102] *Id.*

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

*Id.* at *9.

[114] *Id.*

[115] *Id.* at *11.

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

### III.B Interpreting the I-864

[Reserved]

## IV. Conclusion

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

---

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

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

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

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