Immigration Support Advocates

SUING ON THE I-864 AFFIDAVIT OF SUPPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Contract Issues

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

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

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

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

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

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

I.A. Duration of obligation

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

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

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

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

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

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

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

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

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

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

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

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

[23] *See supra* note 3.

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

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

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

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

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

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

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

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

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

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

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

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

I.B. Defenses

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

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

[33] See *supra* note 15.

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

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

[36] RESTATEMENT (2nd) § 77.

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

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

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

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

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

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

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

[40] Wheeler, *supra* note 12.

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

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

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

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

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

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

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

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

[47] *See* RESTATEMENT (2nd) § 208.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I.C. Damages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[71] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[83] *Id.,* at 1278.

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

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

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

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

II. Procedural Issues

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

II.A. Federal Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.B State Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.B.2 Issue Preclusion, Claim Preclusion

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

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

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

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

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

[124] *Cf.* 18 WRIGHT § 4406.

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

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

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

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

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

III. Unresolved issues

III.A Prenuptial agreements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.B Interpreting the I-864[146]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

Immigration Support Advocates

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

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

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

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

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

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

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

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

I. Contract Issues

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

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

[5] McLawsen, *supra* note 3.

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

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

[8] *See infra*, Section II.

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

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

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

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

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

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

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

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

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

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

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

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

[16] *Id.*

[17] *Id.*

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

[19] *Id.* at *3.

[20] *Id.*

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

I.A. Duration of obligation

[Reserved]

I.B. Defenses

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

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[21] *Id.* at *3.

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

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

[24] *See id.*

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

[26] *Id.* at *3.

[27] *Id.*

[28] *Id.*

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

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

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

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

[30] *Id.* at *10.

[31] *Id.* at *11.

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

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

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

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

I.C. Damages

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

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

[36] *Id.* at *8.

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

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

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

[40] *Id.* at *14.

[41] *Id.*

[42] 8 C.F.R. § 213a.1.

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

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

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

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

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

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

[44] 8 C.F.R. § 213a.1.

[45] *Id.*

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

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

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

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

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

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

[49] *Id.* at *18.

[50] *Id.*

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

[52] *Id.*

[53] *Id.* at *21.

[54] *Id.*

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

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

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

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

[56] *Id.* at 323.

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

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

[59] *Id.* at 325.

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

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

[62] *Id.* at 326.

[63] *Id.*

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

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

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

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[64] *Id.* at 327.

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

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

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

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

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

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

II. Procedural Issues

II.A. Federal Court

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

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[70] *Id.* *4.

[71] *Id.*

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

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

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

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

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

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

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

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

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

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

[78] 8 U.S.C. § 1183a(a)(1)(C).

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

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

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

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

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

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

[82] *Id.* at *9.

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

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

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

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

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

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

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

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

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

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

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

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

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

[91] *Id.*

[92] *Id.*

[93] *Id.*

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

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

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

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

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

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

[97] *Id.*

[98] *Id.*

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

II.B State Court

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

[Reserved]

II.B.2 Issue Preclusion, Claim Preclusion

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

III. Unresolved issues

III.A Prenuptial agreements

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[99] *Cf.* 18 WRIGHT § 4406.

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

[101] *Id.*

[102] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *9.

[114] *Id.*

[115] *Id.* at *11.

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

III.B Interpreting the I-864

[Reserved]

IV. Conclusion

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

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

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

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

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

Immigration Support Advocates

SUING ON THE FORM I-864 AFFIDAVIT OF SUPPORT

DECEMBER 2016 UPDATE

A version of this paper is forthcoming by Benders Immigration Bulletin

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

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

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

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

[2] Visit www.i-864.net → Resources.

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

I. Contract Issues

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

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

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

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

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

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

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

I.A. Duration of obligation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] *Id.*

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

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

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

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

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

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

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

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

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

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

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

[17] *See id*.

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

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

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

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

I.B. Defenses

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

I.C. Damages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[31] 8 C.F.R. § 213a.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[43] *Id.*

[44] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Procedural Issues

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

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

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

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

[52] *Id.*

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

II.A. Federal Court

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

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

II.B State Court

[Reserved]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] *Id.* at 1018.

[63] *Id.* at 1020.

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

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

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

II.B.2 Issue Preclusion, Claim Preclusion

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

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

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

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

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

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

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

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

III. Unresolved issues

III.A Prenuptial agreements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.B Interpreting the I-864

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

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

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[75] Emphasis added.

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

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

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

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

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

IV. Conclusion

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

[79] *Id.*