

## **BENCH CARD FOR STATE COURT JUDGES ON COMMON ISSUES THAT ARISE FROM PARTIES' IMMIGRATION STATUS: ECONOMIC REMEDIES**

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This bench card provides information for state court judges on issues unique to immigrants, such as: eligibility for legal work authorization, eligibility to receive publically funded benefits and services, the use of Individual Tax Identification Numbers (ITINs), and enforcement of immigration affidavits of support in state court proceedings. The purpose of this bench card is to provide a quick reference and to help judges identify immigration issues that might affect the range of outcomes available in cases before them. This includes economic issues that might arise in family, juvenile, criminal and civil court cases. The information contained in this bench card provides accurate information on work authorization, benefits access, assurances made to the Department of Homeland Security (DHS) regarding support of family members, and information about how immigrants who are working (including without authorization) are able to file tax returns, pay taxes, and provide copies of those returns to the court.

The forms of economic relief available to immigrants in protection order, custody, child support, spousal support, and divorce proceedings that the legally accurate immigration information included in this bench card can assist courts deciding include, but are not limited to:

- Child support,
- Spousal support,
- Deciding which parent claims the children on tax returns,
- Determining ability to pay child or spousal support and how much a parent or spouse is earning when they are working in the informal economy receiving cash,
- Enforcing an Affidavit of Support as a contract in a divorce or civil proceeding,
- Disproportionate share of property division in divorce cases involving domestic violence,
- Ordering payment of medical, car and house insurance, rent, mortgage and utility bills in a protection order or divorce case; or
- Orders in child abuse and neglect or delinquency proceedings regarding obtaining public benefits for a non-citizen child.

### **IMMIGRANTS ELIGIBLE TO WORK**

A large percentage of immigrants, both undocumented and documented, are working in the United States. In 2017, about 29 million immigrants were working or looking for work in the United States.<sup>1</sup> Of those, more than 7 million were undocumented immigrants.<sup>2</sup> An individual's

<sup>1</sup> See Abby Budiman, *Key findings about U.S. immigrants*, PEW RESEARCH CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>.

<sup>2</sup> See Nicole Prchal Svajlenka, *Protecting Undocumented Workers on the Pandemic's Front Lines*, CTR. FOR AMERICAN PROG. (Dec. 2, 2020), <https://www.americanprogress.org/article/protecting-undocumented-workers-pandemics-front-lines-2/>.

ability to work could have economic implications on a variety of court cases whether or not that person is working with or without legal work authorization. Having access to accurate information about the form of immigration status that the parties before the court have or are pursuing allows family or juvenile court judges, as well as civil and criminal court judges, to issue more effective orders.<sup>3</sup>

Eligibility to obtain employment in the United States may be an important factor for a state court judge in determining issues of alimony, child support, ability to pay for health insurance, the ability to meet conditions of probation, or the ability to pay for services. In some instances, state courts may need to consider the lack of employment authorization in deciding whether a parent should receive alimony or child support. For example, when an abusive parent could have, but failed to file an immigration case for their abused immigrant spouse, when the court awards custody of a child to a battered immigrant parent who does not have or who has not yet attained legal work authorization, ordering the non-custodial parent to pay child and/or spousal support to assure that the custodial parent is able to provide an adequate home for the child would provide important economic stability for the battered immigrant and children. For a party that is being ordered to pay child support, lack of work authorization is not determinative. If an immigrant parent works they can be ordered to pay child support and cannot use a lack of work authorization as a defense. Courts should also note that payment of court ordered child support regardless of work authorization helps an immigrant prove good moral character in several types of immigration cases including naturalization.<sup>4</sup> Under U.S. immigration laws, when proof of good moral character is required as part of an applicant's immigration case, proof that the applicant is paying child support or has sought child support for children in their custody and that the applicant if working is paying taxes are inquiries the immigrant must address to prove that they have good moral character.

The following are the most common categories of immigrants with legal eligibility to work in the United States who are likely to appear in a state court case.<sup>5</sup> It is important to note that there are immigrants with legal immigration status who are not granted legal work authorization, so having legal immigration status alone does not indicate that an individual is approved to work. Conversely, an immigrant applying for immigration relief that as their immigration case proceeds through the adjudication process can be granted legal work authorization and have it for several years while they are undocumented and awaiting legal status. Any immigrant that is working, has an employment history, has quit a job to avoid being ordered to pay child support, or has income or assets can be ordered to pay child support without regard to their immigration status or legal work authorization. However, ordering an immigrant who lacks legal employment authorization to undertake a job search is considered a *referral for employment*, helping an unauthorized immigrant find work, and is prohibited by the Immigration Reform and Control Act of 1986.<sup>6</sup> The following chart is helpful in determining whether an

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<sup>3</sup> For further information on work authorization by type of visa or whether the visa requires sponsorship, and whether visa holders can obtain visas for their spouse and children, see *Immigration Status: Work Authorization, Public Benefits, and Ability to Sponsor Children* (Dec. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/fam-chart-immstatus>.

<sup>4</sup> See Veronica T. Thronson et al., *Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights*, 9 FAM. & INTIMATE PARTNER VIOLENCE Q. 7, 81-91 (2017).

<sup>5</sup> See *Immigration Status: Work Authorization, Public Benefits, and Ability to Sponsor Children* (Dec. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/fam-chart-immstatus>. (for further information by type of visa on work authorization, whether the visa requires sponsorship, and whether visa holders can obtain visas for their spouse and children).

<sup>6</sup> See generally, "Immigration Reform and Control Act of 1986 (IRCA)". "8 USC 1101 note"

individual can use lack of employment authorization as a defense against an order to pay or an order to find employment.

IMMIGRANTS WHO ARE LEGALLY ELIGIBLE TO WORK	IMMIGRANTS WHO REQUIRE DISCRETIONARY APPROVAL FROM USCIS TO WORK
<ul style="list-style-type: none"> <li>• Lawful permanent residents and conditional permanent residents;</li> <li>• Refugees and asylees;</li> <li>• Immigrants paroled by DHS into the U.S. as refugees;</li> <li>• U visa holders;</li> <li>• T visa holders;</li> <li>• Deferred Action Childhood Arrivals (DACA);</li> <li>• Immigrants granted Temporary Protected Status (TPS);</li> <li>• VAWA self-petitioners whose application has been approved; and</li> <li>• Immigrants granted work authorized visas.</li> </ul>	<ul style="list-style-type: none"> <li>• Conditional immigrants who fail to file a timely application for Lawful permanent resident status pending request for waiver if removal proceedings have been stayed;</li> <li>• Deferred action granted by DHS based on humanitarian reasons;</li> <li>• Immigrants paroled into the U.S. for humanitarian reasons or for public benefit to pursue an application for admission;</li> <li>• Immigrants who have applied for asylum or withholding of removal may apply for employment authorization 150 days after completing the application for asylum;</li> <li>• Cancellation of removal recipients; and</li> <li>• Immigrants who have applied for Lawful permanent resident status.</li> </ul>

### IMMIGRANTS ELIGIBLE FOR BENEFITS OR SERVICES<sup>7</sup>

Federal immigration law limits the eligibility of immigrants, depending on their immigration status, for the following categories of benefits: (1) Federal public benefits, (2) Federal Means-Tested Public Benefits, and (3) State and local public benefits. What benefits an immigrant can receive depends on factors that include:

- When the immigrant first entered the United States

<https://www.oig.lsc.gov/legis/irca86.htm> (justice.gov). Justice Department officials responsible for enforcing IRCA consider court ordered job searches as referrals for employment barred under IRCA when the person being ordered to find employment lacks legal work authorization.

<sup>7</sup> For further information on benefits eligibility for immigrant crime victims, see Daniel Enos, et al., *Family Court Bench Card on Immigrant Crime Victim Access to Public Benefits and Services*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Mar. 29, 2019), available at <https://niwaplibrary.wcl.american.edu/pubs/pb-bchcrd-pubbenefits>; for VAWA benefits eligibility process, see Jordan Tacher, Abigail Whitmore and Leslye E. Orloff, *VAWA Public Benefits Eligibility Process: VAWA Self-petitioners, VAWA Cancellation of Removal, and VAWA Suspension of Deportation*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Apr. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/vawa-eligibility-process>; for U visa benefits eligibility process, see Jordan Tacher, et al., *U-Visa Victim Benefits Eligibility Process*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Apr. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/u-visa-benefits-benchcard>; for T visa benefits eligibility process, see Jordan Tacher and Leslye E. Orloff, *Trafficking Victim Benefits Eligibility Process*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Apr. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/t-visa-benefits-eligibility>.

- The type of immigration status the immigrant has or is in the process of applying for
- Whether the immigrant has been a victim of domestic violence, child abuse, elder abuse, or human trafficking; if the victim has applied for crime victim-related immigration benefits; and where their case is in the DHS adjudication process<sup>8</sup>
- The immigrant’s state of residence;
- Whether the applicant is a child (under 21 years of age) or an adult 21 years of age or older; and
- Whether they can meet the heightened application requirements of specific benefits programs

With regard to the eligibility for benefits, there are two classes of immigrants, “qualified immigrants” and “non-qualified immigrants.” Among some “non-qualified immigrants” who are “lawfully present” or are “persons residing under color of law (PRUCOL)” can receive some state-funded benefits. An immigrant must be a qualified immigrant to be eligible for federal public benefits and federal means-tested public benefits unless the immigrant falls under one of many enumerated exceptions.

Federal means-tested public benefits are the most difficult to access for many immigrants. An individual must wait 5 years after becoming a qualified immigrant eligible to receive public benefits before they are able to access federally funded TANF and TANF funded childcare, Medicaid, SCHIP, food stamps and SSI. States may provide state funded benefits for certain immigrants during this 5-year waiting period.

A federal public benefit is defined as:

- Any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
- Any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

<p><b>QUALIFIED IMMIGRANTS</b></p>	<p><b>NON-QUALIFIED IMMIGRANT</b> (States may elect to provide some benefits to some of the immigrants listed below)</p>
<ul style="list-style-type: none"> <li>• Lawful permanent residents or conditional permanent residents;</li> <li>• Refugees and asylees;</li> <li>• Persons paroled into the United States for a period of at least one year;</li> <li>• Persons granted withholding of</li> </ul>	<p>All noncitizens who are not included in the qualified immigrant list. Examples include:</p> <ul style="list-style-type: none"> <li>• Immigrants who are temporary work, student, or tourist visa holders;</li> <li>• Immigrants paroled into the U.S. for less than one year;</li> </ul>

<sup>8</sup> For an overview of when after filing an immigration case an applicant becomes eligible for which types of public benefits see Daniel Enos et al., *Bench Card on Immigrant Crime Victim’s and Immigrant Children’s Access to Public Benefits and Services*, NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT (NIWAP) (December 31, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/pb-bchcrd-pubbenefits>.

<p>deportation;</p> <ul style="list-style-type: none"> <li>• Persons granted conditional entry;</li> <li>• Cuban and Haitian entrants;</li> <li>• Victims of human trafficking who have Continued Presence, a T visa, or a bona fide determination in a T visa case;</li> <li>• Persons who are approved or pending a VAWA self-petition who have received a prima facie determination and most benefits require a connection between the battery or cruelty and the need for the public benefits.</li> </ul>	<ul style="list-style-type: none"> <li>• VAWA applicants prior to receipt of a prima facie determination letter</li> <li>• U visa holders and applicants;</li> <li>• SIJS children before they are granted lawful permanent residency;</li> <li>• T visa applicants who did not obtain continued presence or a bona fide determination and are awaiting adjudication and receipt of their T visa; and</li> <li>• DACA recipients.</li> </ul>
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Some examples of federal benefits available to all non-citizens, including non-qualified immigrants, are:

- Emergency medical assistance;
- Short-term, non-cash, in-kind emergency disaster relief;
- HHS funded public health clinics (e.g. community or migrant health clinic)<sup>9</sup>
- Assistance or benefits under the Child Nutrition Act of 1966;
- Public health assistance for immunizations with respect to immunizations for diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;

Some examples of federal benefits that are NOT available to all non-citizens are:

- The supplemental security income (SSI) program
- SNAP (food stamps)

The nexus between immigration law and benefits eligibility can be highly complex. Judges seeking guidance and greater detail on whether and which benefits parties can access before the court can look to the [Bench Card on Immigrant Crime Victim’s and Immigrant Children’s Access to Public Benefits and Services](#)<sup>10</sup> available on the National Immigrant Women’s Advocacy Project (NIWAP), American University, Washington College of Law web library. Judges can also receive technical assistance<sup>11</sup> from issue experts at NIWAP by calling (202) 274-4457 or e-mailing [info@niwap.org](mailto:info@niwap.org). NIWAP’s web library also has additional information on legal rights to access public benefits and services for immigrant crime victims and children. The web library is available at <http://niwaplibrary.wcl.american.edu/>.

<sup>9</sup> For a list by city, state or zip code go to [HRSA.gov](http://HRSA.gov).

<sup>10</sup> Daniel Enos et al., *Bench Card on Immigrant Crime Victim’s and Immigrant Children’s Access to Public Benefits and Services*, NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT (NIWAP) (Dec. 31, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/pb-bchcrd-pubbenefits>.

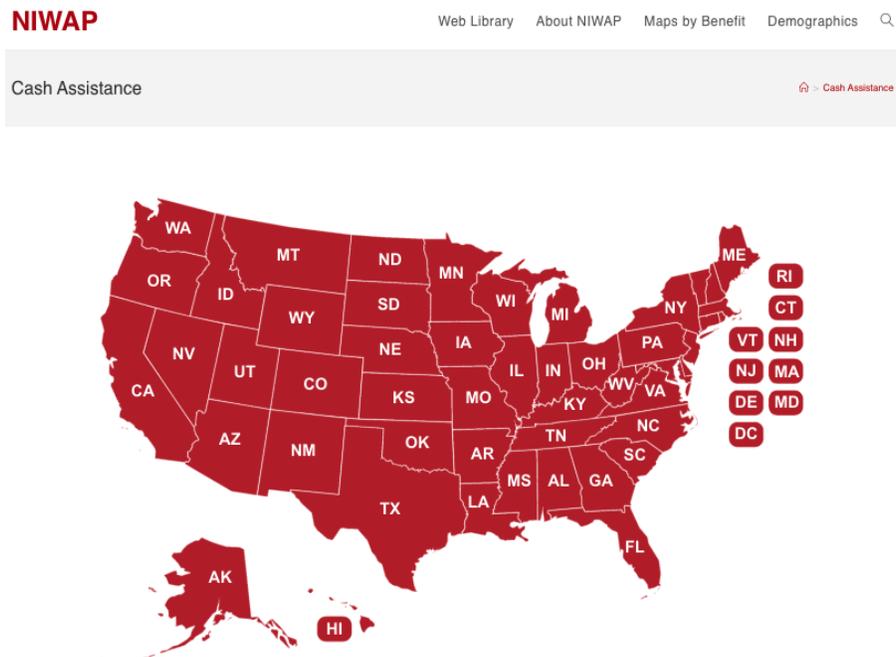
<sup>11</sup> This technical assistance is available free of charge to judges, courts, police, and prosecutors, supported by funding from the Office on Violence Against Women and the State Justice Institute, U.S. Department of Justice and foundation funders.

## State-Funded Benefits

While access to federal means-tested public benefits may be restricted based immigration status and/or other limitations, states may enact state laws that extend or limit access to state funded public benefits to various categories of immigrants. Up to 41 states offer some form of state funded public benefits to immigrants that provide access to state publicly funded assistance that goes beyond what immigrants are eligible for under federal public benefits programs. The state funded benefits most commonly extended to immigrants are access to state funded prenatal care, health care for children through CHIP and/or access to state funded medical assistance. A smaller number of states extend access to state funded TANF to some groups of immigrants.

As a result, which state or federally funded public benefits an immigrant qualifies for varies by state, by public benefits program, by when the immigrant first entered the United States, by what form of immigration relief, if any, and the immigrant may have or may have filed for. Additionally, with regard to some public benefits programs, immigrant crime victims will have more access to state or federally funded public benefits than other immigrants in their state.

NIWAP has created an on-line public benefits map that can be used to identify which immigrants qualify for which benefits programs in each state. The benefits map details eligibility information based on the benefit sought, immigration status, and state in which the immigrant who may need benefits lives. The on-line public benefits map is organized by type of benefit and by state.



To view the public benefits map, please view: <http://map.niwap.org/>. To view detailed charts on the state benefits, view: <http://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts/>.<sup>12</sup>

<sup>12</sup> For an explanation on how to best utilize the map, see *Guide-to-the-Public-Benefits-Map (Updated Oct. 29, 2020)*, National Immigrant Women’s Advocacy Project (NIWAP) (Jun. 11, 2019), available at <https://niwaplibrary.wcl.american.edu/pubs/guide-to-the-public-benefits-map>.

## CHILD AND SPOUSAL SUPPORT FOR IMMIGRANTS

Child and spousal support cases are frequently brought before family court judges. These cases are particularly important when they involve low-income abused immigrants. Child support is particularly important for battered immigrants who cannot work because their abusive spouse never filed immigration papers to provide the victim and/or her child legal immigration status that the victim is eligible to receive. In cases in which the victim’s immigrant or lawful permanent resident spouse did file an immigration case for the benefit of the immigrant spouse, there will be an affidavit of support that is a contract that can be enforced by state courts in divorce or civil proceedings. “Affidavits of Support” are discussed further below.

Battered immigrants who come before courts in family court proceedings will often qualify for or be in the process of applying for VAWA, U visa, T visa, or battered spouse waiver immigration relief. All of these forms of crime victim related immigration relief include provision of legal work authorization for the victim, but it can take from 6 months to 5 years for the victim to receive work authorization due largely to adjudication backlogs. How long the wait is varies by immigration case type. During this wait, victims have no access to legal work authorization.

Ordering child support and spousal support in these cases provides what can be life-saving assistance helping the victim economically eliminating a crucial barrier to a victim being able to leave an abusive home.<sup>13</sup> Judges may encounter other issues unique to immigrants when hearing cases. Courts have ruled when an immigrant parent is working or has income that parent cannot use the excuse of lack of legal work authorization to avoid orders to pay child support for the immigrant parent’s children.<sup>14</sup> When immigrant parents are working in the informal economy, proof of earnings can be more complex. However, proof of income can be attained in a variety of ways including:

- Employer’s statements
- Ordering the completion of court financial statements in which the court can identify expenses that the parent is paying that would not take precedence over child support payments (e.g. luxury items including cars, home entertainment systems)
- Witness testimony
- Tax returns filed by immigrants using Individual Tax Identification Numbers (ITINs) (see discussion of ITINs below);

Child and/or spousal support can be ordered in a range of family court proceedings

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<sup>13</sup> See generally Leslye E. Orloff, Joyce Noche, Anne Benson, Laura Martinez and Jennifer Rose, *Ensuring Economic Relief for Immigrant Victims Through Family Law Court Proceedings: Child Support and Spousal Support*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 2-3 (2013), available at <https://niwaplibrary.wcl.american.edu/pubs/ch6-4-ensuring-econ-relief>.

<sup>14</sup> See *Asal v. Asal*, 960 P.2d 849, 850-851 (Okla. 1998).

including divorce, legal separation, custody, and civil protection orders.<sup>15</sup> The statutory duty to pay child support imposed on parents in the United States, Puerto Rico, the Virgin Islands, Guam, and the District of Columbia,<sup>16</sup> applies to all persons without regard to immigration status. When the parties before the court are separated the court should order child support in immigrant and mixed immigration status families in the same manner and applying the same law and child support guidelines that apply in all cases. All court ordered child support should be paid through the court. This provides either parent who is an immigrant documentation of the child support paid which is beneficial for both child support enforcement and immigration purposes.

An order for child support can also be issued even when the child being supported is not in the United States. If the court has personal jurisdiction in a family court case over the custodial and non-custodial parent, courts can award child support for the parties' children including children who do not reside in the United States. When the court ordered child support is being paid for a child who resides outside of the U.S., courts mail the child support received to the custodial parent or the child's custodian at their address in the country in which the child resides.<sup>17</sup>

### **Use of Individual Tax Identification Numbers (ITINs) in Child and Spousal Support Cases**

Individual Tax Identification Numbers (ITINs) are issued by the Internal Revenue Service (IRS) to certain nonresident and resident immigrants, their spouses, and dependents for the purpose of filing income tax returns.<sup>18</sup> Application for an ITIN must be accompanied by a tax return. Immigrants who are working will complete a tax return reporting their current year's income and will submit the tax return as a required part of the application for the ITIN. The IRS issues ITINs regardless of immigration status because immigrants may have tax filing and payment obligations under U.S. tax laws.<sup>19</sup> In fact, an eventual naturalization requires showing of good moral character, which includes the obligation to report income to the IRS, or to state and local taxing authorities.<sup>20</sup>

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<sup>15</sup> See *Immigration Status: Work Authorization, Public Benefits, and Ability to Sponsor Children 2* (Dec. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/fam-chart-immstatus>.

<sup>16</sup> Orloff, *supra* note 3 at 3 (citing Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004)).

<sup>17</sup> In 1996, section 459A of the Social Security Act (the Act) affirmed that “[t]he Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare any foreign country (or a political subdivision thereof) to be a foreign reciprocating country if the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States, and such procedures are substantially in conformity with the standards prescribed under subsection (b) [which include procedures for establishing paternity and enforcing orders].” See *Processing Cases with Foreign Reciprocating Countries*, Office of Child Support Enforcement, Administration for Children and Families, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (2004), available at <http://www.acf.hhs.gov/programs/css/resource/processing-cases-with-foreign-reciprocating-countries>.

<sup>18</sup> See generally *Individual Taxpayer Identification Numbers (ITIN)*, INTERNAL REVENUE SERVICE, available at <https://www.irs.gov/pub/irs-pdf/p1915.pdf> (last visited Mar. 3, 2022).

<sup>19</sup> See *Understanding Your IRS Individual Taxpayer Number*, INTERNAL REVENUE SERVICE, available at <http://www.irs.gov/pub/irs-pdf/p1915.pdf>.

<sup>20</sup> The application for naturalization (N-400) asks whether the individual has ever failed to file a required federal, state, or local tax return. The form also asks whether the applicant owes any overdue federal, state, or local taxes. Responding yes necessitates explaining the situation to the USCIS. See N-400, Application for Naturalization, U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., available at <https://www.uscis.gov/n-400>.

Taxes may be filed by an employed immigrant who is working who is not eligible for a work authorization or a Social Security Number. Immigrants who cannot obtain a social security number use the 9-digit ITIN in place of the social security number on their U.S. tax returns and other tax related documents. Proof of an ITIN can be useful in determining whether a person has filed taxes – and thus, provides evidence of the immigrant’s income. Working immigrants who have a path through which they plan on applying for lawful permanent residency will obtain and use ITIN numbers to pay taxes, because paying taxes provides evidence of economic earning capacity needed to overcome the public charge ground of inadmissibility. In addition, immigrants who plan on applying for citizenship will need to prove a history of having filed tax returns in order to naturalize.

Filing taxes through an ITIN also helps immigrants who may in the future have an option to attain lawful permanent residency and naturalization which require proof of good moral character. Proof of good moral character include proving a history of payment of taxes on income the immigrant earned (including unauthorized work). To allow for filing of tax returns and payment of taxes by immigrants who are working but who lack legal work authorization the IRS created the ITIN.

### Use of Affidavits of Support in Child and Spousal Support Cases<sup>21</sup>

An affidavit of support is a document that is filed by a U.S. citizen or lawful permanent resident when the family member that he or she has sponsored to attain legal immigration status through a family-based immigration petition applies for lawful permanent residence.<sup>22</sup> The affidavit of support is a sworn statement promising the United States government that the sponsor will financially support the immigrant family member applying for lawful permanent residence. The affidavit of support is also required for immigrants seeking employment-based work visas when the sponsoring employer is a spouse, parent, son, daughter, or sibling when the immigrant sponsor applying for the visa has at least a 5% interest in the company that will employ the immigrant family member.<sup>23</sup> An affidavit of support that has been filed in an immigration case can be used as evidence and can be enforceable as a contract in family court cases providing income to a spouse through the contract and for spousal and child support purposes.<sup>24</sup>

State court judges will most commonly encounter affidavits of support in divorce proceedings where the immigrant spouse is asking the court to enforce the affidavit of support.<sup>25</sup>

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<sup>21</sup> See Sarah Hampton, et al., *Affidavits of Support and Enforceability Bench Card*, NIWAP (Sept 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/affidavits-of-support-bench-card> [For more information on Affidavits of Support]

<sup>22</sup> INA § 212(a)(4)(C); 8 U.S.C. § 1182.

<sup>23</sup> Immigration and Nationality Act § 212(a)(4)(D), 8 U.S.C. § 1182(a)(4)(D); Immigration and Nationality Act § 213A(f)(4), 8 U.S.C. § 1183a(f)(4); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 1 (2021), <https://niwaplibrary.wcl.american.edu/pubs/i-864-affidavit-of-support-instructions>.

<sup>24</sup> For a more detailed discussion, see Sarah Hampton, Limayli Hugnet and Leslye E. Orloff, *Affidavits of Support and Enforceability Bench Card*, NIWAP (Sept 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/affidavits-of-support-bench-card>; see also *Sinajia v. Sinajia*, No. 113953, 1994 Conn. Super. LEXIS 2485 (Conn. Super. Ct. Sept. 27, 1994) (spousal support); *Stein v. Stein*, 831 S.W.2d 684 (Mo. Ct. App. 1992) (affidavit of support admitted as evidence).

<sup>25</sup> See, e.g., *Liu v. Mund*, 686 F.3d 418, 419–20 (7th Cir. 2012) (“The right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law.”); see also U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, FORM I-864 AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 7 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf> (“Divorce does not terminate your obligations under Form I-

The affidavit of support can be used as evidence of the sponsor’s income, ability to pay child or spousal support, and the obligation of the sponsor to support his child and/or spouse. It is important for judges to know that when an affidavit of support has been filed on an immigrant’s behalf, the sponsoring citizen or lawful permanent resident spouse or parent has provided DHS the following information.<sup>26</sup>

- A copy of the sponsor’s income tax returns for the prior three years if he or she had a legal obligation to file;<sup>27</sup>
- Evidence of the sponsor’s current employment or self-employment (usually includes recent pay stubs and a statement from the sponsor’s current employer on business letterhead);<sup>28</sup> and
- If the sponsor’s income is below 125% of the poverty level for a family of that size,<sup>29</sup> the sponsor can also submit other additional evidence of his or her ability to support the immigrant family member, such as proof of the sponsor’s assets.

Only a limited number of immigrant spouses, parents, or other family members are exempt from the affidavit of support requirement.<sup>30</sup> The group of exempt immigrants that courts are most likely to encounter in family court cases, including divorce, are Violence Against Women Act (VAWA) self-petitioners. VAWA self-petitioners are abused spouses and abused children of citizens and lawful permanent residents who are eligible to file their own immigration cases without a sponsor based on having been subjected to battering or extreme cruelty by their U.S. citizen or lawful permanent resident spouse, parent, or step-parent.<sup>31</sup> Another group who are exempt are immigrants who can be credited with working forty qualifying quarters of work credit.<sup>32</sup> One quarter of qualifying work is three months earning the wage needed to qualify for social security set by the Social Security Administration.<sup>33</sup>

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864.”).

<sup>26</sup> Orloff, *supra* note 2 at 19.

<sup>27</sup> 8 C.F.R. § 213a.2(c)(2)(i) (2011).

<sup>28</sup> 8 C.F.R. § 213a.2(c)(2)(ii) (2011).

<sup>29</sup> See Orloff, *supra* note 2 at 20 for explanation of 8 C.F.R. § 213a.2.1 (“in determining whether the household income is sufficient, household size is calculated to include the sponsor, all persons related to the sponsor by birth, marriage, or adoption living in the sponsor’s residence, the sponsor’s dependents, the sponsored immigrant(s), and any immigrants the sponsor has previously sponsored for immigration status when that support obligation has not terminated”).

<sup>30</sup> Abused spouses and children of citizens and lawful permanent residents who file VAWA self-petitions are exempt from the affidavit of support requirement. The other exempt groups are: orphans adopted by U.S. citizens, children of U.S. citizens born outside of the U.S. who acquire citizenship through their citizen parent, widows and widowers of citizens, and immigrant family members who have already worked for forty qualifying quarters or who can be credited with work their parent or spouse did as defined by the Social Security Act. Immigration and Nationality Act § 212(a)(4)(E), 8 U.S.C. § 1182(a)(4)(E); 8 C.F.R. § 213a.2(a)(2)(ii)(A)–(E) (2020); *Affidavit of Support: When NOT to Submit an Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 13, 2021), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support>; see Social Security Act, 42 U.S.C. § 413.

<sup>31</sup> Immigration and Nationality Act § 101(a)(51), 8 U.S.C. § 1101(a)(51); 8 C.F.R. § 204.2(c), (e) (2020); See, Moira Fisher Preda, Cecilia Olavarria, Janice Kaguyutan, and Alicia (Lacy) Carra, *Preparing the VAWA Self-Petition and Applying for Residence*, 3.3 Breaking Barriers (2013), <https://niwaplibrary.wcl.american.edu/pubs/ch3-3-selfpetitionprep>; See also, *Green Card for VAWA Self-Petitioner*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 10, 2020), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-va-wa-self-petitioner>; U.S. CITIZENSHIP & IMMIGR. SERVS., IMMIGRATION OPTIONS FOR VICTIMS OF CRIMES (2011), <https://niwaplibrary.wcl.american.edu/pubs/imm-options-victims-of-crimes>;

<sup>32</sup> 8 C.F.R. § 213.2(a)(2)(ii)(C) (2020). (Immigrants can only earn 4 credits per year. 40 quarters would be 10 years of work unless the immigrant is eligible to apply credits earned by a spouse, if still married, or a parent which can reduce the time period to 5 years).

<sup>33</sup> 42 U.S.C. § 413(a); Immigration and Nationality Act § 213A(a)(3), 8 U.S.C. § 1183a(a)(3). A qualifying quarter for affidavit of support purposes is one quarter of earnings needed to earn one quarter of coverage; this is the basic unit used to determine

## Calculating the Amount Owed Under an Affidavit of Support<sup>34</sup>

A sponsor is required to provide the intending immigrant with the necessary financial support to maintain the immigrant at a minimum of 125% of the Federal Poverty Guidelines annually<sup>35</sup> until the obligations under the affidavit of support terminate. The Federal Poverty Guidelines are determined each year by the U.S. Department of Health and Human Services (HHS) and published in the Federal Register.<sup>36</sup>

The amount due each year under the affidavit of support also depends on the immigrant's household size. For example, when a citizen sponsored their immigrant spouse and stepchild for lawful permanent residency. Then during the marriage, the citizen and immigrant spouse had two more children. Not long after, the immigrant spouse separated from the citizen spouse due to domestic violence, and lived with the three children apart from the abusive citizen spouse for three years. The immigrant spouse who did not receive any income or support from the abuser for those three years filed for divorce and enforcement of the affidavit of support. For purposes of the I-864 affidavit of support, the immigrant spouse's household size would be two covering only the sponsored spouse and stepchild.<sup>37</sup> The two children born of the marriage between the immigrant and sponsoring spouse would have rights to child support that are independent of and in addition to the affidavit of support enforcement.

The court would calculate the amount due to the sponsored spouse and stepchild under the affidavit of support in the following manner. Using the federal poverty guidelines for 2021,<sup>38</sup> the poverty line for a family of two in the forty-eight contiguous states and the District of Columbia is \$17,420. Under the affidavit of support, the citizen sponsor promised to maintain the immigrant spouse and stepchild at 125% poverty, which would total \$21,775 for 2021. This calculation process would be repeated to determine what the sponsor owed the immigrant spouse and step-child for 2020 and 2019 resulting in an additional \$21,550 owed under the affidavit of

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whether a worker has earned a quarter of coverage for social security insurance purposes. 42 U.S.C. § 413; *Quarter of Coverage*, SOC. SEC. ADMIN. (2021), <https://www.ssa.gov/oact/cola/QC.html>. A person can only earn a maximum of four qualifying quarters per year, and the funds can be earned at any time during the year—including being earned all in one quarter. 42 U.S.C. § 413(a)(2)(B)(vii); *Quarter of Coverage*, SOC. SEC. ADMIN. (2021), <https://www.ssa.gov/oact/cola/QC.html>. See *Amount of Earnings Needed to Earn One Quarter of Coverage*, SOC. SEC. ADMIN. (2021), <https://www.ssa.gov/oact/cola/QC.html#qseries>, for a historical chart listing the amount of earnings required to earn a quarter of coverage for each year since 1978.

<sup>34</sup> See Sarah Hampton, et al., *Affidavits of Support and Enforceability Bench Card*, NIWAP (Sept 30, 2021) available at <https://niwaplibrary.wcl.american.edu/pubs/affidavits-of-support-bench-card> [For more information on Affidavits of Support].

<sup>35</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0075, FORM I-864 AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 6 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf>.

<sup>36</sup> See 86 Fed. Reg. 7,732–34 (Feb. 1, 2021); *2021 Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2021), <https://aspe.hhs.gov/2021-poverty-guidelines>.

<sup>37</sup> See, e.g., *Erler v. Erler*, 824 F.3d 1173, 1178 (9th Cir. 2016) (“[I]n 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.”); *Toure-Davis v. Davis*, No. WGC–13–916, 2015 WL 993575, at \*3–4 (D. Md. Mar. 4, 2015) (holding that children who are U.S. citizens are not considered sponsored immigrant children and that an I-864 affidavit of support does not mandate a sponsor to support non-immigrant members of a household); *Motlagh v. Motlagh*, 100 N.E.3d 937, 944 (Ohio Ct. App. 2017) (“[R]egardless of the relationship of the sponsored immigrant and others living in her household, we agree that the I-864 Affidavit ‘does not mandate the sponsor support other non-immigrant members of the household at 125 percent of the Federal poverty line.’” (quoting *Toure-Davis v. Davis*, No. WGC–13–916, 2015 WL 993575, at \*3 (D. Md. 4, 2015))).

<sup>38</sup> 86 Fed. Reg. 7,732–34 (Feb. 1, 2021); *2021 Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2021), <https://aspe.hhs.gov/2021-poverty-guidelines>.

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support for 2020 and \$21,137 for 2019.