

Affidavits of Support and Enforceability Bench Card

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September 30, 2021

I. Affidavits of Support Introduction

United States citizens and lawful permanent residents are able to file petitions with U.S. Citizenship and Immigration Services (USCIS) requesting that their spouse, child, or certain other family members be allowed to immigrate to the U.S.¹ Similarly, U.S. citizens, lawful permanent residents, and U.S. nationals² may sponsor a spouse, child,³ son, daughter, or sibling for an employment-based immigrant visa.⁴ In both cases, successful applicants must meet specific requirements that include proving the immigrant family member is not likely to become a public charge in the future. A public charge is a noncitizen who is “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁵ In general, an immigrant applying to enter the United States who is likely at any time to become a public charge is inadmissible and denied entry into the U.S. or denied lawful permanent residency.⁶

To overcome the public charge ground of inadmissibility, the petitioning family member who is sponsoring the immigrant family member for lawful permanent residency must submit an affidavit of support promising to support the intending immigrant family member so that they are not likely to become a public charge. This affidavit of support is required for all immigrants seeking admission to the U.S. and lawful permanent residency based on the family relationship filing for family-based immigration relief. The affidavit of support is also required for

¹ Immigration and Nationality Act § 204(a)(1)(A)–(B), 8 U.S.C. § 1154(a)(1)(A)–(B).

² U.S. immigration law defines a U.S. national as a citizen of the United States or a person who “owes permanent allegiance to the United States,” even though that person is not a U.S. citizen. Immigration and Nationality Act § 101(a)(22), 8 U.S.C. § 1101(a)(22). A person is a U.S. national, but not a citizen, at birth when the person is born in an “outlying possession of the United States,” or to parents one or both of whom are U.S. nationals that meet certain residency requirements. Immigration and Nationality Act § 308, 8 U.S.C. § 1408. Immigration law defines “outlying possession of the United States” as American Samoa and Swains Island. Immigration and Nationality Act § 101(a)(29), 8 U.S.C. § 1101(a)(29).

³ Under U.S. immigration laws “child” is defined as a person who is unmarried and under the age of twenty-one. Immigration and Nationality Act § 101(b)(1), 8 U.S.C. § 1101(b)(1). When children are over the age of twenty-one, immigration laws refer to them as sons or daughters.

⁴ 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, 11 (2021), <https://niwaplibrary.wcl.american.edu/pubs/i-864-affidavit-of-support-instructions>.

⁵ 64 Fed. Reg. 28,689, 28, 869 (Mar. 26, 1999); *Public Charge Resources*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 19, 2021), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources>; Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4).

⁶ Immigration and Nationality Act § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A).

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immigrants seeking employment-based work visas when the sponsoring employer is a spouse, parent, son, daughter, or sibling with at least a 5% interest in the company that will employ the immigrant family member.⁷

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.⁸ Courts may also see affidavits of support enforced on behalf of immigrant children who were sponsored by their parent or step-parent. Affidavit of support enforcement can be particularly helpful in severing economic dependence and countering economic abuse in divorce, custody, spousal support, and child support cases where the citizen or lawful permanent resident sponsor is a domestic violence or child abuse perpetrator. Sponsored immigrants are also able to bring affidavit of support enforcement cases in civil court contract or small claims actions. Additionally, courts may see cases in which a state public benefits agency that has provided means-tested public benefits to an immigrant whose sponsor has filed an affidavit of support will sue the sponsoring family member for repayment of the money owed under the affidavit of support.⁹

Too often family members can be involved in the human trafficking of family members. For example, in 62.7% of child sex trafficking cases the child's trafficker is a family member.¹⁰ In cases involving human trafficking, affidavit of support enforcement against a trafficker who is a family member can be an important form of relief that courts can use to hold traffickers accountable. In human trafficking cases, trafficking victims could have been sponsored for a family-based visa or an employment-based visa by a family member, and the immigrant trafficking victim could have been subjected to sex and/or labor trafficking.

To sponsor a family member or employee for immigration relief, the individual must be a United States citizen, a United States national or legal permanent resident.¹¹ The sponsor also

⁷ 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>.

⁸ 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-864.”).

⁹ Immigration and Nationality Act § 213A(a)(1)(B)–(C), 8 U.S.C. § 1183a(a)(1)(B)–(C); *Affidavit of Support: Responsibilities as a Sponsor*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 19, 2021), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support>.

¹⁰ Jennifer Cole & Ginny Sprang, *Sex Trafficking of Minors in Metropolitan, Micropolitan, and Rural Communities*, 40 CHILD ABUSE & NEGLECT 113 (2015). For over 62.7% of sex trafficked children, the trafficker is a family member—parent, grandparent, aunt, uncle, cousin, sibling—with 45.8% of traffickers being the parent or guardian. *Id.* at 119. Additionally, up to 34% of sex trafficked children are trafficked by an intimate partner. *Id.* According to the Counter Trafficking Data Collaborative, 27% of adult victims of human trafficking worldwide were trafficked by a family member or intimate partner. *Recruiter Relationship Adults and Children*, COUNTER TRAFFICKING DATA COLLECTIVE (Apr. 13, 2020), <https://www.ctdatacollaborative.org/dataset/age-data-story/resource/5634fe8d-2dec-4385-beec-15ce1848c1c1>.

¹¹ Immigration and Nationality Act § 213A(f)(1), 8 U.S.C. § 1183a(f)(1); Veronica Tobar Thronson, *Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 FAM. CT. REV. 594, 595 (2012), <http://library.niwap.org/wp-content/uploads/Til-Death-Do-Us-Part-Final-PDF.pdf>.

must be domiciled in the United States and have annual income of at least 125 percent over the federal poverty line.¹² However, if a petitioning sponsor does not meet the requisite income level, another individual who meets the requirements, including requisite income, may submit an additional affidavit of support on behalf of the intending immigrant.¹³ By submitting this additional affidavit of support, the additional sponsor agrees to support the intending immigrant should the petitioning sponsor become unable to do so. This additional sponsor accepts joint and several liability with the petitioning sponsor for the full extent of the funds obligated under the affidavit of support and can be sued in court for the money owed.¹⁴

Historically, the federal government has used two different affidavit of support forms: Form I-134 and Form I-864. This bench card discusses both forms because which affidavit of support form the court will be asked to enforce will depend on the duration of the marriage of the parties before the court. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sponsors were required to certify that they would financially support an intending immigrant through affidavit of support Form I-134. Generally speaking, in marriages that took place prior to December 19, 1997, the affidavit of support completed for the immigrant spouse is Form I-134. Detailed information on Form I-134 and the obligations incurred by the sponsor will be discussed in Section III of this Bench Card.

The affidavit of support form that has been required for filings after December 19, 1997, is Form I-864, which replaced Form I-134 for family-based immigrants seeking admission to the United States or permission to be granted to lawful permanent residence.¹⁵ When the court encounters a case regarding affidavits of support, the court will need to first determine whether the form submitted to immigration authorities was Form I-864 or a Form I-134. The legal obligations created under the two forms are different and are discussed separately below.

II. Affidavit of Support Form I-864 (Filed Post-December 19, 1997)

Section 213A of the Immigration and Nationality Act (INA) governs the requirements for a sponsor's affidavit of support. A sponsoring U.S. citizen or lawful permanent resident family member is required to submit Form I-864 for each application they file with USCIS sponsoring:

- An immigrant family member residing overseas for a visa; or
- An immigrant family member to become a lawful permanent resident.

¹² Immigration and Nationality Act § 213A(f)(1), 8 U.S.C. § 1183a(f)(1). For purposes of the Affidavit of Support, the federal poverty line is based on family size and is defined by the Director of the Office of Management and Budget and revised annually by the Secretary of Health and Human Services. Immigration and Nationality Act § 213A(h), 8 U.S.C. § 1183a(h).

¹³ Immigration and Nationality Act § 213A(f)(2), 8 U.S.C. § 1183a(f)(2); 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>.

¹⁴ Immigration and Nationality Act § 213A(f)(5), 8 U.S.C. § 1183a(f)(5); *Affidavit of Support: Responsibilities as a Sponsor*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 19, 2021), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support>.

¹⁵ Form I-134 can still be found on the USCIS website for use by persons who wish to sponsor a foreign national seeking a visa. U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0014, FORM I-134 AFFIDAVIT OF SUPPORT (2019), <https://www.uscis.gov/i-134>. It is no longer used for sponsoring family members. U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0014, FORM I-134 AFFIDAVIT OF SUPPORT 1 (2019), <https://www.uscis.gov/sites/default/files/document/forms/i-134instr.pdf>.

Citizens and lawful permanent residents are authorized under the Immigration and Nationality Act to sponsor specified family members for family-based visas and lawful permanent residency.¹⁶

- U.S. citizens can sponsor their immediate relatives, which means:¹⁷
 - Spouses;
 - Unmarried children under the age of twenty-one; and
 - Parents.¹⁸
- U.S. citizens can sponsor the following family members, subject to worldwide levels and numerical restrictions:¹⁹
 - Unmarried sons and daughters over the age of twenty-one;
 - Married sons and married daughters; and
 - Brothers and sisters.²⁰
- Lawful permanent residents can sponsor the following family members, subject to worldwide levels and numerical restrictions:²¹
 - Unmarried sons and daughters over the age of twenty-one;
 - Spouses; and
 - Unmarried children under the age of twenty-one.

Citizens, nationals, and lawful permanent residents can sponsor the following relatives for a wide range of employment-based visas:²²

- Spouse
- Parent
- Son
- Daughter
- Sibling

¹⁶ Immigration and Nationality Act § 213A(f)(1)(A), 8 U.S.C. § 1183a(f)(1)(A); 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>.

¹⁷ Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Immediate relatives of U.S. citizens are not subject to worldwide levels or numerical restrictions. Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁸ U.S. citizens must be at least twenty-one years old to sponsor their parents. Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁹ Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a).

²⁰ U.S. citizens must be at least twenty-one years old to sponsor their brothers and sisters. Immigration and Nationality Act § 203(a)(4), 8 U.S.C. § 1153(a)(4).

²¹ Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a).

²² Immigration and Nationality Act § 213A(f)(4), 8 U.S.C. § 1183a(f)(4). U.S. citizens, U.S. nationals, and lawful permanent residents can only sponsor relatives seeking employment-based visas when the sponsor is the one who filed a classification petition for the intending employment-based immigrant under section 203(b) of the Immigration and Nationality Act. Immigration and Nationality Act § 213A(f)(4), 8 U.S.C. § 1183a(f)(4); *see* Immigration and Nationality Act § 203(b), 8 U.S.C. § 1153(b). However, if a relative has a 5% or greater interest in the business that is sponsoring the intending employment-based immigrant, the relative must submit an affidavit of support for each family member sponsored. 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>.

When a citizen or lawful permanent resident sponsors their immigrant family member for lawful permanent residence or a work visa, the sponsor must prove that their immigrant family member will not become a public charge.²³ The sponsor meets this burden of proof by filing the Form I-864 Affidavit of Support.²⁴ In cases involving marriages between U.S. citizens or lawful permanent residents and immigrant spouses filed after December 19, 1997, the citizen or lawful permanent resident spouse who filed an application asking USCIS to grant legal immigration status to the immigrant spouse will have filed an affidavit of support using form I-864.²⁵

There are a limited number of groups of immigrant spouses and other immigrant family members who are exempt from the affidavit of support requirement.²⁶ 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.²⁷

Additionally, if the immigrant can be credited with working forty qualifying quarters, the sponsor is exempt from the affidavit of support requirement.²⁸ One quarter of qualifying work is three months earning the wage needed to qualify for social security set by the Social Security

²³ Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4).

²⁴ 8 C.F.R. § 213a.2(a) (2020); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0023, FORM I-485 INSTRUCTIONS FOR APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 12 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf>; see Immigration and Nationality Act § 212(a)(4)(B)(ii), (C)(ii), (D), 8 U.S.C. § 1182(a)(4)(B)(ii), (C)(ii), (D).

²⁵ If the case before the court involves a marriage between a U.S. citizen or lawful permanent resident and an immigrant spouse, and the citizen or lawful permanent resident spouse never filed immigration papers for the immigrant spouse, evidence-based research has found that this failure to file is typically evidence of domestic violence; the failure to file may be part of a pattern of coercive control in the relationship. Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, Symposium Briefing Papers, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY LAW & POL'Y 245, 292–95 (2000), <https://niwaplibrary.wcl.american.edu/pubs/characteristics-help-seeking-behaviors>.

²⁶ 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.

²⁷ 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-vawa-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>;

²⁸ 8 C.F.R. § 213.2(a)(2)(ii)(C) (2020).

Administration.²⁹ Sponsored immigrants have a number of ways to earn credit towards a total of forty qualifying quarters:

- The sponsored immigrant has already earned qualifying quarters of work credit that can be posted to the immigrant's valid social security account in the sponsored immigrant's name;³⁰
- The sponsoring citizen or lawful permanent resident spouse earned qualifying quarters *during the marriage* that can be credited to the immigrant spouse;³¹
- Immigrant children can count the qualifying quarters earned by a parent while the immigrant child was under 18 years old,³² and
- Any combination of the above.³³

To overcome the public charge ground of inadmissibility in all non-exempt family-based visa applications, the citizen or lawful permanent resident family member filing the immigration

²⁹ 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 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.

³⁰ U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1616-0075, INSTRUCTIONS FOR REQUEST FOR EXEMPTION FOR INTENDING IMMIGRANT'S AFFIDAVIT OF SUPPORT 1 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf>; see Charles Wheeler, *Ten Pitfalls to Avoid with the Affidavit of Support*, IMMIGR. DAILY (Nov. 28, 2006), <https://www.ilw.com/articles/2006,1128-wheeler.shtm> (explaining that a sponsored immigrant can receive credit for earnings posted to a valid social security account in the sponsored immigrant's name, including earnings posted after termination of valid employment authorization). After a sponsored immigrant is granted a valid work-authorized social security number, credit for past earnings for which the worker has documentation can be moved into that account to add qualifying quarters. Charles Wheeler, *Ten Pitfalls to Avoid with the Affidavit of Support*, IMMIGR. DAILY (Nov. 28, 2006), <https://www.ilw.com/articles/2006,1128-wheeler.shtm>.

³¹ Immigration and Nationality Act § 213A(a)(3)(B)(ii), 8 U.S.C. § 1183a(a)(3)(B)(ii); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR REQUEST FOR EXEMPTION FOR INTENDING IMMIGRANT'S AFFIDAVIT OF SUPPORT 1 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf>. Divorce cuts the immigrant spouse off from any ability to use qualifying quarters earned by the former spouse during the marriage. If the sponsoring spouse dies, the immigrant spouse can continue to count the sponsoring spouse's quarters earned during the marriage. See Immigration and Nationality Act § 213A(a)(3)(B)(ii), 8 U.S.C. § 1183a(a)(3)(B)(ii); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1616-0075, INSTRUCTIONS FOR REQUEST FOR EXEMPTION FOR INTENDING IMMIGRANT'S AFFIDAVIT OF SUPPORT 1 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf>.

³² Immigration and Nationality Act § 213A(a)(3)(B)(i), 8 U.S.C. § 1183a(a)(3)(B)(i); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1616-0075, INSTRUCTIONS FOR REQUEST FOR EXEMPTION FOR INTENDING IMMIGRANT'S AFFIDAVIT OF SUPPORT 1 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf>.

³³ Immigration and Nationality Act § 213A(a)(3)(B), 8 U.S.C. § 1183a(a)(3)(B); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR REQUEST FOR EXEMPTION FOR INTENDING IMMIGRANT'S AFFIDAVIT OF SUPPORT 1 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf>; *Introductory Guide to the Affidavit of Support*, IMMIGRANT LEGAL RES. CTR. 3 (Apr. 10, 2018), https://www.ilrc.org/sites/default/files/resources/intro_guide_affidavit_support-20180410.pdf.

petition must sign and file a Form I-864 affidavit of support in the immigrant family member's immigration case, proving to the federal government that the sponsored immigrant will not become a public charge.³⁴

The I-864 Affidavit of Support is a legally binding contract between the citizen or lawful permanent resident family member sponsor and the U.S. government.³⁵ In order for the family member sponsor's application on behalf of the intending immigrant to be approved, the sponsoring family member will need to have submitted sufficient supporting evidence of income and assets along with the affidavit of support. It is important for family courts adjudicating child and spousal support issues, affidavit of support enforcement and other financial matters in divorce cases to know that the sponsor can be ordered to turn over to the state court the evidence that the sponsoring spouse or parent submitted to the federal government in the family member's immigration case.

The sponsor must submit supporting documentation on:

- Assets;
- Employment; and
- Income tax filings for the three years prior to the date the I-864 Affidavit of Support was signed.³⁶

For self-employed sponsors to prove their income, they will have submitted documentation of income that often includes:

- 3 years 1040 tax returns;
- Schedule C - forms documenting self-employment;
- Schedule A - itemized deductions;
- Copies of major invoices sent to clients;
- Cancelled checks for large amounts;
- The profit and loss statements for their business; and
- Proof of the value of assets the sponsor owns.³⁷

If the primary sponsor does not meet the income requirement, they are allowed to secure an additional sponsor who will independently commit to supporting the immigrant spouse, child or family member.³⁸ However, adding a joint sponsor does not relieve the primary sponsor of the requirement that they must also file an affidavit of support.³⁹ When joint affidavits of support are

³⁴ Immigration and Nationality Act § 212(a)(4)(C)(ii), 8 U.S.C. § 1182(a)(4)(C)(ii).

³⁵ 8 C.F.R. § 213a.2(d) (2020); 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> ("The intending immigrant becoming a lawful permanent resident is the consideration for the contract.").

³⁶ Immigration and Nationality Act § 213A(f)(6), 8 U.S.C. § 1183a(f)(6); 8 C.F.R. § 213a.2(c)(2) (2020).

³⁷ U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 8-9 (2021), <https://niwaplibrary.wcl.american.edu/pubs/i-864-affidavit-of-support-instructions>; *Introductory Guide to the Affidavit of Support*, IMMIGRANT LEGAL RES. CTR. 7 (Apr. 10, 2018), https://www.ilrc.org/sites/default/files/resources/intro_guide_affidavit_support-20180410.pdf.

³⁸ Immigration and Nationality Act § 213A(f)(2), 8 U.S.C. § 1183a(f)(2); 8 C.F.R. § 213a.2(c)(2)(iii) (2020).

³⁹ Immigration and Nationality Act § 213A(f)(5)(A), 8 U.S.C. § 1183a(f)(5)(A); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 13 (2021), <https://niwaplibrary.wcl.american.edu/pubs/i-864-affidavit-of-support-instructions>.

filed, they are enforceable against both the primary sponsor and the person who agrees to be the additional sponsor.⁴⁰

Obligations under the Form I-864 Affidavit of Support begin once the sponsored immigrant becomes a lawful permanent resident. As soon as an immigration officer or immigration judge grants the intending immigrant's application, the affidavit of support becomes legally binding against the sponsor and the joint sponsor.⁴¹ A sponsor's legal contractual obligation under the I-864 affidavit of support remains in effect and can only be terminated if one of the following occurs:⁴²

- (1) The citizen or lawful permanent resident sponsor dies;⁴³
- (2) The sponsored immigrant dies;⁴⁴
- (3) The sponsored immigrant becomes a U.S. citizen;⁴⁵
- (4) The sponsored immigrant leaves the United States permanently;⁴⁶ or

(5) The sponsored immigrant can be credited with forty qualifying quarters of coverage under title II of the Social Security Act.⁴⁷

Importantly, the contractual commitment of the sponsor who signs an affidavit of support does not end if the sponsor and the sponsored immigrant were married and divorce, become estranged, or if the sponsor loses contact with the sponsored immigrant.⁴⁸ This obligation of support remains unchanged, even when a premarital agreement or a divorce agreement attempt to eliminate the responsibility.⁴⁹

⁴⁰ Immigration and Nationality Act § 213A(f)(5)(A), 8 U.S.C. § 1183a(f)(5)(A); 8 C.F.R. § 213a.2(c)(2)(iii)(C) (2020); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 13 (2021), <https://niwaplibrary.wcl.american.edu/pubs/i-864-affidavit-of-support-instructions>; Veronica Tobar Thronson, *Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 FAM. CT. REV. 594, 595 (2012), <http://library.niwap.org/wp-content/uploads/Til-Death-Do-Us-Part-Final-PDF.pdf>.

⁴¹ Immigration and Nationality Act § 213A(a), 8 U.S.C. § 1183a(a); 8 C.F.R. § 213a.2(d)–(e)(1) (2020).

⁴² Immigration and Nationality Act § 213A(a)(2)–(3), 8 U.S.C. § 1183a(a)(2)–(3); 8 C.F.R. § 213a.2(e) (2020); *see, e.g.*, *Erler v. Erler*, 824 F.3d 1173, 1176–77 (9th Cir. 2016).

⁴³ 8 C.F.R. § 213a.2(e)(2)(ii) (2020). However, in cases involving joint sponsors, the death of one sponsor does not terminate the obligation the joint sponsor. 8 C.F.R. § 213a.2(e)(2)(ii) (2020).

⁴⁴ 8 C.F.R. § 213a.2(e)(2)(i)(E) (2020).

⁴⁵ 8 C.F.R. § 213a.2(e)(2)(i)(A) (2020).

⁴⁶ 8 C.F.R. § 213a.2(e)(2)(i)(C) (2020).

⁴⁷ 8 C.F.R. § 213a.2(e)(2)(i)(B) (2020).

⁴⁸ *See* U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, INSTRUCTIONS FOR AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 13 (2021), <https://niwaplibrary.wcl.american.edu/pubs/i-864-affidavit-of-support-instructions>; *Affidavit of Support: Responsibilities as a Sponsor*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 19, 2021), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support>.

⁴⁹ *See, e.g.*, *Erler v. Erler*, 824 F.3d 1173, 1177 (9th Cir. 2016) (“[U]nder federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support.”).

a. Legal enforceability

Form I-864 is a legally enforceable contract between a sponsor and the United States.⁵⁰ By submitting an affidavit of support for an immigrant spouse or family member, the sponsor agrees to financially support the sponsored immigrant at 125% of the Federal Poverty Guidelines.⁵¹ Under the INA, a family sponsor is required to complete Form I-864 and submit it as evidence that the intending immigrant spouse, child, or other family member will not become a public charge.⁵² Thus, when a sponsor signs an affidavit of support for an intending immigrant, they are entering an agreement with the U.S. government to be legally responsible for supporting the immigrant family member.⁵³

This legal responsibility is enforceable in one of two ways:

- If the sponsor fails to support the immigrant, as stipulated by the I-864, and if the immigrant utilizes public services or benefits, then the government may request that the sponsor reimburse the government agency for the costs of providing the immigrant with public benefits.⁵⁴ If the sponsor fails to do so, the agency may sue for recovery of costs.⁵⁵
- The sponsored immigrant, who is the intended beneficiary of the affidavit of support, has standing in all state and generally in federal courts to bring a claim against his or her respective sponsor to enforce the I-864 Affidavit of Support.⁵⁶

⁵⁰ Immigration and Nationality Act § 213A(a), 8 U.S.C. § 1183a(a); 8 C.F.R. § 213a.2(d); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, FORM I-864 AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 6–7 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf>.

⁵¹ Immigration and Nationality Act § 213A(a)(1)(A), 8 U.S.C. § 1183a(a)(1)(A); 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>.

⁵² Immigration and Nationality Act § (a)(4)(C)(ii)–(D), 8 U.S.C. § 1182(a)(4)(C)(ii)–(D); 8 C.F.R. § 213a.2(a)(1)(i)(A) (2020); 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>.

⁵³ Immigration and Nationality Act § 213A(a), (e), 8 U.S.C. § 1183a(a), (e); 8 C.F.R. § 213a.2(d); 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>.

⁵⁴ Immigration and Nationality Act § 213A(b)–(c), 8 U.S.C. § 1183a(b)–(c); 8 C.F.R. § 213a.2(d); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, FORM I-864 AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 6–7 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf>.

⁵⁵ Immigration and Nationality Act § 213A(b), 8 U.S.C. § 1183a(b); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB No. 1615-0075, FORM I-864 AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 6–7 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf>.

⁵⁶ Immigration and Nationality Act § 213A(a)(1)–(2), (c), 8 U.S.C. § 1183a(a)(1)–(2), (c) (providing that sponsored immigrants may sue sponsors who do not support and maintain the sponsored immigrant at an annual income of at least 125% above the federal poverty line); 8 C.F.R. § 213a.2(c)(2)(i)(C)(2), (d); 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>; *Kumar v. Kumar*, 220 Cal. Rptr. 3d 863, 868 (Cal. Ct. App. 2017) (holding that the obligation under the sponsor’s I-864 affidavit of support is enforceable by the sponsored wife and there is no duty to mitigate when enforcement and affidavit of support); *Love v. Love*, 33 A.3d 1268, 1273 (Pa. Super. Ct. 2011) (holding the obligation of the sponsor’s I-864 affidavit of support is enforceable by the sponsored wife); *In re Marriage of Kamali and Alizadeh*, 356 S.W.3d 544, 546–47 (Tex. App. 2011) (enforcing I-864 affidavit of support despite divorce of the contracting parties and holding that the sponsored immigrant has the right to enforce the I-864 affidavit of support as a third party beneficiary); *In re Marriage of*

i. What is the Financial Obligation?

As indicated on Form I-864, 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 annually⁵⁷ until the obligations under the affidavit of support terminate under the limited conditions listed above.⁵⁸ 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.⁵⁹ Calculating the amount owed under an affidavit of support requires that the court access to the current poverty guidelines as well as the poverty guidelines historically.⁶⁰

The amount due each year under the affidavit of support also depends on the immigrant's household size. For example, say that a citizen sponsored his immigrant spouse and step-child for lawful permanent residency. During the marriage, the citizen and immigrant spouse had two more children. Not long after, the immigrant spouse needed to separate 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 did not receive any income or support from the abuser for those three years, and she 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 in many jurisdictions covering only the sponsored spouse and step-child.⁶¹ The two children

Sandhu, 207 P.3d 1067, 1071 (Kan. Ct. App. 2009) (recognizing the sponsored immigrant's standing to file complaint for enforcement of an I-864 affidavit); Naik v. Naik, 944 A.2d 713, 717 (N.J. Super. Ct. App. Div. 2008) (holding that a sponsored immigrant can enforce an I-864EZ affidavit of support in state court); Davis v. United States, 499 F.3d 590, 595 (6th Cir. 2007) (holding that state court enforcement of an I-864 affidavit of support is "explicitly permitted under the statute"); Moody v. Sorokina, 830 N.Y.S.2d 399, 402 (N.Y. App. Div. 2007) (holding that the sponsored immigrant has independent standing to enforce the sponsor's obligations under the I-864 affidavit of support in any federal or state court). *But see, e.g.,* Ivanoff v. Schmidt, No. 17-cv-01563-KMT, 2018 WL 1468559, at *2-3 (D. Colo. Mar. 23, 2018) (holding that I-864 breach of contract claims do not arise under federal law and that federal courts do not have subject matter jurisdiction to enforce I-864 affidavits of support). For a discussion of state and federal jurisdiction over Form I-864 enforceability, see Veronica Tobar Thronson, *Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 FAM. CT. REV. 594, 596-99 (2012), <http://library.niwap.org/wp-content/uploads/Til-Death-Do-Us-Part-Final-PDF.pdf>.

⁵⁷ 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>.

⁵⁸ 8 C.F.R. § 213a.2(e)(2); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0075, FORM I-864 AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 6-7 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf>.

⁵⁹ 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>.

⁶⁰ HHS publishes a list of the annual poverty guidelines per household since 1982. *Prior HHS Poverty Guidelines and Federal Register References*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2021), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references>

⁶¹ 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-

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 step-child under the affidavit of support in the following manner. Using the federal poverty guidelines for 2021,⁶² 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 step-child 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 support for 2020 and \$21,137 for 2019.

The financial obligation created by a citizen or lawful permanent resident sponsor signing and submitting the Form I-864 affidavit of support is enforced as a contract that is separate and distinct from any child or spousal support obligations that may be awarded under state family laws.⁶³ There is no statute of limitations on a sponsored immigrant's ability to enforce the affidavit of support. Generally, sponsored immigrant spouses and step-children are able to enforce the affidavit of support for all years during which the sponsored immigrant's annual household income fell below 125% of the federal poverty line, starting from the time the sponsored immigrant attained lawful permanent residency until the statutory conditions are met that terminate the sponsor's obligation.

III. Legal Enforceability of Form I-134 Affidavit of Support

In 1996, U.S. immigration laws were amended to require that all affidavits of support filed after December 19, 1997, be legally enforceable using Form I-864.⁶⁴ Prior to 1996, affidavits of support were legally required using Form I-134. The courts that addressed Form I-134 held that these affidavits of support did *not* create a legal obligation to support a sponsored immigrant and were neither legally binding nor enforceable as contracts.⁶⁵

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. Mar. 4, 2015)).

⁶² 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>.

⁶³ See, e.g., *Motlagh v. Motlagh*, 100 N.E.3d 937, 942-43 (Ohio Ct. App. 2017) (holding that "spousal support and an I-864 obligation are separate and distinct issues," but that "a divorce court may enforce the I-864 obligation through a spousal support order, an order of specific performance, or some combination of both"); *In re Marriage of Khan*, 332 P.3d 1016, 1017 (Wash. Ct. App. 2014) ("We hold that [the supported immigrant's] right to support under federal immigration law is a contract right separate from any rights she had as a result of her marriage, and that this contract right need not be enforced through maintenance payments in a dissolution proceeding.").

⁶⁴ Immigration and Nationality Act § 1182(a)(4)(C)(ii), 8 U.S.C. § 1182(a)(4)(C)(ii); see 64 Fed. Reg. 28,689, 28, 869 (Mar. 26, 1999).

⁶⁵ See *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at *2 (M.D. Fla. May 4, 2006) ("[Form I-134] is not a binding contract between the parties; thus, plaintiff, the sponsored immigrant, cannot enforce its terms."); *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534, * 3-6 (E.D.N.Y. Mar. 26, 2002) ("[T]he contractual obligations imposed by the [Illegal Immigration Reform and Immigrant Responsibility Act] on an affidavit of support made on an I-864 Form do not attach to affidavits of support made on an old I-134 Form. As such, this Court finds that an affidavit of support on an I-134 Form is not a legally binding contract under the amended 8 U.S.C. 1183a."); *County of San Diego v. Vilorio*, 80 Cal. Rptr. 869, 875-76 (Cal. Ct. App. 1969)

Family courts hearing divorce and support matters may encounter the I-134 affidavits of support in cases involving marriages in which the marriage was performed and the citizen or lawful permanent resident spouse filed the affidavit of support prior to December 19, 1997.⁶⁶ Despite the fact that Form I-134 is not an enforceable contract under the law, courts have used the information contained in the I-134 affidavit of support as evidence that can assist a court in awarding spousal support under state family laws. The I-134 affidavit of support may be used as evidence that assists the court in deciding whether to issue spousal support in a divorce action in the following ways:

- the fact that the sponsor executed an affidavit of support on form I-134 may be considered together with the other factors required under state law to determine whether an immigrant spouse will be awarded alimony in a divorce that ends a long-term marriage;
- depending on the facts of the case, the Form I-134 affidavit of support may also impact the amount of alimony set by the court; and
- The Form I-134 affidavit of support may also be used to impute income and as evidence that could be helpful to the court in determining a sponsor's ability to pay spousal support.

Additionally, when sponsoring spouses filed I-134 affidavits of support with immigration authorities, the evidence submitted in support of that affidavit was similar to the evidence that documenting the sponsor's assets and income and included three years of income tax findings. When the court learns that a sponsoring spouse filed an affidavit of support the court can order through discovery or the court's own motion that the sponsoring spouse turn over in the family case a copy of the I-134 affidavit of support and all of the evidence that was submitted to immigration authorities that accompanied that filing. This evidence can be very useful evidence of earning capacity, ability to pay, and imputed income for both child and spousal support determinations.

(concluding that I-134 affidavits of support do not create a contract with the United States); Michigan *ex rel* Attorney General v. Binder, 96 N.W.2d 140, 143 (Mich. 1959) (“[N]o statutory authority appears for officials of the state department exacting from [Form I-134 sponsors] binding legal agreements to support them . . . it can scarcely be concluded that there was an intent on the part of the government to create a contract obligation.”); Dep’t of Mental Hygiene of California v. Renel, 173 N.Y.S.2d 231, 235–36 (N.Y. App. Term 1958) (holding that Congress did not create authority to enforce I-134 affidavits of support as contracts); S. REP. NO. 81-1515, at 347 (1950) (“An affidavit of support, at most, appears to be merely a moral obligation upon the affiant, and the Government apparently could not recover from the affiant on the strength of the document since there is no contractual obligation involved.”).

⁶⁶ The Form I-134 Affidavit of Support continues to be used in limited forms for immigration cases that do not involve sponsorship by a family member who is required to file an I-864 Affidavit of Support. See U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0014, I-134 AFFIDAVIT OF SUPPORT 1 (2019), <https://niwaplibrary.wcl.american.edu/pubs/i-134-instructions>.