

Case No. A145181

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION TWO**

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ASHLYNE KUMAR,  
*Appellant,*

v.

VIKASH KUMAR,  
*Respondent.*

---

From the Superior Court of State of California, County of San  
Mateo  
Case No. FAM0124046  
The Honorable Don Franchi  
Department 15, Family Law Division

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND  
*AMICUS CURIAE* BRIEF NATIONAL IMMIGRANT WOMEN'S  
ADVOCACY PROJECT IN SUPPORT OF APPELLANT ASHLYNE  
KUMAR**

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Received by First District Court of Appeal

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**CERTIFICATE OF INTERESTED ENTITIES OF PERSONS**

Court of Appeal, First Appellate District, Division Three

*Kumar v. Kumar*

*Appeal No. A145181*

There are no interested entities or parties that must be listed in this certificate under California Rules of Court, rule 8.208(d)(3).

DATED: September 26, 2016

Respectfully,

By: /s/ Harsh P. Parikh

David Ginsberg

Judy Choi

Harsh Parikh

Attorneys for National Women's  
Advocacy Project

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## APPLICATION FOR LEAVE TO FILE AMICUS

Pursuant to rule 8.200(c) of the California Rules of Court, the National Immigrant Women's Advocacy Project, Inc. (NIWAP) hereby requests permission to file the attached *amicus curiae* brief in support of Appellant Ashlyne Kumar.

### I. INTEREST OF AMICI CURIAE

The National Immigrant Women's Advocacy Project, Inc. is a non-profit public policy advocacy organization that develops, reforms, and promotes the implementation and use of laws, policies and practices to improve legal rights, services and assistance to immigrant women, children and immigrant victims of domestic violence, sexual assault, stalking, human trafficking, and other crimes.

NIWAP is a national resource center offering technical assistance and training to assist a wide range of professionals – including attorneys, advocates, immigration judges, the Board of Immigration Appeals judges and staff, state court judges, police, sheriffs, prosecutors, Department of Homeland Security (DHS) adjudication and enforcement staff – who work with and/or whose work affects immigrant women, children, and immigrant crime victims. NIWAP staff was involved in drafting the protections for immigrant victims sections of the Violence Against Women Acts of 1994, 2000, 2005 and 2013 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the same act that enacted the I-864 Affidavit of Support, the central topic of this brief. Members of the NIWAP staff have also published legal and social science research articles on domestic violence experienced by immigrant women and children.

This case involves an issue of first impression for California courts on the rights and obligations of an immigrant under the I-864 Affidavit of Support. In light of NIWAP's work in this area, the organization has significant interest in assuring that the Court adequately considers the needs of immigrant women and children and particularly battered immigrant spouses of citizens and lawful permanent residents, and that immigrants can continue to depend on the I-864 Affidavit of Support signed by their sponsors.

## **II. PURPOSE OF THE *AMICI CURIAE* BRIEF**

The key question presented in this case is whether a sponsor of an abused immigrant spouse or any immigrant spouse can utilize the common law theory of "duty to mitigate" or fabricate other barricades to circumvent federal protections: the federally-imposed legal obligations ensure that the sponsored immigrant does not become a public charge and the sponsor assured the DHS that he would comply with those obligations when he signed the Affidavit of Support.

The NIWAP submits its *amicus curiae* brief to provide the Court with additional legal support to explain that: (a) an immigrant, including a battered immigrant, must be permitted to enforce the I-864 Affidavit of Support against her sponsor during her divorce proceedings in family court; (b) there is no duty to mitigate under the I-864 Affidavit of Support because imposition of such a condition runs afoul of the text and purpose of federal immigration laws, as well as California case law; and (c) that imposing an obligation to mitigate on Affidavit of Support enforcement undermines the express purpose of the Affidavit.

For the foregoing reasons, the National Immigrant Women's Advocacy Project respectfully request that the Court accept and file their attached *amicus curiae* brief.

DATED: September 26, 2016

Respectfully,

By: /s/ Harsh P. Parikh  
David Ginsberg  
Judy Choi  
Harsh Parikh

Attorneys for National Women's  
Advocacy Project

## *AMICUS CURIAE BRIEF*

### **I. INTRODUCTION**

The National Immigrant Women’s Advocacy Project, Inc. (NIWAP) submits this *amicus curiae* brief in support of Appellant Ms. Ashlyne Kumar, an immigrant woman and victim of domestic violence who is seeking to enforce her rights under federal immigration law. The trial court committed legal error when it refused to enforce the U.S. Citizenship and Immigration Services (“USCIS”) Form I-864 Affidavit of Support (the “Form I-864” or “Affidavit of Support”) on behalf of Ms. Kumar. The court incorrectly asserted that it could only enforce the Affidavit of Support on behalf of the State. The trial court’s order must be reversed.

At the outset, it is clear that Ms. Kumar is a third-party beneficiary of a binding contract with the statutory right to enforce the Affidavit of Support and that the family law court is well within its jurisdiction to rule on the Appellant’s breach of contract claim as part of a family law case.

Next, the statute authorizing the Affidavit of Support as well as the legislative history of that statute make clear that by executing the Affidavit, the sponsor assumes the burden of financially supporting an indigent immigrant so that the sponsored immigrant never becomes a public charge needing support from the government, and thus the taxpayers.<sup>1</sup> The likelihood that an immigrant spouse will be left destitute and without

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<sup>1</sup> A public charge is defined as an immigrant who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) “primarily (Continued...)”

access to income to sustain her at the applicable federal poverty line following divorce is greatest when the sponsoring spouse is the perpetrator of domestic violence against the immigrant spouse. Thus, the trial court's decision to impose a duty to mitigate on the sponsored immigrant runs afoul of the intent of the statute and the underlying purpose of the Affidavit of Support. Finally, requiring an immigrant to mitigate is also contrary to public policy and California law permits courts to excuse such an unreasonable obligation. Ms. Kumar's appeal should be granted and this Court should reverse the trial court.

### III. ARGUMENT

#### A. As a Third-Party Beneficiary, Immigrants Such As Ms. Kumar Must Be Permitted to Enforce the I-864 Affidavit of Support in Family Court.

As a threshold matter, immigrants must be permitted to enforce their legal rights under the Affidavit of Support in family law courts. Here, Ms. Kumar is a third-party beneficiary to the Form I-864 and may enforce the binding agreement in any court of competent jurisdiction, including family court. *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1024 (N.D. Cal. 2008) (“[C]ourts have consistently found that a Form I-864 constitutes a legally binding and enforceable contract between sponsor and a sponsored immigrant.”).

Despite the Respondent's suggestions, there can be no dispute that the Affidavit of Support is “legally enforceable against the sponsor by the sponsored alien.” 8 U.S.C. §

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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.” Immigration and Nationality Act (“INA”) § 212(a)(4); *see* 22 C.F.R. § 40.41.



1183a (a)(1)(b); *see also* Restatement (Second) of Contracts § 302; Cal. Civ. Code § 1559 (2016) (“A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”); *see generally* Veronica Tobar Thronson, *‘Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 Fam. Ct. Rev. 595, 598 (2012) (“Courts have regularly rejected challenges to the general enforceability of the affidavit of support.”).

Furthermore, an immigrant such as Ms. Kumar must be permitted to enforce the Affidavit of Support during family law proceedings. Respondent claims that Ms. Kumar “has not brought an action to enforce her rights as a third-party beneficiary in any court of component jurisdiction” and appears to suggest that Ms. Kumar should be required to initiate separate proceedings to enforce the Affidavit of Support. Response at p. 4. But by executing the Affidavit of Support, “the sponsor [agrees to] submit[] himself to the personal jurisdiction of *any court* of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce the Form I-864.” *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1023–24 (N.D. Cal. 2008) (emphasis added). A family law court in the State of California “has jurisdiction to inquire into and render any judgment and make orders that are appropriate concerning...the support of either party.” Cal. Fam. Code § 2010 (2010). Therefore, similar to any other contracts “concerning...the support of either party,” the family law court may render “any judgment or make orders” enforcing the Affidavit of Support.

This is consistent with findings of a report that reviewed cases from around the country concerning the Affidavit of Support: state courts “simply fold consideration of I-864 issues into divorce and support actions, concluding that they have ‘jurisdiction to consider a claim for enforcement of an affidavit of support within the context of an underlying divorce action.’” Thronson, *supra*, at p. 598 (quoting *Baines v. Baines* (Tenn. Ct. App., Nov. 13, 2009, No. E200900180COAR3CV) 2009 WL 3806131, at p. 3); *see also, e.g., Love v. Love*, 2011 PA Super 268, 33 A.3d 1268, 1272 (2011) (enforcing the Affidavit of Support in issuing a spousal support order in the Pennsylvania family court).

Indeed, requiring immigrants like Ms. Kumar to bring a separate lawsuit to enforce her rights under the Affidavit of Support would impose another obstacle on an indigent and underserved population. Immigrant women are particularly vulnerable group of victims of domestic violence, with significantly fewer economic resources than other victims. *See* Mary Ann Dutton, Leslye E. Orloff, and Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, Georgetown J on Poverty Law and Policy, Vol. II, No. 2, at 250-254 (2000).

The immigrant spouse and battered immigrant spouse often turn to the family courts to enforce the Affidavit of Support. Social science data demonstrates a reciprocal relationship between intimate partner violence and poverty: batterers create economic instability for their partners through economic sabotage and control. *See* Sara Shoener & Erika Sussman, *Economic Ripple Effect of IPV: Building Partnerships for Systematic Change*, Civic Research Institute, at 83-95 (2013). Twenty-five percent of women in the

United States report domestic abuse and this dramatically increases to 70% when looking at women receiving public welfare. *Id.* The Respondent's apparent position requiring a separate action to enforce the Affidavit of Support would also inflict a significant burden on pro bono legal services organizations as well as impede access to justice for immigrant spouses and immigrant victims of domestic violence. *See generally* Alan W. Houseman, *Civil Legal Aid in the United States*, Center for Law and Social Policy (2013), <http://www.clasp.org/resources-and-publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf>.

Therefore, the trial court must be allowed to enforce Ms. Kumar's legal rights pursuant to the Affidavit of Support.

**B. Immigrants Such as Ms. Kumar Have No Duty to Mitigate Damages to Enforce the Affidavit of Support.**

The trial court refused to enforce the Affidavit of Support on the grounds that Ms. Kumar failed to use her "best efforts" to find full-time employment. (RT, March 18, 2015, 9:19-24). This result undermines the purpose of the Affidavit of Support statute and places the sponsored spouse, who in this case is a battered immigrant, at risk of falling into poverty. This is exactly what the Affidavit of Support was designed to prevent. In essence, the trial court permitted the sponsor to evade his obligations under the Affidavit of Support by imposing a duty on the immigrant to mitigate her damages.

But the Affidavit of Support is an enforceable contract that is also a creature of federal immigration law. *See* Thronson, *supra*, at 595-96. Both the plain reading of its implementing statute and its stated purpose explicitly highlight that the Affidavit of Support is primarily concerned with ensuring that a sponsored immigrant will not become a public charge and that the duty of ensuring that the immigrant does not fall below 125% of the federal poverty line falls solely and squarely on the sponsor while the Affidavit of Support is in full force and effect. These provisions, therefore, argue against imposing a duty to mitigate. The inappropriateness of imposing a duty to mitigate is even stronger when the immigrant is a battered spouse. In addition, imposing such a duty to mitigate would be unreasonable, impractical and contrary to California public policy and law.

**1. The Plain Text of the Immigration Statute Imposes No Duty to Mitigate on the Sponsored Immigrant.**

The Affidavit of Support is required under federal immigration law for certain classes of immigrants, including family-sponsored immigrants. The obligations for the sponsor that executes an Affidavit of Support are set forth in the Immigration and National Act (“INA”), its implementing regulations and in the form itself. *See* 8 U.S.C. §§ 1182, 1183, 1183a; 8 C.F.R. Part 213a; USCIS Form I-864.

Under the INA, any immigrant seeking admission into the United States who “is likely at any time to become a public charge is inadmissible.” 8 U.S.C. § 1182(a)(4)(A). Certain classes of immigrants, including family-sponsored immigrants, can only rebut the presumption of becoming a “public charge” by having the person sponsoring the immigrant submit the Affidavit of Support. *Id.* §§ 1183(a)(4)(C), (D). The potential for

an immigrant to become a public burden is avoided because the Affidavit of Support requires the sponsor to support the sponsored immigrant “at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household size.” USCIS Form I-864, Part 8; *see also Carlborg v. Tompkins*, No. 10-CV-187-BBC, 2010 WL 4553558, at \*4 (W.D. Wis. Nov. 3, 2010) (“The requirement under § 1183a that a sponsor promise to maintain the immigrant is intended not only to protect the immigrant from poverty, but to protect the *government* from a public burden.”) (emphasis in original); 62 Fed. Reg. 54346 (Oct. 20, 1997).

In holding that only the State could enforce the Affidavit of Support and imposing a requirement on Ms. Kumar to show that she was using “her best efforts to find a job,” the trial court ignored both the plain text and the purpose of the INA. (RT, March 18, 2015, 9:23-24); *see, e.g., Preston v. State Bd. of Equalization* 25 Cal. 4th 197, 213 (2001) (when interpreting a statute, the court’s fundamental task is to “ascertain the intent of the Legislature so as to effectuate the purpose of the law”). The text of the INA unequivocally states that the primary purpose of the Affidavit of Support is to ensure that an admitted immigrant will not become a “public charge.” 8 U.S.C. § 1182(a)(4).

Additionally, INA’s implementing regulations identify six specific circumstances under which the sponsor’s support obligations terminate under the Affidavit of Support.<sup>2</sup>

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<sup>2</sup> The sponsor’s duty to support the sponsored immigrant terminates upon: (1) the sponsor’s death; (2) the sponsor’s immigrant’s death; (3) the sponsored immigrant becomes a U.S. citizen; (4) the sponsored immigrant can be credited with 40 quarters of work; (5) the sponsored immigrant is no longer a permanent resident and has departed the (Continued...)

See 8 C.F.R. § 213a.2(e)(2)(i)-(ii). These factors are designed to require that the obligation continue for a minimum of 5-10 years (40 quarters) unless before that time the sponsored immigrant becomes a U.S. citizen or either the sponsored spouse or the sponsor dies or is deported or removed from the United States.<sup>3</sup> Divorce or separation does not terminate a sponsor's duty to support the sponsored immigrant because it is not an enumerated condition for terminating the sponsor's support obligations. See, e.g., *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1024 (N.D. Cal. 2008); *In re Schwartz*, 409 B.R. 240, 246 (B.A.P. 1st Cir. 2008); Form I-864, Part 8 ("NOTE: Divorce **does not** terminate your obligations under Form I-864") (emphasis in original).

Notably, the sponsored immigrant's failure to mitigate is not one of the conditions that terminate a sponsor's support obligations. See *Liu v. Mund*, 686 F.3d 418, 422 (7th Cir. 2012) (holding that the sponsored immigrant has no duty to mitigate in order to enforce Form I-864 as the statute failed to specify the duty to mitigate as an excusing condition for the sponsor's obligation and the "only beneficiary of the duty would be the sponsor – and it is not for his benefit that the duty was imposed").

Requiring the sponsored immigrant to mitigate as a precondition of enforcing the Affidavit of Support would have the opposite effect of the statute's stated intent – certain

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U.S.; and (6) the sponsored immigrant, after being ordered removed, seeks permanent residency based on a different I-864. 8 C.F.R. § 213a.2(e)(2)(i)-(ii)

<sup>3</sup> When the parties remain married the minimum number of years it will take a married couple if both parties work to accrue 40 quarters is 5 years. Once an immigrant spouse and sponsoring spouse divorce, the sponsored immigrant loses access in terms of counting quarters to the sponsoring spouse's quarters and the immigrant spouse has to rely only upon her own work quarters effectively extending the time that the Affidavit of Support remains enforceable.

immigrants, due to an inability to find work, a spouse's economic abuse, and/or an abusive spouse's stalking or threats at the victim's work place, would end up as public charges and would be placed in the position of having to turn for support to state or federal benefits paid by taxpayers. Consequently, such a rule would encourage sponsors to evade their obligations, forcing indigent immigrants to become "public charges" while they prove to courts that they are using "best efforts" to find full-time employment.

The consequences of this approach are particularly dire for immigrant victims of spousal abuse. For example, immigrant women are particularly vulnerable to domestic violence – compared to the prevalence of domestic violence among the general population, which has been estimated at 22.1%, the prevalence of domestic violence among immigrant women have been reported as high as 30-50%.<sup>4</sup> Giselle Aguilar Hass, Nawal Ammar and Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses*, Legal Momentum, April 24, 2006, at 2. Battered immigrant women are more likely to become trapped in abusive relationships because of their limited English language skills, lack of knowledge regarding resources to help domestic violence victims, and particularly, financial dependence upon their male partners and family members. *Id.* Requiring

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<sup>4</sup> A growing field of research data demonstrates that immigrant women stay longer in abusive relationships, and sustain more severe physical and emotional consequences as a result of the duration of the abuse than other battered women in the United States. *See* Hass, Ammar and Orloff, *supra*, at 2. In addition to potential difficulties with the English language, immigrant women "often experience discrimination and decreased social opportunities due to their minority status, acculturation difficulties, and social disruption resulting from their experience as immigrants and their lack of legal immigration status," making it even more difficult for battered immigrant women to leave abusive relationships and to seek help. *Id.* at 2-3.



sponsored immigrants to mitigate in order to enforce their legal right to support makes it even more difficult for battered immigrant women to escape their abusive relationships.

The Affidavit of Support aims to shift the burden of supporting certain immigrants to the sponsor rather than having the government support them. Allowing a sponsor to escape his obligations to support the immigrant based on the immigrant's inability to find work is contrary to the stated purpose of the INA, which the Affidavit of Support was created to carry out. Furthermore, such a rule would make it harder for battered immigrant women to leave abusive relationships. *See* Barbara J. Hart, Esq., and Erika A. Sussman, Esq., *Civil Tort Suits and Economic Justice for Battered Women*, The Center for Survivor Agency and Justice at 4 (March, 2004) (explaining that a perpetrator may inflict economic abuse on a domestic violence victim by sabotaging their educational, job training, and employment opportunities).

In sum, imposing a duty on an abused victim to mitigate damages would make it more likely that abused immigrants will stay longer with their abusive spouse and sustain more severe physical and emotional consequences of ongoing abuse of themselves and their children.

## **2. A Duty to Mitigate is Contrary to the Rationale of the Statute.**

In addition to the text of the statute and regulations, it is also instructive to consider the legislative history and context of the Affidavit of Support. The current version of the Affidavit of Support was created by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. 104-208, 110



Stat. 3009-546, which amended the INA to impose stringent restrictions on the eligibility of immigrants for public benefits.

Prior to the IIRIRA amendment, prospective immigrants could overcome the public charge ground of admissibility by showing that they were financially independent, had a job offer in the United States, or by submitting an “affidavit of support” executed on their behalf by someone with sufficient income to be able to assist the prospective immigrant should they be unable to support themselves economically in their first few years in the United States. *See* Immigration Law & Family § 9:25 (2016 ed.). This affidavit of support could be executed by anyone willing to financially assist the prospective immigrant; there was no requirement that it be a family member. Furthermore, there was no specific language or format for the affidavit and such affidavits generally were not understood to have created a contractual duty to support the sponsored immigrant. Immigration officials or U.S. consular officers were expected to weigh the “totality of the alien’s circumstances” in determining whether the prospective immigrant was likely to become a public charge after admission in the U.S. *Matter of A-*, 19 I. & N. Dec. 867, 869 (BIA 1988); *see Liu v. Mund*, 686 F.3d 418, 420-21 (7th Cir. 2012); Robert A. Mautino, *Comment, Sponsor Liability for Alien Immigrants: The Affidavit of Support in Light of Recent Developments*, 7 San Diego Rev. 314, 316 (1970).

The legislative history makes clear that this change in policy by the IIRIRA was motivated by the desire by Congress to ensure that “the immigrant would not *at any time* become a public charge.” S. Rep. No. 104-249, at 6 (emphasis added). Both the Senate and the House of Representatives stressed the change to a “legally enforceable” affidavit

of support, with the Senate explaining that “[i]t is not unreasonable of the taxpayers of this country to require recently arrived immigrants to depend on their sponsors for at least the first 5 years, regardless of the specific terms in the affidavit signed by their sponsors.” See H.R. Rep. No. 104-828, at 241; S. Rep. No. 104-249, at 6; see also *Love v. Love*, 2011 PA Super 268, 33 A.3d 1268, 1276 (2011) (“It is abundantly clear that the purpose of the Affidavit is to prevent an immigrant spouse from becoming a public charge.”).

The legislative history does not include any discussions of mitigation or any precondition on the sponsored immigrant’s right to enforce the Affidavit of Support. Instead, the legislative intent emphasizes the clear language of the statute, which is to prevent the admissions of immigrants to the United States who are “likely at any time to become a public charge.” 8 U.S.C. § 1182(a)(4). Imposition of a duty to mitigate thereby risks that the sponsored immigrant may fail to mitigate sufficiently for the courts and will be left without resources for support and will become public charges. This result is wholly contrary to the intent of the Affidavit of Support.<sup>5</sup>

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<sup>5</sup> As a point of comparison, in cases of battered immigrant spouses like the one before this Court, it is helpful to consider the goals of other legislation enacted by Congress that parallels many of the concerns of the IIRIA. For instance, in enacting the Violence Against Women Act’s (VAWA), Congresswoman Shiela Jackson Lee, Ranking Member of the Subcommittee on Immigration and Claims, Committee on the Judiciary, U.S. House of Representatives states in the Conference Report on VAWA 2000 that:

[I]mmigrant women are caught in an intersection of immigration, family, and welfare laws that do not reflect their needs and life experiences, leaving them vulnerable to exploitation with few options for redress...compelling real life stories illustrate the unique array of legal, economic and social problems battered immigrant women face today.

(Continued...)

3. **Requiring Immigrants like Ms. Kumar to Mitigate Her Sponsor's Losses Is Unreasonable, Impractical and Should Be Excused.**

In addition to the plain language of the federal statute and the legislative intent behind it, California case law also supports the principle that Ms. Kumar should be excused from any obligation to seek employment. Imposing such an obligation would be unreasonable, impracticable and require Ms. Kumar to effectively surrender her federally guaranteed rights under the Affidavit of Support. California law repeats that the “duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. [Moreover, ] [t]he rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.” *Valle de Oro Bank v. Gamboa*, 26 Cal. App. 4th 1686, 1691 (1994) (internal quotations omitted) citing *Valencia v. Shell Oil Co.*, 23 Cal. 2d 840, 844–46 (1944) (excusing duty to mitigate); see e.g., *Questo v. Dorado*, 136 Cal. App. 2d 332, 335–36 (1955) (excusing the duty to mitigate).

In *Valle de Oro Bank*, a lender sought to collect on a contractual obligation for the repayment of a loan – but the lender did not exercise a contractual option to insure

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46 Cong. Rec. H9041-42 (2000); see also 146 Cong. Rec. S10195 (2000) (Senator Orin Hatch noting that the federal laws aim to “enable battered immigrant spouse and children to free themselves of abusive relationships and report abuser without fear of immigrant law consequences controlled by their abusive citizen or lawful permanent resident spouse or parent.”); 146 Cong. Rec. H9040 (2000) (Congresswoman Jan Schakowsky noting that as a result of new federal law, “immigrant women will be empowered to move away from their abusers. They will have the additional legal protections ...that will enable them to alleviate the abuse and break the cycle of violence.”). These statements corroborate Appellant’s position that the Affidavit of Support must be liberally construed to protect the vulnerable immigrant population.

against the loss. The Court held that it “was error to allow the jury to consider and apply the doctrine of mitigation of damages” because the common law doctrine was being used as a “sword against the [lender’s] contractual right to recover damages resulting from [defendant’s] admitted breach of contract.” The panel also reviewed existing caselaw and determined that “the doctrine [of mitigation of damages] is used sparingly in the contract or commercial context.” *Valle de Oro Bank v. Gamboa*, 26 Cal. App. 4th at 1691.

Similar to *Valle de Oro*, the duty to mitigate should not apply here. Such an obligation would not only undermine Congress’s purpose in enacting the federal Affidavit of Support statute, but would require an “innocent party to sacrifice and surrender important and valuable rights” that are based on federal immigration law and policy. Indeed, mitigation is fundamentally grounded in equity and courts may deny application of the mitigation defense when it would be inequitable to do otherwise. *Dakota Gardens Apt. Investors B v. Pudwill*, 75 Cal. App. 3d 346, 352 (1977); *Cal. Sch. Employees Assn. v. Pers. Comm’n*, 30 Cal. App. 3d 241, 249 (1973) (noting that the requirement of mitigation “embodies notions of fairness and socially responsible behavior.”).

In cases like the one before this Court, imposing a duty to mitigate gives that sponsoring spouse, in this case, an abusive spouse, a powerful weapon to avoid federally established payment obligations and ensure that following divorce his immigrant spouse will be impoverished. The public policies behind the federal Affidavit of Support mandate that a duty to mitigate cannot legally apply to Ms. Kumar’s claim under the

Affidavit of Support. This Court must reverse the trial court's determination that sponsored immigrant spouses must find employment to be able to enforce the Affidavit of Support against their sponsors. *See generally*, Aguilar, Hass and Orloff, *supra*, at 1-4.

### CONCLUSION

For the foregoing reasons, National Immigrant Women's Advocacy Project urge the Court to reverse the judgment of the trial court and require the trial court to enforce the clear and unequivocal terms of the Affidavit of Support.

DATED: September 26, 2016

Respectfully,

By: /s/ Harsh P. Parikh

David Ginsberg

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**CERTIFICATE OF WORD COUNT**

In accordance with California Rules of Court, Rule 8.204(c), I certify that the foregoing *amicus curiae* brief contains 4,113 words as determined by Microsoft Word software.

DATED: September 26, 2016

Respectfully,

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**PROOF OF SERVICE BY FEDERAL EXPRESS**

I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 S. Flower St. 40<sup>th</sup> Floor, Los Angeles, California 90017. On September 26, 2016, I served the following documents:

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT IN SUPPORT OF APPELLANT ASHLYNE KUMAR**

On the interested parties in this action by placing true and correct copies thereof in a sealed envelope and depositing the sealed package in a box or other facility regularly maintained by Federal Express for delivery of documents, with the delivery fees paid or provided for by the sender, addressed as set forth below:

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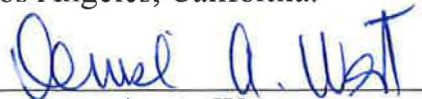
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 26, 2016 at Los Angeles, California.



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