

COMPLICATED AFFIDAVIT OF SUPPORT ISSUES

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When a “Sponsor” Is Not Enough – Understanding the Terminology and Different Roles of Alternative Sponsors

Joint Sponsor or Co-Sponsor

A joint sponsor is someone who is not the Petitioner for the underlying visa (the main sponsor of the I-864).¹ Co-sponsor is another word for joint sponsor and has no legal implication or definition aside from what a joint sponsor is.² The joint sponsor is allowed when the Immigrant Visa Petitioner cannot meet the minimum income threshold for their household size required to act as the financial sponsor of the immigrant.³ A joint sponsor who can independently meet that minimum income threshold after taking into account their own household size plus the immigrant, may step in and meet this income requirement for the Petitioner.⁴ But even though the Petitioner cannot meet the requirements, the Petitioner remains obligated under the I-864, a Form that must also still be filed by the Immigrant Visa Petitioner (the Main “Sponsor”). The joint sponsor also signs an I-864 and becomes jointly and severally liable with the Petitioner for the I-864 obligations with the Petitioner.⁵ The federal government can choose either or both to come after later for reimbursement of payments made to the beneficiary for means tested public benefits. Lastly, just as the main I-864 Petitioner, the joint sponsor must be a U.S. citizen or Lawful Permanent Resident who is 18 years or older.⁶ The joint sponsor must be residing in the U.S. and have filed U.S. tax returns in the last three years, unless can establish that there was no legal obligation to do so.⁷

One immigrant can have only one joint sponsor for an I-864.⁸ Two people who do not earn enough income on their own may not pool their income as joint sponsors into one amount that would serve to meet the income requirements.⁹ Two joint sponsors are only allowed when derivatives are also immigrating on the same immigrant visa petition.¹⁰ However, beneficiaries of an immigrant visa application do not all have to share the same joint sponsor as the principal beneficiary. For example, if a permanent resident husband files an I-130 for his wife and derivative children, when the visa number becomes current, the husband may provide a joint

¹ 8 C.F.R. § 213a.2(b)(1).

² 9 FAM 40.41 N6.2(c) (noting that terms “co-sponsor” and “joint sponsor” are used interchangeably).

³ INA § 213A. See also “Affidavits of Support on Behalf of Immigrants,” 71 Fed. Reg. 35731, 35734, 35749 (Feb. 21, 2010) (hereinafter “Affidavits of Support”).

⁴ INA § 213A(f)(5); Affidavits of Support, 71 Fed. Reg. at 35750.

⁵ Affidavits of Support, 71 Fed. Reg. at 35743, 35750.

⁶ INA § 213A(f)(1)(B).

⁷ 8 C.F.R. § 213a.2(c)(1)(ii); 71 Fed. Reg. at 35751, 35734 (the I-864 sponsor must be domiciled in the U.S., which is defined as the sponsor’s “principle residence” in the U.S.).

⁸ Affidavits of Support, 71 Fed. Reg. at 35734; 9 FAM 40.41 N9(b).

⁹ Affidavits of Support, 71 Fed. Reg. at 35734.

¹⁰ *Id.*

sponsor for his wife's I-864 and another I-864 filed by another joint sponsor to cover the derivatives if the first joint sponsor on the wife's I-864 can only assume the obligation for the wife based on their income or willingness. Each derivative may have their own joint sponsor (as long as the total joint sponsors for the entire case do not exceed 2) who can meet the household size or a joint sponsor that covers any combination of derivatives, depending on the household size and income requirements.

Practice Tip: The larger the family and number of derivatives, the more complicated the review of the file will become at the Chicago Lockbox. Provide a chart of which I-864 joint sponsor is sponsoring which derivative and place on top and to separate different I-864 documentation and under the chart, list the supporting documentation for that sponsor. Don't just place multiple I-864s and supporting documents in the filing.

Household Member

Income and assets of a qualifying "household member" may be pooled with those of a sponsor for purposes of meeting the required level of financial wherewithal.¹¹ A household member does not have to live with the Petitioner if the household member is listed as a dependent on the sponsor's federal tax return and the sponsor may still use their income to meet the income threshold.¹² The household member does not have to meet the minimum income requirements to combine their income for the I-864. The household member may combine or "pool" his or her income or assets with the Petitioner to meet the threshold income requirements but has the burden of demonstrating by a preponderance of the evidence that their lawful income will continue after the beneficiary becomes a permanent resident.¹³ This is an advantage to the Petitioner; in contrast, if the Petitioner had to find a joint sponsor, that joint sponsor must independently make enough income to meet the entire minimum income threshold requirement on the I-864P for the household size, not just a portion of it.

More than one household member may combine their assets with a sponsor to meet the missing income requirement.¹⁴ This is another advantage over joint sponsors who must independently meet the income requirements with their own income or assets and may not pool with the Petitioner. Each household member must sign an I-864A (except for an immigrant with no dependents).¹⁵

A household member is held to the same standard of proof requirements as any other type of sponsor. The household member must provide their last federal tax return (unless can prove that had no legal requirement to file tax return) and paystubs to confirm ongoing and current income or proof of liquid assets (convertible to cash within a year).¹⁶ If the immigrant is the household member, the immigrant is not required to disclose their tax return filings on the Form I-864 and

¹¹ See 9 FAM 40.41 N8.1 (defining "household member").

¹² Form I-864 Instructions, p.9 (March 23, 2013 Ed.), available at <http://www.uscis.gov/sites/default/files/files/form/i-864instr.pdf>.

¹³ Affidavits of Support, 71 Fed Reg. at 35754.

¹⁴ Form I-864 Instructions, *supra* note 12, p.7.

¹⁵ *Id.*

¹⁶ Affidavits of Support, 71 Fed. Reg. at 35753. See also INA § 213A(f)(6)(A)(ii) and (B).

if has no dependents, is not required to file the I-864A so lack of tax return filings in years past may not be a barrier to using the immigrant's income, especially if the immigrant only recently started earning income and only has the most recent year's tax return.¹⁷

The household member's income must also come from a legal source. This can eliminate the ability of an immigrant to combine their income with the Petitioner if the immigrant was not authorized to work when the immigrant earned their income, even if from self-employment.

Practice Tip: Practitioners should provide CIS with a roadmap of when an income source became legal. If the immigrant beneficiary who is trying to combine their income with the I-864 Petitioner to meet the minimum income threshold is a DACA recipient, provide a copy of the EAD and DACA approval notice when filing the I-864 to prove when the income source became lawful and do the math from there. Part of the year may be legal so based on end of year W-2s and paystubs, what portion of that income was from a lawful source can be calculated.

In addition to listing their income on the I-864, the household member must sign the I-864A unless the household member is the immigrant beneficiary.¹⁸ The I-864A is a legal contract that binds both the household member and the signer of the I-864 to the same obligations under the I-864, i.e., to reimburse the federal, state or local government agency or private entity for any means tested public benefit payments made to the immigrant until the I-864 obligation is terminated.¹⁹ This provides the government or private entity providing those means-tested public benefits with an alternative person to tap for reimbursement in case the petitioner is insolvent or otherwise can later demonstrate that s/he does not have the means to pay back the disbursement.

Parents may want to rely on a child who lives in the home, has graduated from high school, born in the U.S. and are working as household members to meet the income requirements. The problem remains that some of these household members are not yet 18 but are close to it. If a person is not 18 years old when signing the I-864, the I-864 has no binding, legal effect. But the regulations allow for an exception.²⁰ It comes down to timing.

Practice pointer: If after researching potential interview timelines for the field office where an adjustment of status interview will take place for a concurrently filed or approved I-130 Immigrant Visa petition, the household member will turn 18, practitioners can file the I-864 with the Chicago lockbox signed by the household member, a copy of the household member's birth certificate, Field office processing chart, and the 2006 Affidavit of Support regulations, along with an explanation that by the time an decision can be made on the adjustment filing,

¹⁷ 71 Fed Reg. 119 at 35738 ("A sponsor need only file a copy fo the tax return for the most recent tax year . . .The sponsor may, *at his or her option*, submit the . . .household member's Federal income tax returns for the three most recent tax years" Emphasis added.)

¹⁸ 9 FAM 40.41 N8.2.

¹⁹ 71 Fed Reg. 119 at 35752, 35754.

²⁰ INA § 213A. *See also* 71 Fed Reg 119 at 35734.

the household member will again sign the I-864 and will be of legal age at that time, the file should be accepted and forwarded for interview.

Similarly, if the case is being processed for consular interview, submit the same to NVC and submit a new I-864 at the consular interview with the signature of the now 18 year old household member and have the immigrant bring the original of the household member's birth certificate (and a copy) to the consular interview as well.

Substitute Sponsor

A substitute sponsor completely takes the place of the underlying Immigrant Visa Petitioner who would otherwise be required to file the I-864.²¹ The substitute sponsor is only allowed after the death of the Immigrant Visa Petitioner and only if CIS allows the Immigrant Visa to stand despite the death of the Petitioner.²² The substitute sponsor must meet the same age, residency, citizen or green card holder status and income requirements and standard of proof that would have been required of the deceased Petitioner to sign the I-864. Unlike the joint sponsor who does not have to be related by blood or marriage to the Beneficiary to sign the I-864, the substitute sponsor *can only* be the immigrant's spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or a legal guardian.²³

The only exception to this is if the deceased Immigrant Visa Petitioner was the spouse of the immigrant. If the couple was married for at least two years when the U.S. citizen spouse died and the immigrant has not remarried, the immigrant is not required to have any sponsor at all.²⁴ The I-864 does not have to be filed if CIS approves the Immigrant Visa petition. Even if the U.S. citizen spouse dies before or after the Immigrant Visa is approved, if the Immigrant Visa petition is approved, an automatic conversion takes place that converts the spouse to an alien immigrating as the widow(er) of a U.S. citizen, not as an Immigrant Visa (I-130) beneficiary, and no I-864 is necessary for such status.²⁵ This same benefit does not apply, though, when the Petitioner dies after the principal beneficiary immigrates to the U.S. but before beneficiaries who are following to join have yet to immigrate. Such derivative children would need a joint sponsor who *can only* be the immigrant's parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or a legal guardian.²⁶ This is not as expansive a solution as it seems since to qualify for derivative status, one must remain unmarried and under the age of 21. As a result, it remains unlikely that many of these qualifying relationships that a joint sponsor can hold would actually exist for the beneficiary.

²¹ Affidavits of Support, 71 Fed. Reg. at 35754.

²² 8 C.F.R. § 205.1(a)(3)(i)(C).

²³ INA § 213A(f)(5)(B).

²⁴ INA § 212(a)(4)(C)(i)(I). *See also* Affidavits of Support, 71 Fed. Reg. at 35735.

²⁵ INA § 212(a)(4)(C)(i)(I).

²⁶ INA § 213A(f)(5)(B).

Meeting Income Support Requirements With No Taxable Income Source or Through Self-Employment

Proving Income with No Taxable Income Source

When the sponsor has no prior taxable income, the sponsor may still be able to demonstrate that he or she can financially support the immigrant at the required income level.²⁷ Several possible scenarios are presented below.

- Social Security earnings sufficient to support the immigrant. To prove this, the sponsor should submit a letter from the Social Security office verifying the payments that are being made currently to the sponsor and a statement concerning the payments that have been made over the past three calendar years. If in a time crunch, copy yearly social security income statement mailed to the recipient and six most recent bank account statements and highlight social security deposits.
- Investment earnings that are categorized by the Internal Revenue Service as being “non-taxable” earnings. Provide quarterly investment statements or brokerage account statements for the past three years and a letter from a Certified Public Accountant explaining why those particular earnings are not listed as “taxable income.”
- Legal Settlement or Award Funds, which came from a personal injury, workers compensation, medical malpractice or other civil action, which could be considered non-taxable: Provide copy of certified disposition or judgment and payment schedule awarding funds and proof of ongoing fund deposits in bank account owned by Sponsor for the past three years and a letter from a Certified Public Accountant explaining why those particular earnings are not listed as “taxable income.”
- Inherited funds, gifts or bequests that are non-taxable or existence of a Trust which provides non-taxable income for the sponsor. Provide a copy of the will, trust, or paperwork from entity proving source of funds and proof of deposit of funds into account owned by Sponsor.
- Life insurance proceeds are not taxable. Provide a letter or documentation from the life insurance company and print out from IRS.gov confirming this for CIS reviewer.
- Child support payments are not taxable. Provide a copy of a court order or legal settlement establishing payment scheme and proof that payments are being deposited into Sponsor’s bank account in the form of last six months of bank statements. Child support payments made upon oral agreement or written agreement between parties outside of the legal system may be utilized but prove through a notarized letter signed by both obligated party and recipient with proof of deposits when submitting I-864.

²⁷ FAM 40.41 N6.5(b) (“Tax-free income (such as a housing allowance for clergy or military personnel) and other tangible benefits in lieu of salary are considered income. The sponsor bears the burden of proving the nature and amount of income.”). For a discussion of taxable income see IRS, Publication 525, Taxable and Nontaxable Income (rev’d Jan. 15, 2015), available at <http://www.irs.gov/pub/irs-pdf/p525.pdf>.

- Income from certain types of scholarships. Even though the income used for room and board is taxable, if the sponsor has no expenses for room and board (such as a student who may be living with his or her parents), then the sponsor might have no taxable income. To the extent that the proceeds of the scholarship are used for qualifying expenses such as tuition, fees, and required books and equipment for the degree candidate, the proceeds would be excludable from income. Advise your client to meet with a CPA to determine whether this income is taxable.
- Disability insurance proceeds and disability compensation may be excluded from taxable income. The sponsor will need to provide statements verifying the income and will need to confer with his or her C.P.A. to confirm if part or all of that income is non-taxable.

Meeting Income Support Requirements Through Self-Employment.

When the sponsor is self-employed, proving the sponsor's income may be more difficult than when the sponsor is an employee receiving a W-2. The self-employed sponsor may submit a letter printed on business letterhead and signed by the Sponsor or preferably, the company's CFO, CPA, or bookkeeper, attesting to the sponsor's net income each year and submitted with copies of the following supporting documentation:

- Federal Business tax return and personal tax return for Sponsor. If the self-employed sponsor files a Schedule C with his or her tax return, that Schedule C will indicate the sponsor's net income from the business. The Sponsor should include all schedules and 1099s submitted with the personal and business tax returns that the sponsor receives from any other income source or to justify underlying business income reflected in the tax returns. The income after expenses from the business are deducted is what should be reflected in, will pass through to the Sponsor's total income line on IRS Form 1040 that is referenced by CIS.
- Sponsor's business license.
- Articles of Incorporation (if the business is incorporated) filed with the state's Secretary of State.
- Bank statements. When co-mingling of personal and business financial records, the sponsor may need to submit bank statements with explanations concerning which income items and expenses should be categorized as business or personal.
- Deposited checks and invoices for payments received in the last six months for business to demonstrate ongoing profitability.
- A profit and loss statement for the current year and for prior years if the business income is not as high as prior years to show one-time investment or expense in current year that will not be repeated in future, which helps demonstrate future profitability of business.

There can be significant challenges when trying to demonstrate to the satisfaction of CIS, the NVC or a consular officer that the sponsor has sufficient income for the purpose of supporting the intending immigrant. The suggestions stated above are not exhaustive and there may be other creative ways to convince the adjudicating official.

Doing the math: looking at income and assets

Analytical steps	Example
<p>(1) What is the household size?</p> <p>Household members include:²⁸</p> <ul style="list-style-type: none"> (1) Sponsor; (2) Sponsor's spouse & children; (3) Sponsor's dependents (regardless of where they live); (4) All immigrants for whom sponsor has filed an I-864 still in effect; (5) Any family members of immigrant listed on Form I-864, Part 3, who will be arriving within six months; and (6) The sponsor's nondependent siblings, parents, or adult children who reside in the sponsor's household, <u>if</u> they complete a Form I-864-A, Contract Between Sponsor and Household Member. 	<p>Petitioner Peter Piper lives in Black Lava Acre with his mother, Betty, and adult son, Washed Out Larry. Betty is claimed on Peter's Form 1040 federal tax returns and is therefore a "household member" for purpose of the I-864. Larry now relies fully on Peter for support, but was not claimed on Peter's returns as a dependent. Since Larry wants "nothing to do with that immigration stuff", and will not sign an I-864A, he is not a household member.</p> <p>Larry's household size is therefore three: Peter + Betty + Intending Immigrant Ivana.</p>
<p>(2) Identify the required support level.</p> <p>USCIS reports the required support levels annually on Form I-864p.²⁹</p>	<p>Normally the required support level for a household size of three is \$24,737, but Black Acre is in Hawaii, which has a higher poverty guideline level, making the number \$28,450</p>
<p>(3) Identify total income.</p> <p>Normally "total <i>unadjusted</i> income" – as shown on the sponsor's Form 1040 return is "total income" for purpose of the I-864.³⁰ For a sponsor who has reported income on a Form 1040EZ, however, total <i>adjusted</i> gross income is used.³¹</p>	<p>Peter is a stock broker taking some time off to explore aromatherapy. After some "creative" accounting, his total reported income was only \$18,000.</p>
<p>(4) Is there a shortfall?</p> <p>Subtract the sponsor's total income from the required support level. If you're left with a</p>	<p>\$28,450 - \$18,000 \$10,450</p>

²⁸ 9 FAM 40.41 N8.1.

²⁹ From I-864p (rev'd March 1, 2014), available at <http://www.uscis.gov/i-864p>.

³⁰ 9 FAM 40.41 N6.7.

³¹ See Form I-864 (rev'd March 22, 2014), pg. 6, available at <http://www.uscis.gov/i-864>.

<p>positive number, this shortfall can be made up with assets. The required asset level is <i>three times</i> the shortfall for a spouse or child of a U.S. citizen, and <i>five times</i> for all other intending immigrants.³²</p>	<p>\$10,450 x 3 \$31,350 (the shortfall)</p>
<p>(5) Identify qualifying assets.</p> <p>For an asset to be used it “must be available in the United States for the applicant's support and must be readily convertible to cash within one year.”³³</p> <ul style="list-style-type: none"> • <u>Types of assets.</u> Assets may include stocks, bonds, certificates of deposit, property and real property. • <u>Assets outside the U.S.</u> Assets <i>may</i> be located outside the U.S., so long as they are readily convertible to cash within one year.³⁴ The intending immigrant’s foreign assets may be used only if she shows ability to move the assets to the U.S. from the forum country.³⁵ This requires counsel to show, at a minimum, that the relocation could actually be accomplished under the regulatory structure of the forum country.³⁶ • <u>Documenting the asset.</u> Must demonstrate: ownership, location, date acquired and (where applicable) 12-month withdrawal history.³⁷ The sponsor must list all liens and liabilities for each asset.³⁸ An evidence-based valuation, of course, must also be provided. • <u>Household members’ assets.</u> Sponsor (and joint sponsors) may count the assets of household members, but only if the 	<p>Peter has a life estate in Black Acre. A conservative market valuation of the fee simple estate would be \$2,000,000. But his real estate agent tells him the valuation of the life estate is about nil. He can’t use Black Acre for the I-864.</p> <p>A few years ago Peter used most of his liquid capital to purchase a controlling interest in Think, Inc., a popular news channel on the island nation of Badland. Peter’s shares in Think, Inc. are valued at millions, but following a recent editorial the government has frozen trade of Think’s stock. The asset cannot be used for the I-864.</p> <p>Washed Out Larry has over \$500,000 in a trust that Peter set up for his benefit. In addition to the fact that Larry won’t sign an I-864A, the terms of the trust do not allow a draw-down for present purposes, so the funds cannot be used for the I-864.</p> <p>The only substantial U.S.-based asset that Peter owns is a savings account he started six months ago with a current balance of about \$50,000. The balance had hovered around \$10,000 for the first four months, and it’s been only the past two months that he’s had over \$40,000. The savings account can be claimed as an asset on the I-864, but a DOS officer would have authority to find the asset insufficient, as Peter cannot meet the requirement (per cable) of showing a 12-month</p>

³² 9 FAM 40.41 N6.6.

³³ 9 FAM 40.41 N6.6(b).

³⁴ U.S. Dep’t of State, Cable No. 98-State-133,584, *I-864 Affidavit of Support—Update No. 17: More Qs and A’s* (July 22, 1998), reprinted at 3 Bender’s Immigr. Bull. 911 (Sept. 1, 1998) (“July 22 Cable”).

³⁵ U.S. Dep’t of State, Cable No. 98-State-112,510, *I-864 Affidavit of Support Update Number 16: Public Information Sheet* (no date provided), reprinted at 3 Bender’s Immigr. Bull. 755 (July 15, 1998).

³⁶ *Id.*

³⁷ U.S. Dep’t of State, Cable No. 97-State-211,673, *P.L. 104-208 Update No. 31—New Affidavit of Support: Nuts and Bolts*, (Nov. 8, 1997), reprinted at 3 Bender’s Immigr. Bull. 36 (Jan. 1, 1998) (“Nov. 1997 Cable”).

³⁸ Nov. 1997 Cable, *supra*.

<p>household member has resided at the address a minimum of 6 months.³⁹</p> <ul style="list-style-type: none"> • <u>How long must it have been owned?</u> There is no black-letter rule requiring an asset to have been held for a particular length of time. Because State Department guidance has advised submission of 12 months of withdrawal records, however, there would be heightened risk in relying on assets held by the sponsor for under one year.⁴⁰ • <u>Assets of sponsored immigrant.</u> Intending immigrant need not complete I-864A for assets to be considered (but may be used by only one sponsor).⁴¹ 	<p>withdrawal history.</p>
<p>(6) If needed, find a joint sponsor and return to step (1).</p> <p>If the primary sponsor's income and assets do not suffice, a joint sponsor must be obtained. The joint sponsor must meet the sponsorship requirements <i>independently</i> of the primary sponsor.⁴² In other words, the primary and joint sponsors' financial abilities are not considered cumulatively.</p>	

³⁹*Id.*

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² 9 FAM 40.41 PN2.6(a)(3); AFM § 20.5(e)(1).