DHS PROPOSES NEW ADJUDICATION STANDARDS FOR FORMS I-864 AND I-864A

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On October 2, 2020, the Department of Homeland Security (DHS) proposed significant revisions to its regulations governing the Affidavit of Support.[2] The Department had proposed complementary revisions of the Affidavit of Support and associated forms in April 2020.[3] The proposed rule imposes a tougher substantive standard for would-be Affidavit sponsors, and adds some documentation requirements to the Affidavit. While it will present an extra challenge to practitioners, the proposed rule represents nothing like the sea change heralded by the public charge rule codified by DHS in 2019.[4]

The stated goal of the proposed rule is to more accurately scrutinize the ability of a would-be sponsor and Form I-864A household member to support a sponsored immigrant.[5] The proposed rule also provides mechanisms to facilitate enforcement of the Form I-864 against

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[1] The author thanks Dr. Julia McLawsen for her assistance reviewing this article.

[2] Dept. Homeland Security, Notice of Proposed Rulemaking, 85 Fed. Reg. 62432 (Oct. 2, 2020) (hereinafter "NPRM"). Comments on the proposed rule are due by November 2, 2020. *Id.* at 62432. For concession, and consistent with use in the official commentary to the proposed rule, "Affidavit" is used in this article to refer to the Form I-864 and "Contract" to refer to the Form I-864A. The standards set forth in the proposed rule govern both the Form I-864 and shortened Form I-864EZ, but any specific references herein to the revised Affidavit are to the standard Form I-864.

[3] Dept. Homeland Security, 30-Day Notice, 85 Fed. Reg. 20292 (Apr. 10, 2020). The revised forms proposed for comment in April 2020 have not yet been published. It seems that some further changes to the form revisions proposed in April 2020 will be required. For example, the instructions reflect the old requirement that only the most recent year's federal income returns must be filed. Form I-864 Instructions (proposed), p. 15. But the proposed rule requires three years of certified returns or tax transcripts. 8 C.F.R. § 213a.2(c)(2)(i)(A) (proposed).

[4] *Cf.* Greg McLawsen, *Understanding the New DHS Rule on Public Charge Inadmissibility*; I-944s, I-864s and Much, Much More, 24 BENDER'S IMMIGR. BULL 1033 (Sep. 1, 2019).

[5] *Id.*, at 62433.

sponsors, both by benefit-granting government agencies and by sponsored immigrants.[6] In this regard, the proposed rule sounds the steady drum beat of the Administration's desire to encourage civil enforcement of the Affidavit of Support.[7]

When considering the proposed rule, bear in mind that its scope is narrower than the 2019 public charge rule.[8] The newly proposed rule pertains exclusively to assessment of the Affidavit of Support and Form I-864A Contract. At stake is whether a given Affidavit or Contract is determined to be insufficient. But an insufficient Affidavit of Contract does not automatically result in public charge inadmissibility. Rather, a negative determination with respect to an Affidavit or Contract means that the applicant and her counsel need to scramble to find a joint sponsor. Without trivializing the very real difficulty that may present in many cases, addressing an insufficient form is less onerous than overcoming public charge inadmissibility.[9]

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[6] *Id.*

[7] *Id*. at 62441 (The Administration "has identified enforcement of sponsorship obligations as a priority"). *See*, *e.g.*, Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens, *available at* https://www.whitehouse.gov/presidential-actions/memorandum-enforcing-legal-responsibilities-sponsors-aliens/ (last visited Oct. 4, 2020), § 1 ("A key priority of my Administration is restoring the rule of law by ensuring that existing immigration laws are enforced. The immigration laws currently require that, when an alien receives certain forms of means-tested public benefits, the government or non-government entity providing the public benefit must request reimbursement from the alien's financial sponsor.").

[8] Dept. Homeland Security, Final Rule, 84 Fed. Reg. 41292 (Aug. 14, 2019).

[9] Under the 2019 public charge revisions, an intending immigrant may potentially overcome a negative public charge finding by submitting a surety bond, if invited to do so by the adjudicating officer. 8 C.F.R. § 213.1.

1. Tougher standard for assessing the sponsor's financial ability.

The proposed rule adds significant interpretive gloss for determining whether an individual's income and assets are sufficient to serve as an Affidavit of Support sponsor.[10] Existing regulations are relatively open-ended, requiring that the sponsor "demonstrate the means to maintain the intending immigrant at an annual income of at least 125 percent of the Federal poverty line."[11] This tracks the statutory requirement that a sponsor must demonstrate "the means to maintain an annual income equal to at least 125 percent of the Federal poverty line."[12]

The proposed rule will require an adjudicator to determine whether a sponsor's income is likely to be at or above the required level for the year in which the application was filed.[13] A Form I-864,

> …will be considered sufficient to satisfy the requirements of section 213A of the Act and this section if the reasonably expected household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status… would equal

[10] The Form I-864, Affidavit of Support has long been a notoriously challenging aspect of family-based immigration. For the best available guidance to the Form I-864 and public charge inadmissibility see Charles Wheeler, *Public Charge and Affidavits if Support: A Practitioner's Guide* (2nd ed.) (AILA 2020).

[11] 8 C.F.R. § 213a.2(c)(2).

[12] *See* 8 U.S.C. § 1183a(f)(1)(E).

[13] While subtly different, this standard does more than simply reiterate statutory language. The statute asks whether a sponsor has the "means to maintain" income at the 125% of the poverty line. 8 U.S.C. § 1183a(f)(1)(E). A sponsor must also be able to "provide support" to maintain the sponsored immigrant at 125% of the poverty line. 8 U.S.C. § 1183a(a)(1)(A). That is, the statute asks not just whether the sponsor's income is presently at or above 125% of the poverty guideline, but whether the sponsor has the ability to keep her income at that level. That subtle difference gives DHS the toehold – in the Department's view – to look beyond the person's income itself.

> at least 125 percent of the Federal Poverty Guidelines for the sponsor's household size…[14]

The most recent tax return "will be given the greatest evidentiary weight."[15] In *most cases*, the sponsor's total income reported on her most recent federal tax returns will be outcome-determinative: if her total income is above 125% of the poverty line, that will normally result in a finding that the Affidavit is sufficient.[16] The proposed rule provides that income from unlawful enterprises or obtained without work authorization cannot be considered for an Affidavit or Contract.[17]

The foregoing is in keeping with current regulations and practice. The proposed rule departs from the status quo, however, by adding a confusing array of mandatory and discretionary grounds for determining an Affidavit to be insufficient despite initial evidence that the mandatory income level has been met. In this way, the proposed rule is akin to the complex totality of circumstances test now used to assess public charge inadmissibility.[18] Like the public charge test, the

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[14] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(1) (proposed). The reference to an "immigrant visa" application is somewhat puzzling. If the applicant is pursuing an immigrant visa, her Form I-864 will be filed with the National Visa Center and ultimately adjudicated by a consular officer applying the standard in the Foreign Affairs Manual. *Cf.* 9 FAM 302.8.

[15] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(2) (proposed).

[16] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(1) (proposed) (except as otherwise provided, the Affidavit will be determined to be sufficient if the sponsor's "reasonably expected" household income for the present year is above the required level). *See also* NPRM, at 62446 ("For purpose of demonstrating the means to maintain income, the total income, before deductions in the sponsor's tax return for the most recent taxable year, will continue to be generally determinative of whether a sponsor's income is sufficient…") (citation omitted).

[17] 8 C.F.R. §§ 213a.1(f)(2)(ii) & (f)(3) (as to household income), 213a.1(i) (as to sponsor's income).

[18] *See* 8 C.F.R. § 212.22.

proposed rule for the Affidavit of Support seems deliberately obfuscating in a way that creates a new discretionary framework to support negative findings.

Mandatory grounds for insufficiency finding. First, an Affidavit of Support will automatically be found insufficient if the sponsor has received means-tested public benefits in the 36-month window before filing the Affidavit.[19] The proposed rule retains the definition of "means-tested public benefits" ("MTPB") that is operative with respect to Affidavits of Support.[20] Under the existing rule, MTPB are those defined as such under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[21] Under field guidance issued by legacy Immigration and Naturalization Service in 1999, those programs have been determined to include *only*:

- Supplemental Security Income (SSI);
- Temporary Assistance for Needy Families (TANF);
- State and local cash assistance programs (also called "general assistance); and

[19] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(i) (proposed). An exception is given for active duty military. 8 C.F.R. § 213a.2(c)(2)(ii)(C)(5) (proposed).

[20] NPRM, at 62442 ("The term 'means-tested public benefits' is used as currently defined in 8 CFR 213a.1 throughout this proposed rule. The proposed rule does not substantively amend the definition of what constitutes a means-tested public benefit"). Although the Department says that the proposed rule does not "substantively amend the definition" of MTPB, the proposed rule simply does not amend the definition at all.

[21] 8 C.F.R. § 213a.1 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Public Law 104-193). *See* PRWORA, §§ 401, 403. The definitional paragraph will be renumbered as 8 C.F.R. § 213a.1(l) (proposed).

- Medicaid (except assistance for an emergency medical condition).[22]

Enrollment in subsidized insurance under the Affordable Care Act, use of the Earned Income Tax Credit and the like should have no negative impact on an individual's ability to be a sponsor.

The proposed rule concerning receipt of MTPB will likely have a significant impact on families with limited resources. There will be cases where a would-be sponsor has current income over 125% of the poverty line, but where the individual has been sufficiently low-income in the prior three years to have received public benefits. Such families will now need to secure a joint sponsor in order to proceed with adjustment.

Note that the definition of MTPB for Affidavits encompasses fewer programs than the standard governing the Form I-944, Declaration of Self-Sufficiency.[23] It is unclear why the proposed rule for Affidavits does not incorporate the new definition of MTPB that the Service created only last year. On the other hand, the proposed rule for Affidavits is in another sense tougher than the standard under the Form I-944. For the Form I-944 it is a "heavily weighted negative factor" if an intending immigrant has received means-tested benefits in the prior 36 months, but only if the benefits were received for an aggregate period of 12

[22] Dept. of Justice, Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (March 26, 1999). Legacy INS proposed but never finalized a rule that would have codified this field guidance. *See* Dept. of Justice, INS Proposed Rule on Public Charge Grounds, 64 Fed. Reg. 28675 (May 26, 1999).

[23] *See* 8 C.F.R. § 212.21(b). The regulation is clear that the definition at applies only to 8 C.F.R. §§ 212.20 through 212.23 and hence not to the regulations governing Affidavits which appear at 8 C.F.R. Part 213a. *See* 8 C.F.R. § 212.21.

months or longer.[24] There is no such *de minimis* threshold under the propose rule for Affidavit. A benefit provided a single time to a would-be sponsor during the specified 36-month period would sink her Affidavit.[25]

> **Practice pointer.** Given the global pandemic, more U.S. citizens and residents than usual are relying on public benefits. But enrollment in such programs will not result in a negative sufficiency finding for the Affidavit if discontinued before the proposed rule takes effect. The negative consequences of a sponsor receiving means-tested benefits is prospective in application.[26] The standard will apply to receipt of benefits 60 days after the proposed rule takes effect.

Second, a negative finding on an Affidavit is required if a judgment has been entered against the sponsor for "failing to meet the support or reimbursement obligations under an existing Affidavit of Support."[27] This circumstance – a judgment against the sponsor for breaching a prior Affidavit – should be fairly uncommon. There have been a limited number of cases in which sponsors have been held liable for failing to

[24] 8 C.F.R. § 212.22(c)(1)(ii).

[25] Another difference is that an intending immigrant is subject to public charge inadmissibility if they were where "certified or approved" to receive public benefits for 12 or more months, even if they did not actually "receive" the benefit. The proposed rule for Affidavits penalizes would-be sponsors only if they "receive" the benefit.

[26] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(i) (proposed).

[27] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(ii) (proposed). The revised Form I-864 will collect information about prior Affidavits that the sponsor has submitted. Form I-864 (proposed), Part 6.

support sponsored immigrants.[28] Lawsuits by government agencies seeking reimbursement from sponsors have been all but unheard of.[29] Still, DHS has attempted to kickstart reimbursement lawsuits by creating a new program to make doing so more administratively feasible,[30] so it is conceivable that judgments against sponsors will become more common – certainly prospective sponsors should be asked about prior judgments if the new rule takes effect.

Discretionary grounds for insufficiency finding. Under the proposed rule, an adjudicator may consider facts, "that suggest that the sponsor cannot maintain income at the income threshold for the sponsor's household size."[31] These facts include: (1) a "material change" in employment or income history; (2) the number of Form I-864 or I-864A beneficiaries for whom the support obligation has not get commenced; and (3) "[a]ny other relevant facts."[32]

Presumably, the Service will be concerned about a "material change" in employment or income that indicates either instability or loss of

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[28] Greg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 BENDER'S IMMIGR. BULL. 1943 (Dec. 15, 2012); Greg McLawsen, *Suing on the I-864 Affidavit of Support; March 2014 Update*, 19 BENDER'S IMMIGR. BULL. 343 (Apr. 1, 2014); Greg McLawsen, *Suing on the I-864 Affidavit of Support; December 2016 Update*, 22 BENDER'S IMMIGR. BULL.137 (Feb. 1, 2017); Greg McLawsen, *Suing on the I-864 Affidavit of Support; September 2020 Update*, __ BENDER'S IMMIGR. BULL. __ (Oct. __, 2020) (collectively summarizing all available case law on enforcement of the Affidavit of Support).

[29] The author is aware of only a single case where a government agency is currently seeking reimbursement from a sponsor, and no jurisdiction in the country where such enforcement is systematically pursued. The author's home state of Washington, for example, lacks any policies or procedures for even considering reimbursement lawsuits against I-864 sponsors.

[30] *See* Appendix (describing the Department's new initiative).

[31] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(3) (proposed).

[32] *Id.*

adequate employment. Under existing practice, it has generally been unproblematic for a sponsor to make a lateral employment move while a Form I-864 adjudication was upcoming. Certainly, it has been unproblematic for a sponsor to accept a promotion.

> **Practice pointer.** If a sponsor has recently changed jobs, practitioners may wish to submit additional evidence to provide context for the adjudicator. The change in employment should be shown – where possible – to be a reasonable and positive employment decision by the sponsor, rather than an event outside the sponsor's control that indicates an inability to maintain employment.

The third, catch-all basis for a discretionary finding ("[a]ny other relevant facts") should be viewed in light of the additional documentation now required for the Affidavit. Considerations such as the sponsor's bank records and credit report can be used on a discretionary basis to depart from the finding that would otherwise follow from looking at the most recent year's returns alone.[33] Even if the sponsor's most recent income returns are above the required level, a bad credit score or financial history could result in a finding that the Affidavit is insufficient and that a joint sponsor is required. Conversely, a good credit score and financial history could theoretically salvage an Affidavit where the most recent income returns are below the required

[33] *Id*. ("…any tax return and other information relating to the sponsor's financial history, including the sponsor's credit history and credit score, will serve as evidence tending to show whether the sponsor is likely to be able to maintain his or her income in the future."

level, though it is difficult to image that the Service would not expect the sponsor to then list assets to make up the shortfall.

> **Practice pointed.** Consider how the proposed rule will work in tandem with the Form I-944 regulations to make adjustment applications difficult for families with limited resources. The proposed rule will increase the number of applicants that will need to secure a joint sponsor for one of the mandatory or discretionary reasons described above. But the Form I-944 regulations heighted tscrutiny of joint sponsors by requiring adjudicators to assess the likelihood that a joint sponsor will provide the promised support.[34] Practitioners may consider providing additional sworn statements by joint sponsors, attesting to their specific intentions to provide support if needed, and may even want to have the joint sponsor appear at the adjustment interview to proffer her testimony.

2. Additional documentation requirements for the Affidavit of Support.

Under the current instructions for the Affidavit of Support, a sponsor must provide proof of citizenship or resident status, along with the most recent year's federal income tax returns.[35] The proposed rule

[34] 8 C.F.R. § 212.22(b)(7)(i). In assessing whether a sponsor is likely to provide the required support, and adjudicator should consider factors including: "(1) The sponsor's annual income, assets, and resources; (2) The sponsor's relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and (3) Whether the sponsor has submitted an affidavit of support with respect to other individuals." 8 C.F.R. § 212.22(b)(7)(i)(A).

[35] Form I-864 Instructions (rev'd Oct. 15, 2019), pp. 6 (proof of citizenship or residence), 8 (requiring a "transcript or a photocopy from your own records of your Federal individual income tax return for the most recent tax year").

adds three additional documentation requirements for the Form I-864. The enhanced documentation requirements are also required for Form I-864A household members.[36]

First, the proposed rule authorizes DHS to consider a sponsor's credit report.[37] Under the April 2020 proposed form revisions, filing the credit report is optional and not required as initial evidence for the Affidavit.[38] Reviewing credit reports aligns with the requirement for intending immigrants who file the Form I-944, Declaration of Self-Sufficiency.[39]

For intending immigrants, the credit report requirement presents a challenge for those working without documentation, as a social security number is required to obtain a credit report. Because sponsors must be citizens or permanent residents, however, obtaining the credit report may be annoying but should be possible.

The credit report is supposedly relevant because it will "serve as evidence tending to show whether the sponsor is likely to be able to maintain his or her income in the future."[40] The comments to the proposed rule suggest that a score of fair or higher – 580 or above – will

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[36] *See* 8 C.F.R. § 213a.2(c)(2)(i)(C)(4) (proposed) (requiring three years of certified tax returns or transcripts, and proof of why returns were not filed); Form I-864A Instructions (proposed), p. 6 (designating a credit report as optional evidence); *id.*, p. 4 (requiring information for household member's checking and savings accounts).

[37] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(2) (proposed).

[38] Form I-864 Instructions (proposed), p. 15 ("You may provide a recent U.S. credit report if you believe doing so may help you to establish your ability to maintain sufficient income…"); Form I-864 (proposed), Part 7, Item 26 (indicating that credit report information is "optional").

[39] 8 C.F.R. § 212.22(b)(4)(ii)(G).

[40] *Id.*

be viewed positively.[41] The rules *do not* state that a score below 580 will automatically result in a negative determination on an Affidavit of Support. Rather – as with the public charge rules surrounding the Form I-944 – a low credit score will be a negative factor that could support a discretionary finding against an Affidavit.

Second, sponsors will need to provide federal income tax returns for the most recent three years.[42] Additionally, the sponsor will now be required to file an *IRS-certified* copy of the returns, rather than an as filed copy the sponsor may have maintained in her records.[43] The returns must be accompanied by all schedules and Forms W-2, as applicable.[44] Alternatively – as under the current rules – the sponsor may use an IRS tax transcript.[45]

If the sponsor was not legally required to file federal income returns, then the sponsor must provide an explanation as to why.[46] The sponsor must provide evidence of why she was not required to file a return and must provide, "a copy of the provisions of any statute, treaty, or regulation that supports the claim that he or she had no duty to file an income tax return with respect to that income."[47] No supporting evidence is required if the sponsor's reason for not filing returns was

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[41] NPRM, at 62445.

[42] 8 C.F.R. § 213a.2(c)(2)(i)(A) (proposed).

[43] *Id*. The proposed rule retains the allowance under current regulations that a sponsor may file additional evidence of income. *Id.* Note that the statute itself actually requires three years of certified tax returns, as provided for under the proposed rule. 8 U.S.C. § 1183a(f)(6)(A)(i).

[44] 8 C.F.R. § 213a.2(c)(2)(i)(A) (proposed).

[45] *Id.*

[46] *Id.*

[47] *Id.*

her income level, although the sponsor "may" provide proof of her income.[48] If the sponsor did not file returns for one of the prior three years, and fails to convince DHS that the sponsor was exempt from filing, the Affidavit of Support will be determined to be insufficient.[49] The deficiency may be cured by subsequently filing the required return.[50]

Third, the proposed rule authorizes DHS to request information about the sponsor's bank accounts.[51] The sponsor will be required to report bank account information on the revised Form I-864.[52] The Affidavit requires the sponsor to provide account and routing numbers for checking and savings account, to identify the institution, and to list any joint account holder.[53] The proposed rule further provides that a sponsor or household member must sign any "necessary waiver" needed to "facilitate the verification" of the sponsor's finances.[54] It seems possible that, were the proposed rule to take effect, such a waiver could be drafted into the Form I-864 itself, authorizing DHS, for example, to access financial records of the sponsor.

Although not codified in the proposed rule, the revised Affidavit of Support adds an additional documentation requirement for would-be

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[48] *Id.*

[49] 8 C.F.R. § 213a.2(c)(2)(i)(D) (proposed).

[50] *Id.*

[51] 8 C.F.R. § 213a.2(c)(2)(v) (proposed).

[52] Form I-864 (proposed), Part 4, Item 15. The text of the proposed rule itself says that DHS "may" request information relating to bank accounts, including account and routing numbers. 8 C.F.R. § 213a.2(c)(2)(v) (proposed).

[53] Form I-864 Instructions (proposed), p. 12.

[54] 8 C.F.R. § 213a.2(c)(2)(v) (proposed).

sponsors who will be seeking to reestablish U.S. domicile. The revised instructions now require that a sponsor seeking to reestablish U.S. domicile provide "proof" of "concrete steps" to establish U.S. domicile.[55]

> Concrete steps might include accepting a job in the United States, signing a lease or purchasing a residence in the United States, or registering children in U.S. schools. Attach proof of the steps you have taken to establish domicile as previously described.[56]

The current instructions for the Affidavit of Support already require similar proof for a sponsor living abroad but who claims U.S. domicile.[57]

In practice, the new documentation requirement may impose little additional burden from what practitioners already undertake when a sponsor is outside of the United States. From a practical standpoint, the most common scenario where the domicile issue arises is when a married couple plans to relocate to the United States. In that case there is rarely a genuine question about the sponsor's intent to remain and relocate with his spouse. In the context of an adjustment application – as opposed to an immigrant visa application – the couple will generally already have relocated, and the sponsor should generally be able to establish domicile without issue.

3. Narrower definition of household members eligible to sign a Form I-864A.

Under current regulations, a sponsor may rely on the income of a qualifying relative residing with the sponsor, provided the relative

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[55] Form I-864 Instructions (proposed), p. 11.

[56] *Id.*

[57] Form I-864 Instructions (rev'd Oct. 15, 2019), p. 6 ("If you are not currently living in the United States, you must provide proof that your trip abroad is temporary and that you have maintained your domicile in the United States").

signs a binding Form I-864A.[58] There is currently no limit to the number of relatives that may serve as household members.[59]

The proposed rule narrows those relatives eligible to sign a Form I-864A to the sponsor's spouse and the intending immigrant.[60] Significantly, with respect to the sponsored immigrant, the individual's income may be counted only if the individual had employment authorization.[61] Notably, this differs from the standard governing the Form I-944, Declaration of Self-Sufficiency, which allows an intending immigrant to rely on undocumented income.[62]

It is unclear whether the new definition of household members will have a significant impact on practitioners. A relative living with the sponsor who no longer qualifies as a household member can still serve as a joint sponsor. The impact would be seen only where a relative lacked sufficient income to serve independently as a joint sponsor, but that income would have passed muster when added to that of the sponsor.

The narrowing definition of household members aligns with the Department's increased scrutiny of joint sponsors, as reflected in the 2019 public charge rules. Under that rubric, DHS reserved the authority to examine the likelihood that a joint sponsor would actually

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[58] 8 C.F.R. § 213a.1 (defining "household income" for purpose of the Form I-864W to include anyone included in the sponsor's "household size," which includes "a husband, wife, father, mother, child, adult son, adult daughter, brother, or sister" residing with the sponsor).

[59] NPRM at 62441.

[60] 8 C.F.R. § 213a.1(f) (proposed).

[61] 8 C.F.R. § 213a.1(f)(2)(ii) (proposed).

[62] Form I-944 Instructions (rev'd Oct. 15, 2019), p. 6 (allowing intending immigrant to list "additional" untaxed income). *See* 8 C.F.R. § 212.22(b)(4)(ii)(B).

abide by the sworn promise to support the intending immigrant.[63] Likewise, the proposed rule evinces skepticism that a pool of Form I-864A household members will actually provide the required support to sponsored immigrants, or be able to pay a judgment if rendered against them collectively.[64]

The proposed rule clarifies that household members are jointly and severally liable with respect to a sponsor's financial obligations to a sponsored immigrant.[65] It also provides that "[t]he sponsor, as a party to the contract, may bring suit to enforce the contract with the spouse."[66] That is, if a sponsored immigrant or benefit-granting agency sued a sponsor, the sponsor could theoretically sue the household member who signed the I-864A, which under the proposed rule would be the sponsor's spouse or the immigrant himself. There is no known state or federal case in which a sponsor has ever joined a Form I-864A household member as a defendant to an Affidavit of Support lawsuit, or where a sponsor has brought a separate lawsuit to seek reimbursement from a household member.[67]

Despite what appears to be a typographical error – and consistent with current regulations – an intending immigrant *does not* need to

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[63] 8 C.F.R. § 212.22(b)(7)(i).

[64] *Cf.* NPRM, at 62444 ("By limiting whose income may be considered available to the sponsor, DHS believes it will reduce the possibility of counting income of household members who may not be able to, on their own, meet the support obligations").

[65] 8 C.F.R. § 213a.2(c)(i)(C)(2) (proposed). The rule specifies that the sponsored immigrant is a third-party beneficiary of the Form I-864A contract.

[66] *Id.*

[67] *See* note 26, *supra* (citing articles reviewing all state and federal I-864 enforcement litigation).

execute a Form I-864A to make her income available to the sponsor, unless the intending immigrant has accompanying dependents.[68]

4. Facilitation of civil lawsuits enforcing the Affidavit.

There are two separate circumstances in which a sponsor can face a lawsuit enforcing obligations under the Affidavit of Support. First, a sponsored immigrant has a private right of action against the sponsor if the immigrant's income falls below 125% of the poverty line while the Affidavit is in force.[69] Second, the sponsor may be sued by a government agency for the cost of means-tested public benefits provided to the sponsored immigrant while the Affidavit is in effect.[70] In either a private lawsuit by a sponsored immigrant or reimbursement lawsuit by the government, the action is in the nature of a breach of contract claim.[71] Hence, the party plaintiff will of course want to produce the signed contract on which the lawsuit is based.

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[68] *Compare* 8 C.F.R. § 213a.2(c)(2)(i)(C)(1) (proposed) ("The sponsor may also rely on the income of his or her spouse, or any intending immigrant who shares the same principal residence, if the spouse *or intending immigrant* is at least 18 years old *and has completed and signed a Contract Between Sponsor and Household Member*") (emphasis added) *with* 8 C.F.R. § 213a.2(c)(2)(i)(C)(1) (proposed) (providing that an intending immigrant without accompanying dependents does not need to sign the Form I-864A). *See also* Form I-864A Instructions (proposed) ("If you are the intending immigrant and the sponsor is including your income on Form I-864 to meet the eligibility requirements, you need to complete this contract only if you have accompanying dependents").

[69] 8 U.S.C. §§ 1183a(a)(1)(A) & (e)(1).

[70] 8 U.S.C. §§ 1183a(a)(1)(B) & (e)(2). *See also* 8 U.S.C. §§ 1183a(b) (setting forth pre-litigation demand requirements in reimbursement lawsuits).

[71] *Cf. Erler v. Erler,* 824 F.3d 1173 (9th Cir. 2016); *Liu v. Mund*, 686 F.3d 418, 420 (7th Cir. 2012), *as amended* (July 27, 2012).

Current regulations authorize DHS to release a certified copy of an Affidavit of Support in response to a "duly issued subpoena."[72] In practice, DHS declines to respond to such subpoenas on the view that the records can be obtained through a Freedom of Information Act request.[73] Regardless, DHS assesses that the process of obtaining a judicial subpoena is overly burdensome and discourages enforcement of the Affidavit of Support.[74]

The proposed rule does away with the subpoena requirement, authorizing disclosure of the Form I-864 in response to a "formal request from a party of entity authorized to bring an action to enforce an Affidavit of Support […]."[75] DHS proposes to create a new form to be used by sponsored immigrants or government agencies to obtain signed contracts: the G-1563, Request for Certified Copy of Affidavit of Support Under Section 213A of the INA or Contract between Sponsor and Household Member.[76] The proposed rule also authorizes USCIS to disclose to the would-be plaintiff the last known address and Social Security number of the sponsor and household member.[77] Collection

[72] 8 C.F.R. § 213a.4(a)(3).

[73] *See* McLawsen (2020), *supra* note 26, at text accompanying notes 10-14.

[74] NPRM, at 62441 ("The requirements in the current regulations may have contributed to unintended difficulties for benefit-granting agencies and sponsored immigrants seeking to hold sponsors legally responsible for their obligations based on Affidavits"), 62447 ("…it is burdensome, costly, and inefficient for parties to obtain subpoenas merely to get a copy of an Affidavit").

[75] 8 C.F.R. § 213a.4(a)(3) (proposed) (emphasis added).

[76] NPRM, at 62433.

[77] 8 C.F.R. § 213a.4(a)(3) (proposed).

and disbursement of this information will be facilitated by a new online tool launched by USCIS in September 2020.[78]

The revised Affidavit of Support contains extensive revisions to the "Sponsor's Certification" at the end of the form, authorizing various forms of information sharing and document disclosure to facilitate enforcement of the Affidavit.[79] For example, the recitation allows a benefit-granting agency authority to "disclose information" to DHS "for purpose of administration of federal laws regarding my obligations as a sponsor."[80]

> **Practice pointer.** Law firms are well advised to ensure that their intake procedure in family-based cases includes a written advisory to would-be Affidavit sponsors. Specifically, practitioners will want to ensure that the advisory contains cautionary language about the government's initiative to facilitate reimbursement lawsuits against sponsors.[81] The potential liability in such lawsuits, were a sponsored immigrant to receive Medicaid benefits in connection with a catastrophic medical event, could be substantial. In practice, such lawsuits have been all but unheard of, but DHS is actively encouraging reimbursement lawsuits.

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[78] See the Appendix for a summary of the "Sponsor Deeming and Agency Reimbursement Initiative."

[79] Form I-864, pp. 8-9.

[80] Form I-864 (proposed), p. 9.

[81] Note that the new reimbursement enforcement initiative has already taken effect as of September 10, 2020 and does not hinge on the outcome of the proposed rule discussed in this Article. *See* Appendix.

The revised Affidavit of Support instructions now contain an advisory on "Sponsor and Beneficiary liability."[82] The advisory cautions a would-be sponsor about liability relating to the duty to reimburse the cost of public benefits provided to the sponsored immigrant.[83] The advisory is somewhat misleading, as it fails to mention a sponsored immigrant's private right of action against the sponsor to recoup damages relating to the obligation to provide income assistance. Nor does the beneficiary have any "liability" under the Form I-864, as the sponsored immigrant is not a party to the contract and does not assume any obligations by virtue of its execution.

5. Expansion of "household size" to include beneficiaries of a prior Form I-864A.

The larger a sponsor's "household size," the higher the individual's income will need to be in order to meet sponsorship requirements. Under current regulations, "household size" included the beneficiaries of prior Affidavits of Support signed by a sponsor.[84] The proposed rule marginally expands the definition of "household size" to include the beneficiary of a Form I-864A signed by the sponsor.[85] Essentially, the proposed rule simply expands the regulation about prior Affidavits of Support to include prior Form I-864A contracts. In practice, this aspect of the new rule seems unlikely to result in significant additional burden to would-be sponsors or to practitioners.

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[82] Form I-864 Instructions (proposed), p. 3.

[83] *Id.* ("Under section 213A of the Act, if the individual you are sponsoring receives means-tested public benefits, you must reimburse the agency that provides the benefits, and the agency that provides the benefits may be able to sue you to recover the cost of the benefits provided if you do not reimburse the agency."

[84] 8 C.F.R. § 213a.1.

[85] 8 C.F.R. § 213a.1(g)(v) (proposed).

6. Other aspects of the proposed rule.

Under current rules, all sponsors and joint sponsors must file a Form I-865 change of address form within 30 days of changing residences.[86] The proposed rule extends this requirement to include a household member signing a Form I-864A.[87] The proposed rule also extends to household members the civil penalty currently applicable (if only in theory) to sponsors who fail to file a Form I-865.[88] In reality the revisions to the address requirement may have little significance. This author is unaware of the existing civil penalty ever having been imposed against a sponsor for failing to file a timely Form I-865.

For adjustment applications, the Form I-485 filing fee will continue to cover the cost of adjudicating the Affidavit of Support.[89] But DHS leaves open the possibility that it will create a filing fee for the Form I-864 if the proposed rule ends up being more burdensome than anticipated.[90]

Although not codified in the proposed rule, and departing from long-standing practice, the revised Affidavit of Support will require notarization.[91] On the other hand, the revised instructions provide that

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[86] 8 C.F.R. § 213a.3(a)(1).

[87] 8 C.F.R. § 213a.3(a)(1) (proposed).

[88] 8 C.F.R. § 213a.3(b) (proposed). *See* 8 C.F.R. § 213a.3(b) (currently authorizing a civil penalty against a "sponsor" who fails to timely update her address).

[89] NPRM, at 62469

[90] *Id*.

[91] Form I-864 Instructions (proposed), pp. 7 ("Form I-864 must be notarized by a notary public. Each affidavit must be properly signed before a notary public and filed...") & 16 ("Form I-864 must be notarized by a notary public or by a foreign equivalent (as applicable), if the sponsor is outside the United States…"); Form I-864 (proposed), p. 9 (revised to contain stamp and signature block for notary public).

DHS (although not the Department of State) will accepted a "photocopied, faxed, or scanned copy of the original handwritten signature" on the Affidavit.[92] The inconvenience of obtaining a notarized signature is thus somewhat offset by being able to use a digital and reprinted copy of signed Affidavit.

DHS forecasts that the proposed rule will add an additional 30 minutes to the estimated six hours it takes a sponsor to prepare the Affidavit of Support.[93] Considering that the revised Affidavit will require notarization, it seems likely that new requirement by itself will cost sponsors significantly more than half an hour. Regardless, practitioners may find that the additional burden imposed by the proposed rule lies not so much in the additional drafting and documentation requirements as in the additional effort needed to properly assess and advise would-be sponsors. The proposed rule makes more difficult the assessment of whether an individual could be determined to lack the ability to maintain a sponsored immigrant, even if the would-be sponsor has reported income above 125% of the poverty line. Even if the sponsor's most recent taxable income exceeded the required level, factors such as credit score, deposit records or other considerations left open-ended by the rules could support a finding that the sponsor's Affidavit is insufficient.

This article leaves aside various housekeeping changes to the public charge regulations that simply correct regulatory cross-references or update definitions to align with the substantive changes discussed

[92] Form I-864 Instructions (proposed), p. 7.

[93] NPRM, at 62463.

below.[94] In an expanded definitional section, the proposed rule separately defines "petitioning sponsor," to distinguish the individual from a joint sponsor (also referred to as a co-sponsor).[95] Practitioners often refer to a Form I-130 petitioner as the "primary" sponsor to make that same distinction.[96] Likewise, the proposed rule lists the categories of intending immigrants exempt from the Affidavit of Support requirement, but these categories are exempt by statute.[97]

Conclusion.

The Department's 2019 public charge rules were a game-changer for family-based adjustment applicants. The old system, wherein a sufficient Form I-864 normally resolved all public charge concerns, was replaced by a new scheme wherein the financial wherewithal of intending immigrants is closely scrutinized. The proposed rule discussed in this article will cause nothing like the agony experienced in the wake of the Form I-944, Declaration of Self-Sufficiency. Yet at the case-assessment stage of representations, lawyers will wish to renew their efforts to scrutinize cases where a petitioning or joint sponsor's income hovers near the requisite level. In such cases, extra attention should be given the sponsor's financial records, including credit score. Likewise, practitioners should review their office

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[94] For example, the proposed rule adds a new definitional provision as to when an Affidavit is considered "executed," but this simply reiterates a provision already contained in the regulations. *Compare* 8 C.F.R. § 213a.1(d) (proposed) *with* 8 C.F.R. § 213a.2(a)(1)(ii).

[95] 8 C.F.R. § 213a.1(m) (proposed).

[96] NPRM, at 62469 ("Future adjustments to the fee schedule maybe necessary to recover these additional operating costs and will be determined at USCIS' next comprehensive biennial fee review").

[97] 8 C.F.R. § 213a.2(a)(2)(ii) (proposed).

procedures in systematically advising new clients about the liabilities incurred when signing the Affidavit of Support. While it is still too soon to tell, the prospect of reimbursement lawsuits against sponsors by government agencies looms as an increasingly threatening possibility.

Appendix

The Systematic Alien Verification for Entitlements or "SAVE" program has long existed for the purpose of assessing the immigration status of those applying for public benefits.[98] On September 10, 2020, USCIS announced a new "Sponsor Deeming and Agency Reimbursement Initiative" under the umbrella of the SAVE program.[99] The new initiative will, *inter alia*, facilitate lawsuits against Affidavit sponsors by providing relevant information to government agencies charged with administering public benefit programs.[100]

Through the new initiative, USCIS has created an online tool that agencies can use to assess whether an individual is recipient of an Affidavit of Support, in which case the agency could seek benefit

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[98] *See*, *e.g.*, Dept. of Health and Human Services, Statement of Organization, Functions, and Delegations of Authority, 59 Fed. Reg. 1 (Mar. 29, 1994) (referencing the SAVE system with respect to various public benefits programs administered by DHHS).

[99] USCIS Website, www.uscis.gov, Save Launces Sponsor Deeming and Agency Reimbursement Initiative, https://www.uscis.gov/save/save-whats-new/save-launches-sponsor-deeming-and-agency-reimbursement-initiative (last visited Oct. 4, 2020). *See* Dept. Homeland Security, Notice of Privacy Act System of Records, 81 Fed. Reg. 78619 (Nov. 8, 2016) (per Privacy Act requirements, announcing plans to update records systems for the SAVE program pertaining the Affidavit of Support and related information).

[100] *Id.*

reimbursement from the sponsor.[101] An agency may input information about an individual receiving benefits, and the SAVE system will return information about the individual's sponsor and, if applicable, Form I-864A household member.[102] It is presently unclear the extent to which states will – voluntarily or otherwise – utilize the SAVE program to pursue reimbursement from Affidavit of Support sponsors.[103]

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[101] *Cf.* USCIS, Save Sponsorship Guide (Sep. 2020), *available at* https://www.uscis.gov/save/save-whats-new/save-launches-sponsor-deeming-and-agency-reimbursement-initiative.

[102] *Id.*, p. 5.

[103] In response to the May 23, 2019 presidential directive, federal agencies provided updated guidance to their state counterparts concerning reimbursement under the Affidavit of Support. But it is unclear if there has been widespread action by state agencies in response. *See* Sponsoring Deeming and Repayment for Certain Immigrants, available at https://www.medicaid.gov/federal-policy-guidance/downloads/sho19004.pdf (last visited Oct. 4, 2020); Reimbursement obligations of sponsors of noncitizens and procedures for recovering TANF funds, *available at* https://www.acf.hhs.gov/ofa/resource/tanf-acf-pi-2019-01 (last visited Oct. 4, 2020); State Enforcement of Legal Responsibilities of Sponsors of Non-Citizens, *available at* https://www.fns.usda.gov/snap/resource/state-enforcement-legal-responsibilities-sponsors-non-citizens (last visited Oct. 4, 2020). *See also*, Dept. of Labor, Final Rule, 85 Fed. Reg. 51896, 51956 (Aug. 21, 2020) (requiring use of the SAVE program for non-citizen applicants for unemployment insurance, codified at 29 C.F.R. § 618.876(b)); Dept. of Labor, Agency Information Collection Activities 85 Fed. Reg. 28037 (May 12, 2020) (issuing notice of information collections relating to the number of unemployment insurance denials "resulting from use of the USCIS SAVE system").