SUING ON THE I-864 AFFIDAVIT OF SUPPORT SEPTEMBER 2020 UPDATE

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Sound Immigration
Mailing address:
113 Cherry St. ECM# 45921
Seattle, WA 98104-2205

www.soundimmigration.com

By Greg McLawsen[1]

The Form I-864, Affidavit of Support is largely unpopular. Certainly, it is disliked by immigration practitioners, who have for years battled with the hyper-technical scrutiny that immigration agencies have applied to these forms. Even more so, the Form I-864 is reviled by sponsors once they find themselves on the receiving end of a litigation-related demand letter. Often it is only at this moment that the sponsor learns that this piece of "paperwork" – signed along with the mountain of other "paperwork" required for his former spouse's visa – was not just another piece of paper.

This is the fourth publication in a series of *Bender's Immigration Bulletin* articles that summarize state and federal case law on enforcement of the Form I-864, Affidavit of Support.[2] In taking stock of the evolving case law, it is essential to remember why the Affidavit of Support exists, and whom it protects. First and foremost, an immigrant's private right of action protects her right to basic financial support from her sponsor. In this way, Affidavit of Support lawsuits are – in the most straightforward sense imaginable – a matter of *immigrant* rights. For that reason, it is perplexing to the author of this article when such lawsuits are scorned by members of the immigration bar as

[1] The author thanks Dr. Julia McLawsen, Jenni Panicker and Nico Ratkowski for their assistance reviewing this article.

[2] 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). As with the past updates, article has been drafted with the intention that readers refer to corresponding sections of the author's original 2012 article for background discussion. *See also* Greg McLawsen and Gustavo Cueva, *The Rules Have Changed: Stop Drafting I-864s for Joint Sponsors*, 20 BENDER'S IMMIGR. BULL. 1287 (Nov. 15, 2015) (discussing the ethics of drafting I-864s for joint sponsors).

discouraging immigration. Every viable I-864 lawsuit represents an immigrant who is living in poverty and is pursuing her last available lifeline for most modest financial assistance.

Much has transpired in the four years since the last I-864 case law update was provided in this publication. Some 23 years after its creation, the I-864 has been litigated in federal courts in Alabama, California, Colorado, Delaware, Florida, Georgia, Indiana, Louisiana, Maryland, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, Utah, South Carolina, Texas, Virginia, Washington, West Virginia, Wisconsin,[3] as well as in the Second, Sixth, Seventh and Ninth Circuits.[4] The issue of federal

[3] *See*, *e.g.*, *Belevich v. Thomas*, No. 2:27-cv-1193 (N.D. Ala. June 20, 2019) (Memo. Op.); *Cyrousi v. Kashyap*, 386 F.Supp.3d 1278, 1285-86 (C.D. Cal. 2019); *Echon v. Sackett*, No. 1:14-cv-03420, 2018 WL 2087594, *3 (D. Colo. May 4, 2018); Yates v. Yates, Civ. No. 14-cv-545 (D. Del. Mar. 23, 2018); *Greiner v. De Capri*, 403 F.Supp.3d 1207 (N.D. Fla. 2019); *Hall v. Hall*, No. 1:19-cv-03903 (N.D. Ga. Aug. 29, 2019) (complaint); Stump *v. Stump*, No. No. 1:04-cv-253-TS, 2005 WL 2757329, *8 (N.D. Ind. Oct. 25, 2005); *Ainsworth v. Ainsworth*, No. 02-cv-1137, 2004 U.S. Dist. LEXIS 28962 (M.D. La. Apr. 29, 2004); *Farhan v. Farhan*, Civil No. 1:11-cv-01943, 2013 U.S. Dist. LEXIS 21702 (D. Md. Feb. 5, 2013); *Dahhane v. Stanton*, No. 0:15-cv-01229 (D. Minn. Aug. 4, 2015) (report and recommendation); *Pachal v. Bugreeff,* No. 9:20-cv-00050 (D. Mont. Apr. 24, 2020) (complaint); *Montgomery v. Montgomery*, 764 F. Supp. 2d 328 (D.N.H. 2011); *Shah v. Shah*, No. 12-cv-4648 (D.N.J. Jan. 14, 2014); *Tornheim v. Kohn*, No. 00-cv-5084, 2002 U.S. Dist. LEXIS 27914, (E.D. N.Y. Mar. 26, 2002); *Nasir v. Shah*, No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207 (S.D. Ohio Sept. 21, 2012); *Nguyen v. Dean*, No. 10-cv-6138, 2011 U.S. Dist. LEXIS 3803 (D. Or. Jan. 14, 2011); *Mathieson v. Mathieson*, No. 10–1158, 2011 U.S. Dist. LEXIS 44054 (W.D. Penn., Apr. 25, 2011); *Harsing v. Naseem*, No. 11-cv-1240 (D.P.R. Jan. 18, 2012); *Golipour v. Moghaddam*, No. 4:19-cv-00035 (D. Utah Feb. 7, 2020); *Kawai v. Uacearnaigh*, 249 F. Supp. 3d 821 (D.S.C. 2017); *Nwauwa v. Ugochukwu*, No. 1:18-cv-1130 (W.D. Tex. May 10, 2019); *Al-Aromah v. Tomaszewicz*, No. 7:19-cv-294 (W.D. Va. Sep. 10, 2019) (Memo. Op.); *Liu v. Kell*, 299 F. Supp. 3d 1128, 1133 (W.D. Wash. 2017); *Du v. McCarthy*, No. 2:14-cv-100 (N.D. W. Vir. March 26, 2015) (report and recommendations); Carlbog v. Tompkins, No. 10-cv-00187, 2010 U.S. Dist. LEXIS 117252 (W.D. Wi., Nov. 3, 2010)

[4] *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). *See also Levin v. Barone*, No. 18-1307-cv (2d Cir. June 4, 2019) (unpublished) (holding that plaintiff's I-864 claim was barred by *res judicata*); *Du v. McCarthy*, No. 17-1660 (4th Cir. Feb. 9, 2018) (unpublished) (affirming summary judgment in favor of I-864 plaintiff); *Davis v. U.S.*, 499 F.3d 590,

question jurisdiction seems finally to be settled.[5] The calculation of damages is increasingly clear.[6] And most notably, courts have increasingly recognized I-864 enforcement lawsuits as highly focused statutory matters, in which the defendant has virtually no affirmative defenses to liability.[7] In the 23 years since the Form I-864 was created, a hospitable environment for its enforcement by needy immigrants is finally flourishing. This jurisprudential environment is correspondingly hostile to sponsors who would seek to avoid their contractual duty to provide financial support.

I. Contract Issues

Just as the Immigration and Nationality Act (INA) provides, the Affidavit of Support is enforceable contract.[8] Or to be hyper-technical, it becomes an enforceable contract once "executed," which means that it is signed and appropriately submitted to USCIS or the Department of State.[9]

When a sponsored immigrant decides to enforce her right to support, how does she go about *getting* a copy of her signed Affidavit of Support? The issue is no small matter. She can obtain the Affidavit, along with her whole Alien File, through a Freedom of Information Act (FOIA) request.[10] But as every practitioner is aware, these requests can take

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594-95 (6th Cir. 2007) (holding that court lacked subject matter jurisdiction over declaratory judgment action seeking to clarify sponsor's duties).

[5] See Section II.A, below.

[6] See Section I.C, below.

[7] See Section I.B, below.

[8] 8 U.S.C. § 1183a(a)(1)(B).

[9] 8 C.F.R. §§ 213a.2(a)(1)(ii) (defining execution), (h) (affidavit is a contract once executed).

[10] Immigration lawyers often believe that an immigrant cannot obtain the Affidavit of Support from her Alien File, on the view that it would be protected by the Privacy Act.

many months, despite the 20-day response time mandated by statute.[11] In fact, the regulations expressly authorize issuance of a subpoena to USCIS for the purpose of getting the Affidavit for use in an enforcement case.[12] Yet despite its own regulations, the agency has generally refused to comply with the subpoenas.[13] USCIS cites *Touhy v. Ragen* and progeny and asserts that the immigrant can simply get her Affidavit via a FOIA request.[14]

For an I-864 beneficiary who was represented during the immigration process, the easiest option is simply to request a copy of the individual's client file. As a matter of both professional ethics, a former client is, of course, entitled to a copy of their file.[15] On more than one occasion, however, this author has had firms flatly refuse to provide a copy of an I-864 beneficiary's former client file, on the view that a "conflict of interest" existed with the sponsor. It is the law firm's problem, however, not that of the former client, if the firm failed to caution a couple about the limitations of joint representation and as to how conflicts would be handled if they arise. Each firm that refused to release a file to the author's clients ultimately agreed to do so under threat of a disciplinary complaint. Which is to say that the firm recognized its obligation to release the former client's papers regardless

In practice, this author files Alien File FOIA requests for every I-864 enforcement client and has never received a denial with respect to the I-864, nor has the I-864 been redacted.

[11] 5 U.S.C. § 552(a)(6)(A)(i).

[12] 8 C.F.R. § 213a.4(a)(3).

[13] Redacted copies of emails from the USCIS Office of Chief Counsel, which relate to cases for former clients, are available from the author.

[14] 340 U.S. 462, 474-75 (1951).

[15] ABA Formal Opinion 471, *Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled* (July 1, 2015).

of whether the firm may also have failed to protect the interests of its other client through appropriate advisories at the outset of a representation.[16]

One option is simply to proceed to litigation without the signed Form I-864. Recall that the Affidavit is required by law for all family-sponsored immigrant matters.[17] The only exceptions to that broad requirement are the discrete classes listed at 8 C.F.R. § 213a.2(a)(2)(ii).[18] The most common of these is perhaps intending immigrants who can already be credited with 40 qualifying quarters of coverage under the Social Security Act.[19] But it can be readily ascertained whether a would-be plaintiff could have qualified under any of these exemptions. For a "standard" finac(é)e or marriage-based adjustment applicant, it can easily be determined if – by law – the Form I-864 must have been executed. If so, the matter can be established for purposes of summary judgment as lacking a genuine factual dispute.

Illustratively, in *Mason v. Mason* a Washington State resident filed a petition to modify child support payments, arguing that the court had

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[16] Best practice, of course, includes counseling new clients in writing as to the limitations of joint representation. This includes a description of the conditions in which a conflict would require the firm to withdraw from joint representation. It also includes an explanation of how communications will be handled, and that confidences cannot be kept as between the two clients. The new clients should also be advised that either client has access to the papers contained in their joint client file.

[17] 8 U.S.C. § 1182(a)(4).

[18] 8 C.F.R. § 213a.2(a)(2)(ii) lists: (A) self-petitioners under the Violence Against Women Act; (B) grandfathered immigrants with petitions pending prior to December 19, 1997; (C) those who have worked and/or may be credited with 40 qualifying quarters of coverage as defined under title II of the Social Security Act; (D) a child admitted under 8 U.S.C. § 1181(a) and 8 C.F.R. § 211.1(b)(1); and (E) a child who will automatically acquire citizenship under 8 U.S.C. § 1431.

[19] 8 C.F.R. § 213a.2(a)(2)(ii)(C).

failed to consider the respondent's financial duties under the Affidavit of Support.[20] The sponsored immigrant presented a copy of the Affidavit, but it was "not notarized or dated."[21] After the respondent attested that he did "not remember" signing the Affidavit, a three-day fact-finding hearing ensued. The sponsored immigrant offered the testimony of an expert witness, an immigration lawyer, who explained that the respondent must have signed the Affidavit in the underlying immigration case.[22] The Court agreed, and then went on to award sanctions against the respondent on the view that he had no good faith basis for denying that he had executed the Affidavit.[23] The sanctions were overturned on appeal, as the trial court failed to enter written findings as required by Washington civil rules.[24] Nonetheless, *Mason* shows that it can be sanctionably unfounded for a primary sponsor to deny executing the Form I-864.[25]

I.A. Duration of obligation

The sponsor's obligation under the I-864 begins once the sponsored individual acquires residency.[26] It ends only upon one of the five

[20] No. 49839-1-II (Wash. App. Div. II July 31, 2018).

[21] *Id.*, at *4. This observation from the Court is somewhat confusing, as the Form I-864 does not require notarization. Did the Court mean that it was unsigned?

[22] *Id.*, at *5.

[23] *Id.*

[24] *Id.*, at *16-17.

[25] Here, the distinction between primary and joint sponsor is important. It was sanctionable for the *Mason* sponsor to denying signing the Form I-864 since the intending immigrant could not possibly – as a matter of federal law – have obtained resident status without a signed Affidavit of Support from her visa petitioner. The same rationale would not apply to a joint sponsor, since there no similar requirement that a particular person serve as a joint sponsor for a specific intending immigrant.

[26] 8 C.F.R. § 213a.2(e)(1).

Terminating Events defined in the contract and accompanying regulation.[27] Those are, that the sponsored immigrant: (A) becomes a citizen of the United States; (B) has worked, or can be credited with, 40 qualifying quarters of work under title II of the Social Security Act; (C) ceases to hold the status of an alien lawfully admitted for permanent residence and departs the United States; (D) obtains in a removal proceeding new grant of adjustment of status as relief from removal; or (E) dies.[28] The support obligation also ends upon the death of the sponsor.[29]

Despite the plain language of both the contract and regulation, defendants often take aim at a beneficiary-plaintiff's current immigration status. Defendants argue that if the beneficiary's immigration status has lapsed, she has also lost her rights under the Affidavit. Plaintiffs in these matters usually have obtained LPR status through their spouses, and it is common for them to be in the midst of a Form I-751 adjudication when they bring their I-864 enforcement claim. Defendants often incorrectly believe that they will not be liable if the plaintiff's LPR status has been terminated.[30] But recall that only loss of

[27] The term "Terminating Events" is the author's and does not appear in the statute.

[28] 8 C.F.R. § 213a.2(e)(2)(i). In fact, only the first and second Terminating Events are provided within the INA. 8 U.S.C. §§ 1183a(a)(2) (acquisition of citizenship) and (a)(3)(A) (40 quarters of work). The remaining three were added as interpretive gloss by legacy INS.

[29] 8 C.F.R. § 213a.2(e)(2)(ii).

[30] *See, e.g., Golipour v. Moghaddam*, 4:19-cv-00035, at *8 (D. Utah Feb. 7, 2020) (holding that loss of LPR status without departure from the United States does not terminate support obligation); *Cyrousi v. Kashyap*, 386 F.Supp.3d 1278, 1285-86 (C.D. Cal. 2019) (holding that plaintiff's LPR status had not terminated where he timely filed a Form I-751 petition before departing the United States).

resident status *and* departure from the United States qualifies as a Terminating Event.[31]

In the California family law case, *Marriage of Tamboura*, the defendant argued that the I-864 became unenforceable when the immigrant filed a Form I-751 waiver petition with trumped up allegations of abuse.[32] The sponsor argued that because the Form I-751 was allegedly based on false information, USCIS should have denied the application and referred the immigrant for removal proceedings.[33] The trial court seems to have assumed that fraud in the waiver petition would render the I-864 unenforceable, and conducted an *in camera* review of the petition.[34] But the court found no evidence of fraud.[35]

On appeal, the court engaged in a confusing discussion of when a USCIS agency decision can be collaterally attacked in federal court.[36] Ultimately the court punted on the question of whether it had the ability to collaterally assess the Form I-751 approval, and upheld the trial court on the sufficiency of the factual record to show absence of fraud.[37] But the decision did not need to be so complicated. Only loss of LPR status *and* departure from the United States qualifies as a Terminating Event.[38] *Even if* the immigrant had fraudulently obtained unconditional LPR status, and *even if* she was placed in to proceedings,

[31] 8 C.F.R. § 213a.2(e)(2)(i)(C).

[32] No. A-151889 (Cal. 1st App., Div. I May 22, 2019).

[33] *Id.*, at *2, *4.

[34] *Id..*, at *6.

[35] *Id..*, at *6-7.

[36] *Id..*, at *7-8.

[37] *Id..*, at *8-9.

[38] 8 C.F.R. § 213a.2(e)(2)(i)(C).

the Affidavit of Support remains in effect so long as she remains in the United States.[39]

Similarly, in *Belevich v. Thomas*, the defendant argued that the plaintiff became "subject to removal" when charged with aggravated felonies.[40] But so what? The Court correctly observed that only being "subject to removal" *and* reacquiring LPR status would terminate the support obligation.[41]

Some of the most vexing issues in I-864 litigation concern how to calculate quarters of coverage under Title II of the Social Security Act. The INA provides that "qualifying quarters of coverage" is as provided "under Title II of the Social Security Act."[42] This includes all qualifying quarters "worked by a spouse of [an] alien and the alien remains married to such spouse or such spouse is deceased."[43] In I-864 litigation, the issue arises as to if and how the I-864 beneficiary should be imputed with work quarters earned by her sponsor. In *Cyrousi v. Kashyap*, the plaintiff argued that the work quarters reflected on his official Social Security statement were either dispositive or at least entitled to deference – that is, that the 40 quarters issue was decided by whatever was reflected on the statement.[44] But the Court noted that the INA looks to whether an immigrant "*can* be credited" with qualifying quarters rather than whether the immigrant actually *is*

[39] *Id.*

[40] *Belevich v. Thomas*, No. 2:27-cv-1193, at *10 (N.D. Ala. June 20, 2019) (Memo. Op.).

[41] *Id.*, at *12.

[42] 8 U.S.C. § 1183a(a)(3)(B). *See* 42 U.S.C. § 401.

[43] 8 U.S.C. § 1183a(a)(3)(B)(ii).

[44] 386 F.Supp.3d 1278, 1284 (C.D. Cal. 2019).

credited.[45] Hence, the Court credited the plaintiff for four qualifying quarters for income earned in a calendar year, even though the income was not reflected on this Social Security statement, since those "could" have been credited to him.[46]

I.B. Defenses

As repeated frequently in this article, the Form I-864 is a contract. It is therefore natural to assume that a defendant may assert any affirmative defense normally available in breach of contract claims. In recent years, however, federal courts have increasingly adopted the view that contract law defenses *categorically* do not apply in I-864 litigation.[47] Why? In short, because the INA sets forth a comprehensive statutory scheme for the I-864 that preempts any common law that would otherwise govern defenses to a breach of contract.

The leading district court case is *Dorsaneo v. Dorsaneo* in the Northern District of California.[48] The *Dorsaneo* defendant asserted the defense of fraud in the inducement, on the view the plaintiff had duped him into marriage and had never intended to "create a family" with him.[49] The Court granted the plaintiff's motion for partial judgment on

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[45] *Id.* at 1287.

[46] *Id.*

[47] *Cyrousi v. Kashyap*, 386 F.Supp.3d 1278, 1284 (C.D. Cal. 2019); *Belevich v. Thomas*, No. 2:27-cv-1193, at *21 (N.D. Ala. June 20, 2019) (Memo. Op.) ("Courts have consistently recognized that a sponsor's breach of an Affidavit of Support can only be excused by the conditions enumerated in the Form I-864 and 8 C.F.R. § 213a.2(e)(2)(i)(ii)"); *Dorsaneo v. Dorsaneo*, 261. F.Supp.3d 1052, 1054 (N.D. Cal. 2017); Li Liu v. Kell, 299 F. Supp. 3d 1128, 1133 (W.D. Wash. 2017); *Erler*, 824 F.3d at 1179; *Liu v. Mund*, 686 F.3d 418, 420 (7th Cir. 2012), *as amended* (July 27, 2012).

[48] 261 F.Supp.3d 1052 (N.D. Cal. 2017). In the interest of disclosure, I was co-counsel in this matter and the subsequent appeal to the Ninth Circuit.

[49] *Id.* at 1054. The affirmative defenses of estoppel and fraud in the execution were also asserted.

the pleadings, holding that "[f]raud in the inducement cannot be a defense to an I-864 enforcement action."[50]

> Permitting a sponsor to evade his support obligation by asserting a defense of fraud in the inducement is inconsistent with the purpose of the I–864 requirement, because it would place lawful permanent residents at risk of becoming dependent on the government for subsistence. The statute and implementing regulations show that the purpose of the support obligation is to ensure that family-sponsored immigrants do not become a "public charge."[51]

Instead, only the Terminating Events of the Affidavit end a sponsor's obligation.[52] The Court excavated further support for this approach from the Ninth Circuit's holding in *Erler II* that nuptial agreements may not terminate support obligations.[53] Just as "[state] divorce law" may not prematurely end a sponsor's obligation through enforcement of a nuptial agreement, nor may a common law contract defense do so.[54] Thus, the defendant's defenses of estoppel and fraud in the execution also failed.[55]

On appeal, the Ninth Circuit upheld the District Court, agreeing that the fraud defense is categorically unavailable to sponsors.[56] The Court reasoned that "nothing in the statutes, the regulations, or the I-864 contract" allows a sponsor to escape liability by arguing that he was fraudulently induced into marriage.[57] Notably, the Court believed the

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[50] *Id.*; *see also id.* ("It does not appear that any court has held to the contrary").

[51] *Id.* (citing 8 U.S.C. § 1183a).

[52] *Id.* (citing 8 C.F.R. § 213a2(e)).

[53] *Id.*

[54] *Id.* (quoting *Erler II*, 824 F.3d at 1177).

[55] *Id.*, at 1155.

[56] *Dorsaneo v. Dorsaneo*, No. 18-15487 (9th Cir. Oct. 18, 2019) (unpublished).

[57] *Id.*, at *3.

issue was squarely resolved by the admonition in *Erler II* that the I-864 must be interpreted so as to serve its purpose of providing security to the immigrant. "'[T]hat purpose is best served by interpreting the affidavit in a way that makes prospective sponsors more cautious about sponsoring immigrants.' [The sponsor] was not sufficiently cautious."[58]

Likewise, in *Cyrousi v. Kashyap* the Central District of California concluded that the Ninth Circuit's public policy discussion in *Erler II* was outcome-determinative on the issue of affirmative defenses.[59]

> Because the Court finds that Plaintiffs' affirmative defenses would place the immigrant at risk of becoming public charge, and because courts have enforced Congress's policy choice of placing the risk on the sponsor rather than on the state or federal taxpayers, it concludes that Plaintiffs' affirmative defenses, outside the statutory Terminating Events, do not apply here.[60]

That is a striking, and full-throated adoption of the reasoning in *Erler II*. *Cyrousi* is crystal clear: unless and until one of the five Terminating Events has occurred, a sponsor is on the hook for the support obligation. Standard contract law affirmative defenses are not an escape valve – full stop.

In *Liu v. Kell*, the Western District of Washington addressed the affirmative defense of failure to mitigate.[61] The Court endorsed the

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[58] *Id.*, at *3-4 (quoting *Erler*, 824 F.3d at 1179).

[59] 386 F.Supp.3d 1278, 1284 (C.D. Cal. 2019).

[60] *Id.*, at 1284-85.

[61] 299 F.Supp.3d 1128, 1133 (W.D. Wash. 2017). *Cf.* Note, John T. Burger, *Contract Rights under the I-864 Affidavit of Support: Seventh Circuit's Reasoning Binds Courts' Hands in a Shifting Landscape for Public Charge Doctrine*, 93 ST. JOHN'S L. REV. 509 (2019) (advancing the view that federal courts have gone too far in limiting the defenses available to Form I-864 sponsors).

approach taken elsewhere in the Ninth Circuit, holding that the five Terminating Events are outcome determinative:

> The federal law underlying the I–864 Affidavit clearly specifies the instances in which the support obligation can be avoided. 8 U.S.C. § 1183a(a)(2)–(3). None of the criteria are met by an immigrant's willful failure to seek employment. The Court will not look beyond such clear statutory language.[62]

This construction, again, supports the congressional purpose of preventing the sponsored immigrant from becoming a public charge. "The onus is on the sponsor, not the sponsored party or the government. By ensuring the sponsor's continued support of that immigrant, the I–864 accomplishes that goal."[63]

Finally, in *Marriage of Kumar*, the California Court of Appeals concluded that the duty to mitigate does not apply in state court actions to enforce the Affidavit of Support.[64] In *Liu v. Mund*, the Seventh Circuit concluded that the duty to mitigate does not apply in I-864 enforcement actions, but that holding rested in part on the view that federal common law lacks a general duty to mitigate.[65] The *Kumar* Court, however, followed the reasoning in *Liu v. Mund* that imposing a

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[62] *Id.* (citing *U.S. v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 11 (2008); *U.S. v. Smith*, 499 U.S. 160, 167 (1991)). The Court concluded that an affirmative defense of waiver failed for the same reason. *Id.*, at 1134. Yet the Court declined to dismiss the defense of equitable estoppel, even though it raised the same argument as a defense of fraud in the inducement. *Id.* (the defendant "asserts that he was duped into signing the I–864 Affidavit"). It is unclear whether the reasoning applied to the defenses of failure to mitigate and waiver would also not apply to the equitable estoppel defense.

[63] *Id. See also Anderson v. Anderson*, 17-cv-891, at *4 (W.D. Wash. Feb. 25, 2019) (Memo. Op.) ("Defendant entered into a binding agreement with the United States for the benefit of plaintiff, a sponsored immigrant. Allegations of pre-contract impropriety on plaintiff's part do not make defendant's promises to the United States void or voidable.") (*citing Dorsaneo*, 261 F.Supp.3d 1052).

[64] *Marriage of Kumar*, 13 220 Cal.Rptr.3d 863 (Cal. Ct. App. 2017).

[65] *Liu v. Mund*, 686 F.3d 418, 423 (7th Cir. 2012),

duty to mitigate undermines the congressional objective of ensuring that sponsored immigrants do not become public charges.[66] Concluding the duty to mitigate was inapplicable, the *Kumar* Court held that the trial court erred in denying the breach of contract claim on the grounds that the beneficiary should have seeking work.[67]

In some cases, courts simply have not been presented with the argument that standard affirmative defenses are categorically unavailable in I-864 enforcement actions. Even in these decisions, where affirmative defenses are not categorically rejected, they fail on their own terms.

Sponsor-defendants often argue that a claim is barred by issue or claim preclusion, on the view it could and/or should have been litigated in a prior divorce proceeding. In *Anderson*, the sponsor had his res judicata defense rejected on a Rule 12 motion to dismiss:

> There is no indication that plaintiff's I-864 claim was litigated or resolved in the state court divorce proceedings. Defendant has not, therefore, shown a factual or legal basis for his res judicata or preclusion defense.[68]

The defendant took another swing at the defense, attempting to amend his Answer.

> Had the [family] court evaluated the merits of plaintiff's I-864 claim and entered judgment regarding defendant's obligations thereunder, res judicata would likely bar relitigation of those issues. But where, as here, the state court limited itself to applying state divorce law - even with the incorporation of an agreement which may or may

[66] *Id.*, at 871.

[67] *Id.*, at 872.

[68] *Id.*, at *3.

> not contain a waiver of the I-864 claim – neither the divorce nor the waiver abrogate the support obligations defendant undertook for the benefit of the public.[69]

Unconscionability continues to fail every time it is raised. In the words of the *Anderson* Court: "Whatever one thinks of the policy choices behind the I-864, it is not substantively or procedurally unconscionable in the circumstances presented here."[70]

Notably, courts applying the categorical approach to affirmative defenses go a step further. In I-864 cases, it is a common litigation tactic for defendants to assert a plethora of state law counterclaims. Usually, at the top of the list, is a counterclaim for fraud on the allegation that the plaintiff duped the defendant into marriage.[71] Because such a claim sounds in state law, the question becomes whether the federal court has supplemental jurisdiction to hear the counterclaim.[72]

In *Rahman v. Chen* the defendant asserted a counterclaim of fraud, along with other state law claims.[73] The Court first noted, per the Ninth Circuit cases discussed above, that the *defense* of fraud in I-864 enforcement proceedings is "invalid as a matter of law."[74] Because the *defense* of fraud was not available, the facts underpinning the *counterclaim* of fraud therefore fell outside the nucleus of common fact

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[69] *Anderson v. U.S.*, 17-cv-891, at *5 (W.D. Wash. Apr. 17, 2019) (Memo. Op.).

[70] No. 17-cv-891, at *5 (W.D. Wash. Feb. 25, 2019).

[71] *See*, *e.g.*, *Rahman v. Chan*, 281 F.Supp.3d 1124, 1125 (W.D. Wash. 2017) (defendant asserting the counterclaims of recission, fraud, battery, assault and outrage).

[72] 28 U.S.C. §§ 1331, 1367(a).

[73] 281 F.Supp.3d at 1125.

[74] *Id*. (citing *Liu,* 299 F.Supp.3d 1128, *Dorsaneo*, 261 F.Supp.3d 1082, and *Erler II*, 824 F.3d at 1177).

required for supplemental jurisdiction.[75] "On this basis alone, dismissal is warranted."[76]

Surprisingly, the issue of statute of limitations has almost never been raised in I-864 enforcement actions. But in *Akers v. Akers*, the Ohio Court of appeals concluded that there *is no* statute of limitations.[77] The Court recognized that the INA imposes a ten-year statute of limitations at 8 U.S.C. § 1183a(b)(2)(C). However, this is only as to actions by the government to recoup the cost of means-tested public benefits provided to the beneficiary.[78] Because the statute imposed a time-limitation on actions by the government, the "omission of any such limitation period for an immigrant seeking to sue a sponsor for financial support suggests that Congress did not intent to impose one."[79]

I.C. Damages

A sponsor promises to maintain the beneficiary's income at 125% of the Federal Poverty Guidelines ("Poverty Guidelines").[80] Damages in an I-864 suit are calculated by taking the required support level – 125% of

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[75] *Id*. at 1126.

[76] *Id*. The Western District also rejected a counterclaim of fraud in *Anderson*. No. 17-cv-0891, at *8 (W.D. Wash. Feb 25, 2019) (Memo. Op.) ("To the extent defendant is asserting that plaintiff misrepresented facts or otherwise defrauded him into signing the I-864 contract and obligating himself to provide financial support in perpetuity, the claims do not defeat the promises he made to the United States regarding the support available to plaintiff.").

[77] 102 N.E.3d 648 (Ohio Ct. App. 2017).

[78] *Id.* ("the statute expressly provides a limitation period for actions brought by government agencies to recover means-tested public benefits from a sponsor"). The INA creates two separate causes of action: one by the sponsored immigrant; another by a Federal, State or local agency seeking reimbursement of means-tested benefits. 8 U.S.C. §§ 1183a(e)(1) & (e)(2).

[79] *Id*. at 653.

[80] 8 U.S.C. § 1183a(a)(1)(A). *See* 8 U.S.C. § 1183a(h) (defining "Federal poverty line"), & 8 C.F.R. § 213a.1 (same).

the Poverty Guidelines for the beneficiary's household size – and other income subtracting any support paid to the beneficiary.[81] As used in the regulations, "income" means an individual's total income as reported on their IRS Form 1040, or total adjusted income if using a Form 1040EZ.[82]

One issue is whether damages are calculated on an annual or on an aggregate basis. Let us assume that a plaintiff was unemployed for Year One, Year Two, and Year Three, then earned $200,000 in Year Four. Sponsors would prefer that damages be calculated in the aggregate over the four-year period. That way, the $200,000 earned in Year Four bleeds over into Years One through Three. Thus, the Year Four income would defeat the plaintiff's claim to any damages in years.[83]

By contrast, I-864 plaintiffs generally benefit if damages are calculated on an annual basis. Using that approach, the above plaintiff clearly recovers no damages for Year Four. But she may recover damages for Years One through Three, since she was unemployed during those years.

The annual approach is followed by federal courts in Alabama, California, Maryland, Virginia.[84] The aggregation approach has been

[81] 8 U.S.C. § 1183a(a)(1)(A).

[82] 8 C.F.R. § 213a. By comparison, "household income" specifically refers to "the income used to determine whether the sponsor meets the minimum income requirements" to serve as a sponsor. *Id.*

[83] This because the income averaged across the four years her income exceeds 125% FPG.

[84] *Al-Aromah v. Tomaszewicz*, No. 7:19-cv-294 (W.D. Va. Sep. 10, 2019) (Memo. Op.); *Belevich v. Thomas*, No. 2:27-cv-1193, at *13 (N.D. Ala. June 20, 2019) (Memo. Op.); *Younis v. Farooqi*, 597 F. Supp. 2d 552, 554 (D. Md. 2009); *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1024-25 (N.D. Cal. 2008).

used in Colorado and Indiana.[85] Courts applying the annual approach look to the statute, which defines the beneficiary's right to support in terms of "annual income."[86]

Virtually every I-864 enforcement case includes a battle over what qualifies as the plaintiff's "income." This is critical, since the support obligation is defined in relation to the plaintiff's "income" – specifically, 125% of the federal poverty guideline. Anything that the plaintiff receives which qualifies as "income" correspondingly offsets the sponsor's liability.

On its return to the Ninth Circuit, the unpublished *Erler III* decision addressed two potential offsets.[87] First, the beneficiary argued that a foreign pension did not qualify as income because only taxable income so qualifies under 8 C.F.R. § 213a.2(c).[88] But the Court concluded that 8 C.F.R. § 213a.2(c) pertained to assessing income for the purpose of determining the financial wherewithal of a would-be sponsor.[89] The beneficiary seems not to have based her argument on the definition of "income" at 8 C.F.R. § 213a.1, which applies throughout 8 C.F.R. Part 213a. Although it unclear what rule the Ninth Circuit relied upon, the

[85] *Echon v. Sackett*, No. 14-cv-03420, 2018 WL 2087594, *3 (D. Colo. May 4, 2018); *Cheshire v. Cheshire*, No. 3:05-cv-00453, 2006 WL 1208010, *5 (M.D. Fla. May 4, 2006); Stump v. Stump, No. 1:04-cv-253, 2005 WL 2757329, *8 (N.D. Ind. Oct. 25, 2005).

[86] 8 U.S.C. 1183a(a)(1)(A) ("…the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable…"). *See Belevich*, 2:27-cv-1193, at *13 ("The court believes that the [ ] "annual" approach is more faithful to the statute…").

[87] *Erler v. Erler (Erler III)*, No. 18-16703 (9th Cir. Mar. 17, 2020) (unpublished decision).

[88] *Id.*, at *2.

[89] *Id.*, at *3.

Court determined that he foreign pension did qualify as income.[90] The Court further concluded that the value of the beneficiary's non-taxable food stamps qualified as income.[91]

In Alabama, the *Belevich v. Thomas* held that a plaintiff's Russian pension qualified as "income."[92] That was an easy conclusion to reach, since the plaintiff had reported the pension on his federal income returns for years in which he received it.[93] *Belevich* also held that the beneficiary-plaintiff was entitled to pre-judgment interest on his damages.[94] The INA, federal regulations and provisions of the I-864 are each silent on that issue. But where "the relevant federal statute is silent regarding prejudgment interest, 'traditional equitable principles govern the award of such compensation.'"[95] And those principles, the court held, militated in favor of allowing prejudgment interest, although this amounted to just $567.82.[96]

I.D. Attorney fees

Under the plain terms of the INA and the Form I-864, a sponsored immigrant may recover costs and attorney fees when enforcing the Affidavit of Support.[97] For a fully-litigated enforcement case, the fee

[90] *Id.*, at *3-4.

[91] *Id.*, at *4. The Court asserted without discussion, "Means-tested public benefits, such as food stamps, are income to the recipient even if they are non-taxable for the purposes of federal income tax reporting." *Id.*

[92] No. 2:27-cv-1193, at *14-16 (N.D. Ala. June 20, 2019) (Memo. Op.).

[93] *Id.*, at *16.

[94] *Id.*, at *23.

[95] *Id*, at *24 (quoting *ATM Exp., Inc. v. Montgomery, Ala.*, 516 F. Supp. 2d 1242, 1252 (M.D. Ala. 2007)

[96] *Id.*

[97] 8 U.S.C. § 1183a(c).

award will almost always vastly outstrip the principal damages at issue.

Consider the economics of these matters. For a one-person household, damages accrue at a modest $1,329 per month, assuming the plaintiff is unemployed.[98] Significant damages would be at issue only if the individual had been un- or under-employed for years. But in most cases, the sponsored immigrant will need to get into court much sooner. Why? Because, by definition, she is living in poverty. An immigrant seeking to enforce the Affidavit of Support is definitionally someone with inadequate financial resources.

Imagine, then, an immigrant who has ceased residing with her sponsor. She is unemployed and crashing on a friend's couch. After three months, she decides to enforce her Affidavit of Support rights against her sponsor. At this point, she has $3,987 in support arrearages – which is to say that a judgment could not be for more than $3,987 in compensatory damages as of this time.[99]

In a utopian world, the immigrant would phone her sponsor, remind him of his duty under the Affidavit, and receive a check the following day. If that is the way things worked, this article would be unnecessary.

Without an attorney fee provision, the immigrant's rights under the Form I-864 would be rendered worthless as soon as a sponsor puts down his foot and refuses to pay up. By time an attorney conducts an initial consultation, performs her due diligence, and drafts a complaint,

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[98] *Cf*. U.S. Dept. of Health & Hum. Serv., Poverty Guidelines, https://aspe.hhs.gov/poverty-guidelines (last visited Sep. 1, 2020).

[99] As to support that will be owed into the future, a court may of course order specific performance of the contract but may not award a sum certain of damages. Likewise, the question of whether a sponsored immigrant may recover punitive damages remains unanswered.

she has already incurred fees that equal or exceed the damages at issue in small cases. Understanding that economic reality, court have consistently honored the fee-shifting provision in the I-864 statute, even when doing so leads to awards that eclipse damages.[100]

After remand from the Ninth Circuit, the plaintiff immigrant in *Erler II* moved for a fee award.[101] The sponsor argued that plaintiff's pro bono counsel should not receive a fee award, and the $100,000 recommended by the magistrate judge was grossly excessive.[102] The Court noted that it could find no case where an I-864 plaintiff had been denied a fee award.[103] The Court also rejected the view that pro bono counsel cannot recoup fees in the Ninth Circuit, and upheld the $100,000 award.[104]

In *Dorsaneo*, plaintiff's counsel was awarded $94,259 in fees after prevailing on dispositive motions practice, which was upheld on appeal.[105] Notably, the defendant then turned around and sued his lawyer for malpractice.[106] His theory of liability, *inter alia*, is that his

[100] In practice, attorney fees almost always exceed compensatory damages in I-864 enforcement actions. The only exceptions are the cases that settle either pre-filing, or after the complaint has been filed but before discovery or significant motions practice has taken place.

[101] *Erler v. Erler*, 824 F.3d 1173 (9th Cir. 2016).

[102] No. 12-cv-02793 (N.D. Cal. Jul. 16, 2018) (Order Affirming Award of Attorneys' Fees).

[103] *Id.*, at *4.

[104] *Id.*, at *5.

[105] No. 17-cv-00765 (N.D. Cal. May 11, 2018) (Order Granting in Part Motion for Attorneys' Fees), *upheld on appeal* No. 18-15487 (9th Cir. Oct. 18, 2019) (unpublished decision).

[106] *Dorsaneo v. Neustadt*, *et al*, No. CGC-19-576246 (Sup. Ct. Cal., Co. San Fran. Apr, 14, 2020) (First Amended Complaint for Damages). The case remains unresolved as this article goes to press.

lawyer breached the standard of care by not advising him to settle early on, and by failing him to advise him of his exposure for the plaintiff's legal fees. It would be just one bridge further to argue that an immigration lawyer has liability to a sponsor when *preparing* the Affidavit of Support. Imagine the facts of *Dorsaneo*, except that the sponsor was represented in the underlying immigration case. What if that lawyer failed to appropriately advise the sponsor about the ramifications of signing the Affidavit of Support? This author suspects that concerns over that possibility, rather then more general policy concerns, is what underlies the immigration bar's hostility to I-864 enforcement.

In *Jubber v. Jubber*, the plaintiff won a preliminary injunction motion for a *de minimis* $61.42 per month in damages.[107] Thereafter, the case settled in mediation before a magistrate for $21,250, leaving mostly unresolved the defendant's liability for support into the future.[108] The Court concluded that the time spent on litigation, including the injunction motion that catalyzed settlement, was overall reasonable.[109] The Court awarded $38,653.31 in fees.[110]

There is no known federal case in which a prevailing I-864 plaintiff has not been awarded her attorney fees. Defendants, therefore, should seriously consider the wisdom of inventing creative legal theories in combating these actions.

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[107] No. 1:19-cv-00717 (M.D. Md. May 29, 2019) (Memo. Op. on Plaintiff's Motion for Preliminary Injunction).

[108] No. 1:19-cv-00717, Dkt. 51 (M.D. Md. Sep. 9, 2019) (Order Granting in Part and Denying in Part Plaintiff's Motion for Attorney's Fees and Costs). In the interest of disclosure, I was co-counsel for the plaintiff.

[109] *Id*., at *11-13.

[110] Dkt. 60 (D. Md. Oct. 2, 2019) (Joint Stipulation for Attorney Fees and Costs).

II. Procedural Issues

There is one wide-spread litigation tactic by defendants that has been especially disappointing to observe: threatening to imperil the plaintiff's immigration status.[111] Recall that I-864 litigation is generally between current or ex-spouses. A marriage has fallen apart, sometimes violently, and there are often bad feelings on both sides. The immigrant often feels abandoned and the defendant often claims that he was duped into marriage. But in addition to asserting fraud as a contract defense,[112] the defendant will sometimes threaten to file a report with USCIS or ICE if the plaintiff presses her claim, alleging marriage fraud. That is another matter altogether.

It is a longstanding principle of legal ethics that a litigant cannot seek a strategic advantage by threatening criminal charges against a claimant. The basic notion underlying this proposition of ethics is that civil claims should be resolved on their merits, and claimants should not be bullied out of court. Just as deportation has long been understood to be as or more severe than criminal punishment, ethics codes recognize that litigants should not have to deal with immigration-related threats.

Dorsaneo v. Dorsaneo, in the Northern District of California, was an especially egregious example.[113] There, the defendant brazenly argued in a brief that the plaintiff was a former prostitute who had lied about the matter on her immigration application and "should be referred by

[111] Depressingly, these threats have come not only from pro se defendants but from attorneys, including prominent members of the American Immigration Lawyers Association.

[112] See Section I.B above for a discussion of fraud as a defense.

[113] No. 3:17-cv-00765 (N.D. Cal. Apr. 4, 2018) (Order Sanctioning Defendant's Counsel).

the Court to law enforcement for investigation."[114] The Court took the statement to be a threat of collateral prosecution and sua sponte ordered defense counsel to show cause why he should not be sanctioned.[115] In a head-spinning rhetorical move, defense counsel argued that the statement was not a "threat" since he had in fact already followed-through and filed a report with law enforcement.[116] Unimpressed, the Court found defense counsel in violation of the Rules of Professional Conduct and Rule 11, and ordered him to pay a $500 sanction.[117] The Ninth Circuit upheld the sanction.[118]

II.A. Federal Court

The INA provides that an I-864 enforcement action may be brought in "any appropriate court."[119] Generally, members of both the family law and immigration bars simply assume that I-864 enforcement takes place primarily in federal court. That is, indeed, a reasonable assumption given that the cause of action was created by federal law, is governed by federal regulations, and turns on the provisions of a form created and administered by a federal agency. Yet two district courts – the Middle District of Florida and the District of Colorado – once held

[114] No. 3:17-cv-00765, Dkt. 109, at *1 (N.D. Cal. Feb. 24, 2018) (Order to Show Cause).

[115] *Id.*, at *2.

[116] Response of Attorney Jeffery B. Neustadt to This Court's Order to Show Cause; Memorandum of Support Thereof, 3:17-cv-00765, Dkt. 112, at *7 (N.D. Cal. Mar. 1, 2018).

[117] No. 3:17-cv-00765, Dkt. 133, at *2 (N.D. Cal. Apr. 4, 2018) (Order Sanctioning Defendant's Counsel).

[118] No. 18-15678 (9th Cir. Oct. 18, 2019) ("1261-63 (9th Cir. 2009) ("The irrelevant nature of the presentation at the summary judgment hearing, including its scandalous and not well supported attack on [Plaintiff's] character, strongly suggested that it was being used for an improper purpose.")

[119] 8 U.S.C. § 1183a(e). *See also* 8 U.S.C. § 1183a(a)(1)(C) (the sponsor also agrees to "submit to the jurisdiction of any Federal or State court" for purposes of an enforcement action).

that they *lacked* federal question jurisdiction over I-864 claims.[120] Considering the decisions on I-864 claims from the Seventh and Ninth Circuits, and a host of district court holdings on point, it seems safe to say that the federal question "question" is now settled in favor of there being jurisdiction in these matters.[121]

Greiner v. De Capri in the Northern District of Florida will hopefully cement a course-correction within the Eleventh Circuit.[122] There, the Court highlighted a string of Supreme Court decisions in support of the view that no particular or magic language is needed in a statute to support federal question jurisdiction.[123] As a general matter, if a federal statute creates a cause of action, it presumptively gives rise to federal question jurisdiction.[124] The Court emphasized the broad authority that Congress has to regulate immigration.[125] Here, the I-864 plaintiff was "seeking to vindicate a right created by federal law and bestowed upon him by federal law."[126] The cause of action asserted in the complaint, "was expressly created by a federal statute; the statute created a federal right that otherwise did not exist; and federal law provides an essential element of the claim."[127] The Court concluded that it did indeed possess federal question jurisdiction.

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[120] *Ivanoff v. Schmidt*, No. 17-cv-01563-KMT (D. Colo. Mar. 23, 2018); *Winters v. Winters*, 2012 U.S. Dist. LEXIS 75069 (M.D. Fla. Apr. 25, 2012).

[121] *Belevich v. Thomas*, No. 2:27-cv-1193, at *23 (N.D. Ala. June 20, 2019) (Memo. Op.) ("In federal question cases such as this one…").

[122] 403 F.Supp.3d 1207 (N.D. Fla. 2019).

[123] *Id.* at 1215.

[124] *Id.* (citing *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 377 (2012)).

[125] *Id.*, at 1216.

[126] *Id.*, at 1217.

[127] *Id.*

The Western District of Virginia reached the same conclusion in the reported case of *Madrid v. Robinson*.[128] The Court noted that the majority view – even when the Court was writing in 2016 – was in favor of federal question jurisdiction.[129] Looking at the text of 8 U.S.C. § 1183a(e)(1), "[u]nder any formulation of the arising under standard, this federal statute 'creates' or 'authorizes' a private right of action to enforce an Affidavit of Support."[130] Nor did the Court accept the argument that the cause of action arose from the four corners of the Form I-864 contract rather than federal law. "the fact that an Affidavit of Support is a contract does not negate the fact that § 1183a(e) specifically grants the right to bring an action."[131]

Most, but not all, I-864 enforcement cases are lawsuits against a former or soon-to-be-former spouse.[132] And it is often during the divorce process that the sponsored immigrant learns of her rights under the I-864. Often that leads the immigrant to try enforcing her contractual rights in a divorce proceeding, but as discussed below that is a perilous endeavor.[133] Common, also, is for the beneficiary to file a federal action while the divorce is still being litigated. That then raises the issue of whether abstention doctrines require or – as a matter of discretion – advise the federal court to stay or dismiss the federal action pending outcome of the state family court proceeding.

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[128] 218 F.Supp.3d 482 (W.D.Va. 2016).

[129] *Id*., at 485 ("At least four circuit courts and many more district courts have found, either explicitly or implicitly, that arising under jurisdiction exists for Form I–864 cases").

[130] *Id*., at 486.

[131] *Id.* (citing *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012)).

[132] *But see Jubber v. Jubber,* No. 19-cv-0717 (D. Md. May 30, 2019) (Memo. Op.). In the interest of disclosure, I was co-counsel for the plaintiff.

[133] See Section II.B.1 below.

Pursuant to *Younger* abstention, a federal court should abstain from exercising jurisdiction when doing so would interfere with an ongoing state court proceeding.[134] A majority of federal courts have *not* abstained when an I-864 claimant also had an ongoing family law matter.[135] In *Belevich v. Thomas*, arising within the Eleventh Circuit, the District Court concluded that federal enforcement of the I-864 would not interfere with a concurrent family law proceeding.[136] The "tangential overlap between state and federal proceedings… is a far cry from the 'meticulous and burdensome federal oversight' […] undue interference under Younger."[137]

In *Al-Aromah v. Tomaszewicz*, the Western District of Virginia concluded that *Younger* abstention did not apply where the record showed that the I-864 had not been raised as an issue in the family court case.[138] The idea that the I-864 did not appear to have been raised made a pro-abstention case in the same District distinguishable on its facts.[139] Those cases were also distinguishable, the Court said, since *Al-Aromah* sought damages for arrears prior to when the divorce action

[134] *Younger v. Harris*, 401 U.S. 37 (1971).

[135] *Compare Al-Aromah v. Tomaszewicz*, No. 7:19-CV-294, at *14 (W.D. Va. Sep. 10, 2019) (Memo. Op.) and Pavlenco v. Pearsall, No. 13-cv-1953 (E.D.N.Y. Nov. 27, 2013) (Memo. Op.) and *Montgomery v. Montgomery*, 764 F.Supp.2d 328 (D.N.H. 2011) and *Belevich v. Thomas*, No. 2:17-cv-01193 (N.D. Ala. Mar. 9, 2018) (Memo. Op.) (all declining to abstain) with *Kawai v. Uacearnaigh*, 249 F. Supp. 3d 821 (D.S.C. 2017) (abstaining).

[136] No. 2:17-cv-01193 (N.D. Ala. Mar. 9, 2018) (Memo. Op.).

[137] *Id*., at 11.

[138] 7:19-cv-294, Dkt. 21 (W.D. Va. Sep. 10, 2019) (Memo. Op.).

[139] *Id*., at *14 (citing *Wigley v. Wigley*, No. 7:17-cv-425 (W.D. Va. March 5, 2018).

was commenced – these supposedly would not be recoverable under the applicable state family law.[140]

Now, what about preliminary injunctions? Recall the basics of the Form I-864. It is intended to ensure a small level of financial support for a plaintiff who is near or below the Federal Poverty level. To have a claim under the Affidavit the plaintiff needs to be broke. In such circumstances, it is all well and good for a plaintiff to walk away with a judgment at the end of her case. But litigating a disputed I-864 claim can take months or years – what is the plaintiff to do in the meanwhile?

For plaintiffs in especially dire circumstances, this author has experimented with seeking injunctive relief to compel sponsors to comply with their support obligation during litigation. In *Jubber v. Jubber*, the District of Maryland granted the plaintiff's motion for preliminary injunction.[141] *Jubber* involved a rare set of facts wherein a parent sought to enforce his support obligation against his sponsor-son and daughter-in-law, who served as his joint sponsor.[142] The Court heard testimony concerning the plaintiff's part time work. It also considered the defendant's "estimate" about the fair market rental value of the home in which the plaintiff had been allowed to live at a reduced rent.[143] The Court concluded that the plaintiff had demonstrated his entitlement to an injunction, and that public policy militated in favor of an injunction:

> The Court finds [plaintiff]… is likely to suffer irreparable harm without being provided preliminary relief, that the

[140] *Id.*

[141] No. 19-cv-0717 (D. Md. May 30, 2019) (Memo. Op.). In the interest of disclosure, I represented the plaintiff.

[142] *Id.*, at *1.

[143] *Id.*, at *1-3.

> balance of equities tips in his favor, and that an injunction is in the public interest of requiring immigration sponsors to fulfill their legal obligations of support to those whom they sponsor.[144]

The Court then imputed to the plaintiff as "income" the difference between his rent payments and the estimated fair market value of the home in which he was living.[145] The Court ordered the defendants to commence monthly support payments, subject to the rent offset.[146]

II.B State Court

Here is the problem with litigating Affidavit of Support claims in state courts: it turns out to be a mess. Almost without exception, state court enforcement matters arise in the confines of a divorce proceeding – not as a standalone breach of contract case.[147] Generally, beneficiaries seek to enforce their rights through alimony orders. That sounds great, since it seems like a readily available legal vehicle to a claimant who is already in the midst of divorce. But doused with a sauce of multi-factor, discretionary ephemera of marital law, the clear rights of the I-864 are largely spoiled.[148]

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[144] *Id.*, at *3-4.

[145] *Id.*, at *3. The legal issue of imputing income was neither briefed nor argued in *Jubber*.

[146] *Id.*, at*4.

[147] *Cf.* Comment, Mallory Medeiros, *Immigration Law - Court of Appeals of Washington Holds Spousal Maintenance Order Not Required to Enforce I-864 Obligation*, 38 SUFFOLK TRANSNAT'L L. REV. 221 (2015)

[148] Another chronic problem has been litigants failing to spot the I-864 enforcement issue and to raise it in a timely and proper manner. *See*, *e.g.*, *Marriage of Miotke*, No. H-040611 (Cal. 6th App.) (holding that immigrant could not raise enforceability of the I-864 for the first time on appeal); *Marriage of Wigley*, No. 9-18-3, at *7 (Va. Ct. App. Oct. 30, 2018) ("Wife argues that husband owes her additional spousal support based on the Form I-864. However, the trial court could not determine whether the form created an obligation on husband because it was not admitted into evidence"); *Marriage of Volovik*, No. B-280980 (Cal. App. 2nd Dist., Div. V Apr. 18, 2018) (holding

II.B.1 Maintenance ("Alimony") Orders

In California, a published appellate decision squarely holds that a sponsored immigrant may enforce the Affidavit of Support in family law proceedings.[149] In *Marriage of Kumar*, the trial court declined to enforce the Affidavit of Support when raised in connection with a request for spousal support.[150] The Court of Appeals readily concluded that the Form I-864 is indeed an enforceable contract.[151] The Court rejected the sponsor's argument that the I-864 claims was not before the court, since the beneficiary had not plead a breach of contract claim in her response to the petition.[152] In response to the contention that the I-864 claim belongs in a "civil trial court," the Court of Appeals noted that family court is not a court of separate jurisdiction but merely the superior court acting in a particular capacity.[153] The family law tribunal had jurisdiction over the breach of contract claim because it is – nomenclature aside – the court of general jurisdiction for the state.[154] The case was therefore remanded for consideration of the beneficiary's "contract claim."[155]

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that sponsored immigrant waived argument over enforcement of the I-864 by failing to timely raise it).

[149] *Marriage of Kumar*, 13 220 Cal.Rptr.3d 863 (Cal. Ct. App. 2017).

[150] *Id*, at 866-67. The court also advised the beneficiary to "[f]ile a federal case." *Id.* at 867.

[151] *Id*., at 867-68.

[152] *Id*., at 868. Surprisingly, the Court offered little response to the sponsor's argument about deficient pleading.

[153] *Id*., at 870.

[154] *See id.*

[155] *Id*. at 872.

Marriage of Kumar makes it seem like sponsored immigrants have an efficient route to enforcing their I-864 rights. If you will already be in family law court, why not just assert your claim there? The problem, it turns out, is that family law courts tend to mix and match between the contractual terms of the Affidavit of Support and the vaguer considerations of state alimony law.

In *Marriage of Motlagh*, for example, an Ohio family law court considered a breach of contract claim under the Affidavit of Support.[156] It ordered the sponsor to pay $900 per month in support for two years, but also to ensure that the beneficiary's income was at least 125% Poverty Line for that two-year period.[157] The beneficiary appealed, arguing that the trial court had imported spousal maintenance considerations to its decision on her breach of contract claim.[158] The Court of Appeals agreed that the breach of contract claim was separate from the request for maintenance.[159] Here, the time-limited support order failed to fully enforce the Affidavit's terms. "[I]rrespective of how the I–864 support obligation is enforced, the ordered support must be sufficient so that the obligee's income meets 125% of the federal poverty line requirement."[160]

Motlagh ends happily, since the appeals court corrected the arbitrary duration of I-864 related support, but other cases come out

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[156] 100 N.E.3d 937 (Ohio Ct. App. 2017).

[157] *Id.*, at 940-41.

[158] *Id.*, at 942.

[159] *Id.* ("…a state court has the ability to enforce compliance with an I–864 obligation through specific performance of the contract, by issuing an order for spousal support under state law, or by a combination of both").

[160] *Id.*, at 943.

differently. In *Marriage of Miller*, a sponsored immigrant argued that she was entitled to ongoing alimony in light of the I-864.[161] Nonetheless, the trial court awarded only short-duration alimony – just half a year – in the monthly amount of $1,480.[162] The court rejected the argument that the trial court had failed to properly consider the Affidavit of Support.[163] The appeals court looked at the issue through the multi-factorial lens of alimony.[164] Through that lens, the contractual Terminating Events of the Affidavit were not dispositive, since the trial court could consider the general equity of alimony.[165] In the federal case, the Terminating Events are black letter terms of law that define Ms. Bugreeff's liability. But in family law court they are vague guidelines that meld into the multi-factor ephemera of an alimony award.[166]

Again, in the Texas case, *Marriage of Beringer*, the issue on appeal was that the Affidavit of Support sponsor had not been ordered to pay full arrearages from the date the parties ceased cohabitating.[167] The immigrant lost her appeal, as the court concluded that her pleadings had not clearly sought support arrearages, only that the sponsor "be ordered to *continue* to support her under his federal contractual

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[161] No. E-067923 (Cal. 4th App. Dist., Div. II June 22, 2019).

[162] *Id.*, at *3.

[163] *Id.*, at *5.

[164] *Id.*, at *6.

[165] *Id.*

[166] *See, e.g.,* Mont. Code Ann. § 40-5-202(1) (listing factors to be considered in relation to division of marital property). Virtually the same result occurred in the Washington State case, *Marriage of Khan*, 332 P.3d 1016 (Wash. 2014) (upholding alimony award that enforced I-864 but limited duration of payment). In the interest of disclosure, I represented the sponsored immigrant in *Marriage of Khan*.

[167] No. 04-19-00097-CV, at *5 (Tex. App. Apr. 1, 2020).

obligation."[168] The immigrant in *Marriage of Beringer* also lost her request for attorney fees due to how she had pled her claim.[169]

Sponsored immigrants are therefore taking a significant risk if they choose to enforce their rights in family court. In federal court, the terms of the Affidavit of Support and federal law are relatively clear. In family law court, however, the immigrant will need to fight hard to ensure the state alimony law does not muddy the waters.

II.B.2 Issue Preclusion, Claim Preclusion

Procedural doctrines prohibit the litigation both of matters that have *actually* been litigated and those that *could* have been litigated. The former is referred to as issue preclusion and the latter as claim preclusion.[170] In *Yuryeva v. McManus*, a Texas appeals court stated clearly, although in dicta, that an immigrant-beneficiary could bring a subsequent contract action on the I-864, despite failing to raise enforcement in the context of her divorce proceeding.[171] In the divorce proceeding, the beneficiary had put the I-864 into evidence, and had testified that the sponsor had been failing to meet support obligations. The sponsor's attorney had stipulated that "there was an agreement that they were to live together and [the sponsor] would support her."[172] The beneficiary did not, however, specifically request that the trial

[168] *Id.*, at *6 (emphasis added).

[169] *Id.*, at *6-7 (she pled the claim as declaratory relief rather than breach of contract).

[170] *Cf.* 18 WRIGHT § 4406.

[171] No. 01-12-00988-CV, 2013 Tex. App. LEXIS 14419, at *19 (Tex. App. Houston 1st Dist. Nov. 26, 2013) (memo. op.)

[172] *Id.*

court "enforce" the I-864 support duty.[173] For this reason the appeals court held that the lower court did not err in failing to incorporate the support obligation into the divorce decree, but the appeals court stated that an actionable contractual obligation survived.[174]

III. Additional issues

III.A Prenuptial agreements

Every federal court to reach a holding on the issue has conclude that nuptial agreements categorically cannot waive the support obligations imposed by the Affidavit of Support.[175]

In *Golipour v. Moghaddam*, decided in the Tenth Circuit, the Court followed *Erler II* to hold that nuptial agreements categorically cannot waive support under the I-864.[176] First, the Court observed that the Affidavit clearly outlines the Terminating Events that end a sponsor's support obligation, and that divorce is not one of those events.[177] Additionally, the Court looked to the public policy choice, reflected by the statute, that sponsors instead of taxpayers should support sponsored immigrants.[178]

> To permit a sponsor to unilaterally terminate the Form I-864's financial support obligation through a separate

[173] *Id.*

[174] *Id.* For discussion of a possible claim preclusion issue concerning the defense of fraud, see section I.B, above.

[175] *Matter of A.M.H.* addressed the issue of nuptial waivers of I-864 support, but the Court concluded that the matter was moot because the immigrant had naturalized, triggering a terminating event. No. 14-17-00908-cv, at *15 (Tex. App. Sep. 17, 2019). *See also Marriage of Tamboura*, No. A-151889 (Cal. 1st App., Div. I May 22, 2019) (holding in California state court that nuptial agreement could not waive I-864 support).

[176] 4:19-cv-00035, at *8 (D. Utah Feb. 7, 2020).

[177] *Id*. at *11.

[178] *Id*., at *11-12.

> agreement with the immigrant would ignore the interests of the U.S. Government and the benefits of taxpayers and charitable donors. It would also defeat the Form I-864's purpose of preventing admission of an immigrant that is likely to become a public charge at any time. Therefore, nuptial agreements will not terminate a Form I-864's financial support obligation.[179]

Likewise, in *Cyrousi v. Kashyap*, the Central District of California considered the effect of a nuptial settlement that was, "a final and complete settlement of all of [the parties'] rights and obligations as between them, including property rights and property claims, and the right of either Wife or Husband to spousal support."[180] The Court rejected the defendant's argument that *Erler II* was distinguishable because *Cyrousi* involved a nuptial settlement rather than a prenuptial agreement.[181] *Erler II*, the Court observed, was based on the view that parties should not be allowed to undercut the public policy objective of the I-864 – that is, to require the sponsor to support the immigrant.[182]

III.B Interpreting the I-864

One challenge that has plagued federal litigation of I-864 claims is that most plaintiffs in such case are unrepresented.[183] A review of all known cases in October 2019 showed that 54% of I-864 plaintiffs were self-represented at some stage of their litigation.[184] Some of the

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[179] *Id.*, at *12.

[180] 386 F.Supp.3d 1278 (C.D. Cal. 2019).

[181] *Id.*, at 1283.

[182] *Id.*

[183] *Wolf v. Wolf*, No. 19-cv-523 (E.D. Wisc. Apr. 12, 2019) (order granting pro se plaintiff's request to proceed *in forma pauperis*).

[184] Blog Post, Greg McLawsen, *54% of I-864 Plaintiffs lack legal representation* (Oct 4, 2019), *available at* http://www.i-864.net/blog/2019/10/4/54-of-i-864-plaintiffs-lack-legal-representation.

anomalous case law in this area may simply be a result of non-native English speakers trying their best to litigate in federal court without the aid of a lawyer.

IV. Conclusion

Caselaw continues to make it easier for sponsored immigrants to enforce their rights in streamlined federal litigation. Affirmative defenses and most counterclaims are disallowed; the calculation of damages is generally clear; the entitlement to plaintiff's legal fees is black letter law. In this jurisprudential environment, and especially during the present global economic crisis, the number of I-864 enforcement actions will surely increase. These individuals, in urgent need of help, will be knocking on the doors of the experienced lawyers reading this article. This author trusts that the dedicated members of the immigration bar will do their best to proactively help sponsored immigrants get the financial support they too often need.