

Two Immigration Law Issues That (Ought To) Concern the General Practitioner

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2019

Today's Topics

1. The Affidavit of Support required in family-based immigration cases, and how it can come into play in state court family law cases

2. Special Immigrant Juvenile Status, and how it can come into play in state court family law cases

Background on Structure of Immigration Entities

- INS (Immigration and Naturalization Service) no longer exists; replaced by Department of Homeland Security under the Homeland Security Act of 2002
- May still hear reference to “Immigration,” but that now means either DHS or some sub-agency of DHS

DHS Agency Structure

- United States Citizenship and Immigration Services (USCIS) – adjudicates benefit applications
- Immigration and Customs Enforcement (ICE) – in charge of interior enforcement
- Customs and Border Protection (CBP) – in charge of ports of entry

Other Immigration-Related Agencies

- Department of State – adjudicates applications from immigrants abroad seeking to come to U.S.
- Department of Justice – Host agency for Executive Office for Immigration Review (Immigration Court and Board of Immigration Appeals)

The I-864 Affidavit of Support

- This form is required by USCIS in all family-based immigration cases
- Purpose of the Affidavit is to ensure that intending immigrant is “not likely to become a public charge” (ground of inadmissibility)

I-864 (cont.)

- I-864 is executed by a “sponsor”
- By signing the I-864, sponsor agrees to support the intending immigrant at level of at least 125% of the federal poverty guidelines
- I-864 also obligates sponsor to reimburse governmental unit(s) for any means-tested public benefits provided to immigrant

I-864 (cont.)

- The I-864 is a binding contract between sponsor and government
- The intending immigrant is a third-party beneficiary to the contract
- I-864 provides that either a governmental entity or the immigrant can sue the sponsor to enforce the obligation under the Affidavit

I-864 (cont.)

- Financial obligation imposed on sponsor is substantial
- At 2019 level, 125% for one person is \$15,613/year, or \$1301/month for first person; additional \$5225/year (additional \$435/month) for each additional person

When Sponsor's Obligations End

- When immigrant becomes USC
- When immigrant has worked or can be credited with 40 qualifying quarters of work under SSA
- When immigrant ceases to be LPR and leaves U.S.
- When immigrant gets LPR status anew as defense to deportation
- When immigrant or sponsor dies

Credit for Qualifying Quarters

- For 2019, person must earn at least \$5440 each calendar year to be credited with 4 quarters of coverage (\$1360/quarter)
- When an immigrant can be credited with quarters of coverage:
 - His/her own earnings
 - All parents' earnings are credited to kid under age 18 (even those earned before birth)
 - All of a person's earnings are credited to his/her spouse during period of marriage until marriage ends

The Forms

- Take a look at the actual forms
- Most current versions available on USCIS web site:
<https://www.uscis.gov/>



Instructions for Affidavit of Support Under Section 213A of the INA

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-864
OMB No. 1615-0075
Expires 07/31/2017

What is the Purpose of Form I-864

This affidavit is required for most family-based immigrants and some employment-based intending immigrants to show that they have adequate means of financial support and are not likely to become a public charge.

How Is Form I-864 Used?

This affidavit is a contract between a sponsor and the U.S. Government. Completing and signing Form I-864 makes you the sponsor. You must show on this affidavit that you have enough income and/or assets to maintain the intending immigrant(s) and the rest of your household at 125 percent of the Federal Poverty Guidelines. By signing Form I-864, you are agreeing to use your resources to support the intending immigrant(s) named in this affidavit, if it becomes necessary.

The submission of this affidavit may make the sponsored immigrant ineligible for certain Federal, state, or local means-tested public benefits, because an agency that provides means-tested public benefits will consider your resources and assets as available to the sponsored immigrant when determining his or her eligibility for the program.

If the immigrant sponsored in this affidavit does receive one of the designated Federal, state or local means-tested public benefits, the agency providing the benefit may request that you repay the cost of those benefits. That agency can sue you if the cost of the benefits provided is not repaid.

For USCIS Use Only	Household Size	Poverty Guideline	Sponsor's Household Income <i>(Page 5, Line 10)</i>	Remarks
	<input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 <input type="checkbox"/> Other _____	Year: <u>20</u> Poverty Line: \$ _____	\$ _____ <i>The total value of all assets, line 10, must equal 5 times (3 times for spouses and children of USC's, or 1 time for orphans to be formally adopted in the U.S.) the difference between the poverty guidelines and the sponsor's household income, line 10.</i>	

Part 7. Use of Assets to Supplement Income
(Optional) (continued)

7. Enter the net cash value of all the sponsored immigrant's real estate holdings. (Net value means investment value minus mortgage debt.)

\$

8. Enter the current cash value of the sponsored immigrant's stocks, bonds, certificates of deposit, and other assets not included in **Item Number 6.** or **Item Number 7.**

\$

9. **Add together Item Numbers 6. - 8. and enter the number here.**

\$

Total Value of Assets

10. **Add together Item Numbers 4., 5.b., and 9. and enter the number here. TOTAL:** \$

What is the Legal Effect of My Signing Form I-864?

If you sign Form I-864 on behalf of any person (called the intending immigrant) who is applying for an immigrant visa or for adjustment of status to a lawful permanent resident, and that intending immigrant submits Form I-864 to the U.S.

Government with his or her application for an immigrant visa or adjustment of status, under INA section 213A, these actions create a contract between you and the U.S. Government. The intending immigrant becoming a lawful permanent resident is the consideration for the contract.

Under this contract, you agree that, in deciding whether the intending immigrant can establish that he or she is not inadmissible to the United States as a person likely to become a public charge, the U.S. Government can consider your income and assets as available for the support of the intending immigrant.

What If I Choose Not to Sign Form I-864?

The U.S. Government cannot make you sign Form I-864 if you do not want to do so. But if you do not sign Form I-864, the intending immigrant may not become a lawful permanent

assets as available to that person, in determining whether he or she is eligible for certain Federal means-tested public benefits and also for state or local means-tested public benefits, if the state or local government's rules provide for consideration (deeming) of your income and assets as available to the person.

This provision does **not** apply to public benefits specified in section 403(c) of the Welfare Reform Act such as emergency Medicaid, short-term, non-cash emergency relief; services provided under the National School Lunch and Child Nutrition Acts; immunizations and testing and treatment for communicable diseases; and means-tested programs under the Elementary and Secondary Education Act.

What If I Do Not Fulfill My Obligations?

If you do not provide sufficient support to the person who becomes a lawful permanent resident based on a Form I-864 that you signed, that person may sue you for this support.

If a Federal, state, local, or private agency provided any covered means-tested public benefit to the person who becomes a lawful permanent resident based on a Form I-864 that you signed, the agency may ask you to reimburse them for the amount of the benefits they provided. If you do not make the reimbursement, the agency may sue you for the amount that the agency believes you owe.

If you are sued, and the court enters a judgment against you, the person or agency that sued you may use any legally permitted procedures for enforcing or collecting the judgment. You may also be required to pay the costs of collection, including attorney fees.

If you do not file a properly completed Form I-865 within 30

E. Dies.

NOTE: Divorce **does not** terminate your obligations under Form I-864.

Your obligations under a Form I-864 that you signed also end if you die. Therefore, if you die, your estate is not required to take responsibility for the person's support after your death. However, your estate may owe any support that you accumulated before you died.

Sponsor's Statement

NOTE: Select the box for either **Item Number 1.a.** or **1.b.** If applicable, select the box for **Item Number 2.**

- 1.a.** I can read and understand English, and have read and understand every question and instruction on this affidavit, as well as my answer to every question.
- 1.b.** The interpreter named in **Part 9.** has also read to me every question and instruction on this affidavit, as well as my answer to every question, in , a language in which I am fluent. I understand every question and instruction on this affidavit as translated to me by my interpreter, and have provided complete, true, and correct responses in the language indicated above.

I-864 Process

- Petition for immigrant visa (Form I-130) is approved
- Immigrant seeks admission to U.S.
 - Consular processing abroad
 - Adjustment of status from within U.S.
- I-864 is submitted as part of the admission determination
- If I-864 is sufficient and immigrant is otherwise admissible, s/he is granted permanent resident status

I-864 in State Family Law Cases

- Obvious implications in divorce or legal separation cases
- Possible legal theories:
 - Alimony factor
 - Child support factor
 - Breach of contract claim

I-864 and support obligation – Nebraska family law cases

Anderson v. Anderson, 290 Neb. 530
(2015)

- Facts → W immigrated to U.S. on fiancé visa in 2009; later adjusted to LPR
- W asked for alimony in divorce
Relied on I-134 (signed by H but not notarized) and I-864 (neither completed nor signed by H)
- Marriage of 4 years; H ordered to pay alimony of \$600/month for 5 years

Anderson (cont.)

- Supreme Court affirmed alimony award, citing statutory and common law alimony factors
- Court commented on “unique circumstances” of case re immigration of W (relocation, disruption, etc.)
- OK for trial court to consider I-134 as “evidence of circumstances”
- Court noted W did not assert breach of contract claim

Anderson (cont.)

- Problems with this case
- I-134 was not proper under these facts and likely not used by USCIS
- No executed copies of either I-134 or I-864 in evidence
- Legal analysis of effects of affidavits on duty to support very thin (parties' briefs don't help much)

Catlett v. Catlett, 23 Neb. App. 136 (2015)

- Marriage of short duration (3 years)
- H signed I-864 as sponsor for both W and her daughter
- Court awarded alimony to W and ordered H to pay child support to W for support of her daughter (his former step-daughter)

Catlett (cont.)

- Court of Appeals affirmed alimony award using same type of rationale as in *Anderson*
- Court vacated child support award
 - Recognized H had duty to support step-daughter under I-864
 - Held that purpose of child support and I-864 are different
 - Step-daughter is real party in interest; she did not assert breach of contract claim

Miscellaneous Issues

- Can an immigrant directly sue a sponsor for support? → **yes**
- What jurisdiction is appropriate? → **federal court or state court**
- What is correct legal theory? → **probably breach of contract claim**, but could also be alimony factor (but not child support, per *Catlett*)

Miscellaneous Issues

- What if immigrant has other source(s) of income?
- Impute income to immigrant?
- Duty to mitigate damages?
- Can breach of contract claim be asserted in divorce context? **Yes.**
 - Joinder of claims → § 25-701
 - Joinder of parties → § 25-311 (for kids or other non-parties)
- Claim preclusion if not asserted?
- Attorney's fees (8 USC §1183a(c))

Miscellaneous Issues

- How to get copy of affidavit of support and supporting docs
 - FOIA request to USCIS and/or State Department (takes 6-8 months for USCIS, even longer for DOS)
 - Rule 34 request/Rule 34A document subpoena
- “Means-tested public benefits” → federal list is on I-864P; no definitive state list
- How to define household size

Matter of Song, 27 I&N Dec. 488 (BIA 2018)

- Applicant for admission must submit I-864 signed by former spouse, even if no longer married (fiancé visa petition case)
- Obvious negotiation strategies for both sides

3 great articles on issues raised by I-864 in family law context by Greg McLawsen in Bender's Immigration Bulletin (Lexis publication) → highly recommended if you encounter this issue

December 2012

April 2014

February 2017

Special Immigrant Juvenile Status (SIJS)

- Avenue by which kids with no immigration status can get green cards
- Something to put on your radar screen in cases involving custody of kids

SIJS – General Overview

- 8 USC § 1101(a)(27)(J) → federal statute setting forth eligibility requirements
- 8 CFR § 204.11 → federal regulations fleshing out the statutory provisions
- Neb. Rev. Stat. § 43-1238(b) → specific UCCJEA provisions applying to SIJS-related cases in state courts

SIJS Statute

- (J) an immigrant who is present in the United States--
- (i) who has been declared dependent on a juvenile court located in the United States. . . . and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
- (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence

Definitions

“Juvenile Court” → A court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles. 8 CFR § 204.11(a)

“Child” → An unmarried person under the age of 21. 8 USC § 1101(b)(1).

SIJS – Overview of Process

First

State court either:

(1) declares child dependent on the court

or

(2) legally commits child to, or places child under the custody of, an agency, department, individual or entity

SIJS – Overview of Process

Second

State Court makes following findings:

1. Reunification of kid and parent(s) not viable due to abuse, neglect, abandonment or similar basis under state law
2. It would not be in kid's best interest to be returned to home country

SIJS – Overview of Process

Third

Kid files petition (Form I-360) with USCIS, attaching state court order with predicate findings

If I-360 approved, kid files application (Form I-485) with USCIS to “adjust status” (i.e., get green card)

Non-exclusive list of case types in which SIJS orders could be pursued

- “Traditional” juvenile cases (either 3(a) or 3(b) cases)
- Guardianship cases
- Divorce cases
- Legal separation cases
- Paternity cases (depending on possibility of proving up on paternity)

Procedure for obtaining predicate findings in state court

- Blend into complaint/petition
- If not, file a motion in the underlying proceeding
- We also file a brief with the motion and prepare a proposed order for the court

Nebraska Cases

In re Interest of Luis G., 17 Neb. App. 377 (2009)

Good template of what type of evidence to offer to get SIJS finding

Done in context of traditional juvenile court case

Court of Appeals reversed County Court which had vacated SIJS predicate findings *sua sponte*

Nebraska Cases

In re Interest of Erick M., 284 Neb. 340
(2012)

- Talks about “1 or both” language in SIJS statute
 - Look at language on I-360, Part 8, Question 4.A.
- Case stands alone nationally
- Amendment to § 43-1238(b) has essentially overruled the main holding in this case

New Policy Guidance From USCIS

- USCIS Policy Manual is central repository for all USCIS policy memos
- Found at <https://www.uscis.gov/policymanual/HTML/PolicyManual.html>
- Amended as to SIJS on 10/26/16
- Nothing really new, but contains most recent policy interpretations of SIJS program by USCIS
- Vol. 6, Part J
 - <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html>
- Vol. 7, Part F
 - <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartF.html>

Pitch for Pro Bono Work

- Attorney of the Day Program
- Joseph/Bond Hearings

QUESTIONS?