ANALYSIS OF COMPETING VIEWS ON HANDLING ETHICAL PROBLEMS WITH THE NEW I-864 FORM

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A new Form I-864 "Affidavit of Support Under Section 213A of the Act" was released on July 2, 2015. On October 6, 2015, this new version became mandatory.[2] The new form includes a new Preparer's Statement and Preparer's Certification.[3] "This new language forces lawyers to grapple with ethical issues concerning the I-864 more closely than they may have done in the past."[4]

Since 1996, the U.S. government has relied on the I-864 to minimize the immigration of persons who may be likely to become public charges.[5] The I-864 is mandatory in all family-based and some employment-based applications for adjustment of status.[6]

A leading immigration law treatise summarizes some key I-864 enforcement rules as follows:

> Courts have universally held that the I-864 is a binding contract between the sponsor and the U.S. government, and that the immigrant-beneficiary has standing to sue the sponsor for the promised support. An action by the immigrant-beneficiary may be started in either state or federal court. Federal abstention doctrines may apply where I-864 enforcement has been addressed in a state tribunal, and failure to seek enforcement during marriage dissolution proceedings may prejudice a beneficiary's ability to prosecute subsequent litigation. The sponsor's duty to provide support starts once the immigrant-beneficiary becomes a permanent resident and ends upon the occurrence of one of five events set forth on the I-864 and in the regulations. Defendant-sponsors have asserted various contract defenses, including lack of

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[2] http://www.uscis.gov/i-864.

[3] *Id*.

[4] Bruce A. Hake & Brian C. Schmitt, *ETHICAL PROBLEMS WITH THE NEW I-864 FORM*, 20 Bender's Immigr. Bull. 1279 (Nov. 15, 2015).

[5] *Id*.

[6] *Id*. (citing to Sections 212(a)(4)(C)(ii) and (D), and 213A(a)(1) of the Immigration and Nationality Act (INA); *see also* 8 C.F.R. § 213a.2).

consideration, unconscionability, and fraud. Most of these defenses have failed. The immigrant-beneficiary may recover damages equivalent to 125% of the federal poverty guideline amount for any month, less any support paid by the sponsor and any income earned, and may also recover attorney fees. The Seventh Circuit has held that the immigrant-beneficiary has no duty to mitigate damages, for instance by seeking employment, but state courts have reached divergent conclusions on the issue. The immigrant-beneficiary may try to waive her right to enforce the I-864 by way of a prenuptial agreement or in a divorce settlement, but it appears that the majority view is that such waivers are unenforceable.[7]

The "I-864 can potentially create an unbounded obligation for a sponsor or joint sponsor, which may extend for decades."[8] It is also important to note that "obligations under the I-864 may survive a pre-nuptial agreement, divorce, and even allegations of marriage fraud."[9]

Critical Aspects of the New Form

Preparer's Statement

7.a. ____ I am not an attorney or accredited representative but have prepared this affidavit on behalf of the sponsor and with the sponsor's consent.

7.b. ____ I am an attorney or accredited representative and my representation of the sponsor in this case ____ extends ____ does not extend beyond the preparation of this affidavit.

NOTE: If you are an attorney or accredited representative whose representation extends beyond preparation of this affidavit, you must submit a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with this affidavit.

Preparer's Certification

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this affidavit on behalf of, at the request of, and with the express consent of the sponsor. I completed this affidavit based only on responses the sponsor provided to me. After completing the affidavit, I reviewed it and all of the responses with the sponsor, who agreed with every answer on the affidavit. If the

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[7] Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 63.05[5][a] (footnotes omitted).

[8] Hake, *supra* note 3, at 1279-80.

[9] *Id*. at 1280.

sponsor supplied additional information concerning a question on the affidavit, I recorded it on the affidavit.[10]

How is the lawyer supposed to treat the new Preparer's Statement and Certification in the common situation of a family one-step adjustment case, where the family needs a joint sponsor because they do not meet 125% of the annual federal poverty guidelines?

Analysis

There are several different approaches a lawyer could take in dealing with this problem. Shortly after the new Form I-864 was introduced, two separate papers were published in Bender's Immigration Bulletin: the paper by Bruce A. Hake and this author, and a paper reaching a different conclusion authored by Greg McLawsen and Gustavo Cueva.[11] This portion of the paper will analyze how each paper dealt with these distinct approaches.

Approach 1-Full or limited representation

A lawyer could check either option on item 7.b. Here the lawyer acknowledges a lawyer-client relationship with the joint sponsor, which either extends to just the I-864 or to the I-864 and other matters.[12] This means the lawyer is agreeing to fulfill all duties that he would have toward any client.[13] This possibility is problematic because of the risk to the lawyer and due to the inherent conflict of interest between the joint sponsor and the immigrant beneficiary.[14] However, compared with all other available options, in the opinion of Hake and Schmitt, this option is the best option.[15]

Our conclusion is that the lawyer should inform a prospective sponsor or joint sponsor, both orally and in writing, of the possible risks associated with signing an I-864.[16] We proposed the following statement in our paper:

By signing the I-864 Affidavit of Support as a sponsor or joint sponsor, you are entering into a contract between yourself and the U.S. Government on behalf of

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[10] July 2, 2015 version of the form. *See* http://www.uscis.gov/i-864

[11] Hake, *supra* note 3 and Greg McLawsen & Gustavo Cueva, *THE RULES HAVE CHANGED; STOP DRAFTING I-864S FOR JOINT SPONSORS*, 20 Bender's Immigr. Bull. 1285.

[12] Hake, *supra* note 3 at 1282.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*. at 1283.

> the intending immigrant. Once the intending immigrant becomes a U.S. lawful permanent resident, you are agreeing to support the intending immigrant at the level of up to 125% of the U.S. annual Poverty Income Guidelines should his or her income fall below that level. If there is more than one intending immigrant included on the I-864, you may have that obligation to all of them.
>
> As noted on the I-864 form, which you should carefully read, this obligation will end if certain conditions are met, such as the intending immigrant becoming a U.S. citizen. It is possible, however, that the obligation might extend for a long time if none of those conditions are met. Legal actions to force an I-864 sponsor or joint sponsor to make support payments according to the I-864 are uncommon, but they do occur. You should not sign the I-864 unless you regard the intending immigrant as trustworthy. I will discuss this with you by telephone, and you may call me with questions. Note also that if you change address, Form I-864 requires you to file with the USCIS an address change on Form I-865 within 30 days.[17]

In summary, "our recommendation is to give a statement like this to any prospective sponsor or joint sponsor in writing; check the box to represent the joint sponsor for the I-864 only (and not for other matters); and talk on the phone briefly with the sponsor or joint sponsor to fulfill the requirements of the new certification and to establish personal contact with the client(s), as required for any lawyer-client relationship."[18] While this approach has its risks, "we think it is the best way to strike the balance between the lawyer's duties to the immigrant, to the sponsor, to the joint sponsor (if there is one), and to his own personal interests."[19]

The McLawsen and Cueva paper calls Approach 1 "limited representation."[20] The McLawsen paper states in pertinent part:

> . . . On this approach, the scope of the representation would be designed to include preparation of the Form and not one iota more.
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> * * *
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> To take the *Limited Representation* approach, the attorney must cleave very finely the scope of representation, telling the joint sponsor: "I am preparing this contract for you, as your attorney, but am not going to advise you about the wisdom of signing it."

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[17] *Id*. at 1283.

[18] *Id*. at 1283-84.

[19] *Id*. at 1284.

[20] McLawsen, *supra* note 10 at 1289.

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> At the very least, an attorney taking the *Limited Representation* approach would need to advise the sponsor that she would not be advising the joint sponsor about the consequences of signing the form that she was preparing as that joint sponsor's attorney. . . .[21]

This author wholly rejects the McLawsen view on Approach 1. As shown above, a lawyer can draft the I-864 for a joint sponsor and provide the full scope of representation. Indeed, with the proposed written advisal the joint sponsor would be fully apprised of the full range of consequences of signing the form.

Approach 2-Cross out the Preparer's Statement and Preparer's Certification

A lawyer could cross out the Preparer's Statement and Preparer's Certification.[22] This is unacceptable because there is a high risk that the USCIS would reject the I-485.[23] The USCIS did this recently in an RFE issued to another lawyer who crossed out some certification language on the new Form I-129.[24] This option is also unacceptable because it would violate the lawyer's duty to zealously advocate for the clients.[25] "This kind of effort at self-protection is likely to cause significant delays and otherwise prejudice the clients."[26] The McLawsen paper does not address this approach.

Approach 3-Position that there is a distinction between a "preparer" and a "lawyer"

A lawyer could take the position that there is a distinction between a "preparer" and a "lawyer."[27] This option is untenable for several reasons. First, the joint sponsor would still be able to establish an implied lawyer-client relationship, notwithstanding the lawyer's effort to

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[21] *Id*. at 1289-90.

[22] Hake, *supra* note 3 at 1282.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

avoid that.[28] Second, this kind of effort could also be viewed by a tribunal as a sign of bad faith.[29]

The McLawsen paper deals with this approach under their analysis of Approach 1, where they state: ". . . some may believe that completing an I-864 is merely 'filling out a form' rather than drafting a contract."[30] The McLawsen paper goes on to state that they believe this view is "profoundly misguided," citing to service regulations and literature describing efforts to combat notario fraud.[31] This author agrees with their position on Approach 3.

Approach 4-Insist that the joint sponsor hire his or her own lawyer

A lawyer can insist that the joint sponsor hire his own lawyer to prepare and sign the joint sponsor's I-864, where the lawyer could then file that along with the adjustment application without personally undertaking a lawyer-client relationship with the joint sponsor.[32] This position is ethically dubious because it greatly increases the risk of the joint sponsor backing out for two reasons.[33] "First, some joint sponsors will not want to expend the time and money to hire their own lawyer."[34] "Second, some joint sponsors will not want to sign the I-864 once they learn of the extent of their potential liability."[35] "Any insistence on a separate lawyer threatens harm to the initial lawyer's co-clients."[36] Subjecting the initial co-clients to such risks may violate the lawyer's duty to zealously advocate for his clients.

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[28] *Id*.

[29] *Id*.

[30] McLawsen, *supra* note 10 at 1289.

[31] *Id*.

[32] Hake, *supra* note 3 at 1282.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

The McLawsen paper takes the position that Approach 4 is the best approach.[37] The McLawsen paper states:

> . . . As has always been the case, the safest approach is to steadfastly refuse contact with the joint sponsor. As proposed by Ms. York, the intending immigrant client or I-130 petition can be provided with the required forms and official instructions, along with guidelines for who would qualify as a joint sponsor and what information is needed for the I-864. If the joint sponsor requires assistance to complete the Form I-864, she can seek that assistance from another attorney. . . .[38]

This position ignores the implied lawyer-client relationship. In essence, if the lawyer provides his client with the required forms and instructions, along with guidelines for who would qualify to serve as a joint sponsor, the joint sponsor may take the position that the lawyer was, in fact, his lawyer.

The McLawsen paper goes on to state:

> . . . Practitioners may find it helpful to arrange reciprocal referral arrangements with a colleague, where each agrees to offer I-864 services to each other's joint sponsors at a predetermined rate. . . .[39]

This seems cumbersome, unnecessary, and likely to harm the initial petitioner and beneficiary for a number of reasons. First, it creates an additional, unnecessary fee. It is easy for a lawyer working on an existing adjustment to simply take on the minor matter of handling the I-864 for the joint sponsor, as set forth in Approach 1 (above). Indeed, this firm always performs this work for no additional charge. Having someone go to a new lawyer will require that lawyer to do a consultation, followed by the opening of a file, followed by the preparation of the form, which will cost a lot more than $0. Second, joint sponsors will not want to expend the time and money to hire their own lawyer. Third, some joint sponsors will not want to sign the I-864 when their learn of the extent of their potential liability.

The McLawsen paper goes on to state:

> . . . Alternatively, or additionally, the firm can provide DIY instructions to the joint sponsor, via the client(s). To avoid inadvertently giving legal advice through those instructions it would be preferable to have them drafted by a third party. For

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[37] McLawsen, *supra* note 10 at 1288. The McLawsen paper calls this the "Hands Off" approach.

[38] *Id.*

[39] *Id.*

this reason we have made available on our website a downloadable step-by-step guide to completing the Form I-864, which is freely available. . . .[40]

These suggestions ignore the implied lawyer-client relationship and set the lawyer following such advice to liability. Having a third party draft the materials but posting the materials on your own website is rendering legal advice. I visited the guide to completing the Form I-864. It is clearly rendering legal advice in a manner that could allow for the establishment of an implied attorney-client relationship. Compared with our suggested approach set forth above, our two-paragraph advisal comprises better advice than this 10-page document.

The McLawsen paper continues:

> . . . But it is also unclear if the *Hands Off* approach will take any longer, or cost the client any more, than if the attorney drafts the joint sponsor's form. Most attorneys likely know of a colleague of equal ability and comparable cost. Why should it be more expensive, or take longer, for the second attorney to prepare the joint sponsor I-864 than for the first? This seems especially true if the first attorney has the referral arranged on a standby basis to smooth logistics. Indeed, if this economic supposition is accurate, we might wonder whether attorneys want to keep joint sponsor drafting, at least in part, simply to avoid losing the business.[41]

As set forth above, it actually is pretty clear that the hands-off approach will necessarily take longer, cost more, and create additional, unnecessary risks for the petitioner and beneficiary. Specifically, it's easy for the adjustment attorney to simply take on the additional matter for no additional charge, whereas a second lawyer will incur significant costs and time in making initial contact with the client, entering into a retainer, rending legal advice, and completing the form.

Conflict of Interest Issues

The McLawsen paper analyzes the general rule on conflicts of interest in his paper.[42] Maryland Rule 1.7(a) states in pertinent part:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:
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> > (1) the representation of one client will be directly adverse to another client; or

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[40] *Id*.

[41] *Id*. at 1289.

[42] *Id*. at 1286. He analyzes American Bar Association (ABA) Model Rule 1.7(a), the relevant language of which is the same in MRPC 1.7(a).

> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Maryland Rule of Professional Conduct (MRPC) Rule 1.7. The McLawsen paper goes on to focus on the question of whether there is a "significant risk" that the representation of the joint sponsor will "be materially limited by the lawyer's responsibilities" to the intending immigrant.[43] The McLawsen paper goes on to quote a section of a Tennessee Ethics Opinion, which states:

> The critical questions are: what is the likelihood that a difference in interests will eventuate and, if it does, will it materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?[44]

The McLawsen paper then goes on to conduct a thought experiment to make the point that a lawyer would tend to have a bias towards either the prospective joint sponsor or the one-step immigrant couple, depending on who came to the lawyer first.[45]

This author rejects this analysis. First, there is no conflict of interest under Maryland Rule 1.7. Comment 29 of Maryland Rule 1.7 deals with the situation where a conflict arises in common representation:

> *Special Considerations in Common Representation*. -- [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all the clients if common representation fails. . . .[46]

Second, as the McLawsen paper admits, a joint sponsor's interests are unlikely to be "directly adverse" to the immigrant clients.[47] If a conflict arises, the lawyer must withdraw, as the lawyer would be required to do if the relationship between the petitioner and beneficiary broke down to the point of being irreconcilable. Third, utilizing our proposed recommendation on representing

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[43] *Id*. at 1287.

[44] *Id*. at 1287 (emphasis in original) (citing to Tennessee Ethics Op. 2013-F-157 (2013) (emphasis added).

[45] *Id*. at 1288.

[46] MRPC 1.7 Comment 29 (emphasis in original).

[47] *Id.* at 1287.

joint sponsors, the bias problem would not become a problem and a straightforward application of Rule 1.7 would be used if a conflict ever arose in the future.

Conclusion

As set forth above, our recommendation is that the lawyer give a statement like our proposed statement to any prospective sponsor or joint sponsor, in writing; check the box to represent the joint sponsor for the I-864 only (and not for other matters); and talk on the phone briefly with the sponsor or joint sponsor to fulfill the requirements of the new certification and to establish personal contact with the clients.[48]

[48] Hake, *supra* note 3 at 1283.