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.[1] The new form includes a new Preparer's Statement and Preparer's Certification. This new language forces lawyers to grapple with ethical issues concerning the I-864 more closely than they may have done in the past.

Working on this article has been an intellectual odyssey for the first author. He started out from the largely intuitive position that once the new language became mandatory, it would be intolerably dangerous for a lawyer ever to acknowledge a lawyer-client relationship with an I-864 joint sponsor. But after close scrutiny, he reversed himself and came to the conclusion that a lawyer should now always acknowledge representation of an I-864 joint sponsor, and also should revise procedures for advising spouse sponsors. In his more than twenty-five years of legal writing, that's the first time the process of writing has caused a 180-degree change of mind.

Introduction

One of the oldest ideas in U.S. immigration law is the rule that foreigners may not be admitted if they are deemed likely to become a public charge, that is, go on welfare. "[S]ince 1822 the 'Likely to Become a Public Charge' clause ... has survived historical and legal changes to become the most used ground of ineligibility ... to deny an American visa ...."[2]

Since 1996, the U.S. government has relied on the I-864 Affidavit of Support to minimize the immigration of persons who may be likely to become public charges. Many scholarly papers discuss I-864 issues.[3] The I-864 is mandatory in all family-based and some employment-based applications for adjustment of status (permanent resident status).[4]

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 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.[5]

It is important to understand that the I-864 can potentially create an unbounded obligation for a sponsor or joint sponsor, which may extend for

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

[2] Camila Morsch, The Selective Capacity of the Likely to Become a Public Charge Clause in the Visa Issuance Process (2006) *available at* Theses, Dissertations and Capstones (Paper 752. Marshall University, Marshall Digital Scholar).

[3] See especiallyGreg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 Bender's Immigr. Bull. 1943 (Dec. 15, 2012) (available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192275) ; Greg McLawsen, *Suing on the I-864 Affidavit of Support March 2014 Update*, 19 Bender's Immigr. Bull. 343 (Apr. 1, 2014); Charles Wheeler, *Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support*, 10 Bender's Immigr. Bull. 1791 (Dec. 1, 2005) (available at http://www.ilw.com/articles/2006,0110-wheeler.shtm). Mr. McLawsen also maintains a blog concerning I-864 issues at http://www.i-864.net.

[4] 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.

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

decades.[6] The total liability could be hundreds of thousands of dollars. So a sponsor's or joint sponsor's signature on an I-864 is momentous.

Obligations under the I-864 may survive a pre-nuptial agreement, divorce, and even allegations of marriage fraud. For example, in *Erler v. Erler*,[7] a former wife claimed her former husband had breached his I-864 obligation by failing to make support payments to her after their divorce. The ex-husband claimed that he was not required to pay for three reasons: (1) the couple had signed a prenuptial agreement that said neither party would ever owe the other support payments; (2) the divorce decree said that neither owed the other support payments, and (3) he believed his ex-wife had married him solely for immigration purposes. The court rejected all three reasons, holding that the prenuptial agreement was signed before the I-864; a divorce court cannot remove an obligation to the federal government; and the fraud charge was brought too late. However, the court refused to order support payments, because the ex-wife was being supported above the I-864 amount by her adult son.

Dual Representation[8]

Every case involving an I-864 involves some kind of dual representation.

Unlike in other areas of law, in immigration practice it is routine for a lawyer to represent more than one co-client in the same matter. With employment-based petitions, the lawyer typically represents the employer petitioner, the employee or prospective employee beneficiary, and sometimes also the beneficiary's dependents. With family-based petitions, the lawyer typically represents the spouse petitioner, the spouse beneficiary, and sometimes dependent children as well.[9]

The law does not distinguish between different categories of clients. A person either is, or is not, a client. A lawyer owes an equal level of duties to all co-clients. It doesn't matter who initiated contact with the lawyer, who pays the legal fees, whether or not one client (such as an employer) is a longtime client of the lawyer, and so forth.

Moreover, the establishment of a lawyer-client relationship does not depend on the existence of a written retainer agreement or some other document such as a G-28 notice of appearance. Instead, a lawyer can be held by a court, by a state bar, or by other authorities to be fully responsible to a co-client if the co-client reasonably believed the lawyer was acting as his lawyer. This is called an implied lawyer-client relationship. The likelihood that a lawyer will be held accountable in this manner is more likely the more the facts show that the lawyer acted in a lawyer-like fashion, such as by filing legal papers that affect the rights of the putative client.

Lawyers sometimes try to escape from their duties to beneficiaries and their dependents by adopting what the first author has called the "simple solution" of regarding only the petitioner as a client. But close examination shows that this stance is incorrect in all circumstances, save only for rare cases where the beneficiary is represented by separate counsel.

Lawyers sometimes try to escape from their duties to beneficiaries and their dependents by extracting from a person some kind of "advance waiver of conflicts." But close examination shows that such advance waivers are always unenforceable in immigration matters, save only for rare cases where the beneficiary is represented by separate counsel.

Ordinarily the interests of the co-clients are aligned. When potential conflicts arise, the lawyer must attempt to resolve the conflicts and may be required to withdraw from representation of both co-clients in that matter if the conflicts prove to be irreconcilable.

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[6] For example, this could happen if the beneficiary obtains permanent resident status but never works and never obtains any creditable quarters under the Social Security Act; the couple divorces and the permanent resident never works; the obligation would continue until one of the five termination grounds occur. There are other such possible scenarios. The total liability would increase every year as the annual Poverty Income Guidelines are revised upwards. The five termination grounds are listed on Form I-864 itself and are specified below.

[7] 2013 U.S. Dist. LEXIS 165814 (N.D. Cal. Nov. 21, 2013).

[8] Authority for the statements in this section may be found in Bruce Hake's articles *Dual Representation in Immigration Practice: The Simple Solution is the Wrong Solution*, 5 Geo. Immigr. L.J. 581 (Fall 1991); *Dual Representation in Immigration Practice*, in AILA's Ethics in a Brave New World: Professional Responsibility, Personal Accountability, and Risk Management for Immigration Practitioners 28-35 (John L. Pinnix, ed.) (AILA 2004) (this volume was distributed at no charge to all of the thousands of members of the American Immigration Lawyers Association (AILA) and is published in the Ethics section of AILA's website for members); and *Advance Conflict Waivers are Unethical in Immigration Practice: Debunking Mehta's "Golden Mean*," 12 Bender's Immigr. Bull. 682 (June 1, 2007) (this was also published in Immigration Daily at ILW.COM, June 27, 2007).

[9] For the sake of simplicity, this article uses male pronouns for the lawyer and for the U.S.-citizen petitioner and female pronouns for the immigrant-beneficiary, but of course any of these might be reversed.

In a typical family "one-step" adjustment application, the lawyer represents both spouses, whose interests are closely aligned. The lawyer owes equal duties to both spouses. The U.S.-citizen spouse will be the petitioner on the I-864, and the alien spouse will be the beneficiary of the I-864. The lawyer must make sure the U.S. citizen understands the nature of the obligation he is undertaking by signing the I-864. If the marriage falls apart, the lawyer may not take sides and must withdraw from representing both spouses.

Sometimes, however, the U.S.-citizen spouse has insufficient income or assets to support the I-864 on his own. In that case, the only option may be to persuade another family member or friend to file a separate I-864 as a joint sponsor. In that situation, what is the relationship between the lawyer and the joint sponsor?

The lawyer wants to maintain a minimum number of lawyer-client relationships in the matter. The lawyer typically does not mind engaging in a dual representation of two spouses he has met and trusts. But the lawyer will be reluctant to enter a lawyer-client relationship with a joint sponsor with whom he will have minimal contact. A lawyer's reluctance to become entangled with multiple lawyer-client relationships in one matter is reinforced by the general public policy objections to many kinds of multiple representations.

Further, there is an inherent conflict of interest between the immigrant-beneficiary and the joint sponsor. Some potential joint sponsors simply would not undertake the obligation of the I-864 if they realized it could potentially cost hundreds of thousands of dollars over several decades. The lawyer has a duty to zealously advocate for every client and to keep every client informed. But the lawyer cannot give the potential joint sponsor optimal information and advice without potentially causing drastic harm to his existing spouse co-clients, because if the potential joint sponsor backs out, it may end up being impossible for the foreign spouse to maintain lawful immigration status.

To our best knowledge, the consensus among immigration lawyers confronting this situation has been to prepare the I-864 for the joint sponsor, but to state that the lawyer is filing the I-864 as a courtesy to his married couple co-clients and to disclaim in writing a representation of the joint sponsor. Such a disclaimer would include the recommendation that the potential joint sponsor consult independent legal counsel if he has any questions about the I-864 obligations.

However, such a disclaimer of representation is arguably uncomfortably close to the advance conflict waivers that we have consistently opposed. It is conceivable that in future years the joint sponsor in a situation like this might make a claim against the lawyer, arguing that he never consented to the disclaimer and naturally assumed the lawyer was acting as his lawyer, especially since the lawyer actually did prepare the I-864 for his signature and did file it, affecting his legal rights. Nonetheless, this approach has seemed to be the most reasonable solution to this fairly common problem, and it would probably be upheld by a court or state bar.

But the language on the new version of the I-864 makes this approach impossible.

The New Preparer's Statement and Preparer's Certification

For years the I-864 included this standard declaration to be signed by the lawyer or other preparer:

> **Declaration**
>
> I certify under penalty of perjury under the laws of the United States that I prepared this affidavit of support at the sponsor's request and that this affidavit of support is based on all information of which I have knowledge.[10]

That is a reasonable and unobjectionable declaration.

The new version, however, contains this much more complicated and problematic Preparer's Statement and Preparer's Certification:

> ***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

[10] This most recently appeared on the March 22, 2013, version of the form.

> 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 sponsor supplied additional information concerning a question on the affidavit, I recorded it on the affidavit.[11]

Take the common situation where a U.S.-citizen spouse and his immediate-relative wife are filing a family one-step adjustment of status application (Forms I-130 and I-485), but he does not have sufficient income or assets to prove that he could support his spouse and other family members as appropriate for an extended period at at least 125% of the annual federal Poverty Income Guidelines. In such a situation, the only way to obtain a green card for the wife is to obtain a second I-864 from a joint sponsor, such as a family friend, who does have sufficient income and/or assets. But in such a situation, how is the lawyer supposed to treat the new Preparer's Statement and Preparer's Certification?

Analysis

There are several possibilities.

First, the lawyer could check either option on Item 7.b. If this possibility is chosen, the lawyer acknowledges a lawyer-client relationship with the joint sponsor, which extends to just the I-864 or to the I-864 and other matters. With respect to the I-864, this means that the lawyer is agreeing to fulfill all duties that he would have toward any client. This possibility is uncomfortable for the lawyer, because of the risk to the lawyer and due to the inherent conflict of interest between the joint sponsor and the immigrant-beneficiary, as discussed above. This possibility is also onerous, because the Preparer's Certification would require the lawyer personally to review every response on the I-864 with the joint sponsor. However, as explained below, on balance the best option is for the lawyer to check the option to acknowledge representation of the joint sponsor and to take reasonable steps to inform the joint sponsor of his obligations under the I-864.

Second, the lawyer could cross out the Preparer's Statement and Preparer's Certification, perhaps adding substitute language. This possibility is unacceptable, because there is a high risk that USCIS would reject the I-485 application, demanding that this all be executed as it appears on the form. Recently USCIS did just that in a request for evidence issued to another lawyer who crossed out some certification language on the new Form I-129 petition. This possibility is also unacceptable, because the lawyer has a duty to zealously advocate for his clients, and this kind of effort at self-protection is likely to cause significant delays and otherwise prejudice the clients.

Third, the lawyer could take the position that there is a distinction between a "preparer" and a "lawyer," perhaps having the I-864's certification signed by one of the lawyer's assistants. This possibility is unacceptable, because a lawyer is liable for the actions of his assistants, and the joint sponsor would still probably be able to establish an implied lawyer-client relationship, notwithstanding the lawyer's effort to avoid that. This kind of effort to avoid liability might also be viewed by a tribunal as a sign of bad faith.

Fourth, the lawyer could insist that the joint sponsor hire his own lawyer to prepare and sign the joint sponsor's I-864, and the lawyer could then file that along with the adjustment application without personally undertaking a lawyer-client relationship with the joint sponsor. It is commonplace in immigration practice for a lawyer to present a declaration or report that was prepared by another lawyer or by a professional, without undertaking a lawyer-client relationship with such other lawyer or professional.

Some lawyers may conclude that this last option—insisting that the joint sponsor retain his own lawyer to prepare the I-864 and to advise him about it—is probably the most prudent option for the lawyer to take. It is ethically dubious, however, because it greatly increases the risk of the joint sponsor backing out, for two reasons. First, some joint sponsors will not want to expend the time and money to hire their own lawyer. Second, some joint sponsors will not want to sign the I-864 once they learn of the extent of their potential liability. Any insistence on a separate lawyer thus threatens harm to the initial lawyer's co-clients.

The crux of all of these ethical concerns is the danger that a prospective sponsor or joint sponsor, who is fully briefed as to the worst-case scenarios, will be less likely to sign the I-864, which could be devastating to the lawyer's immigrant client. There is no easy answer. The lawyer cannot shirk his duty to protect the prospective sponsor or joint sponsor, but he also can't blow up his immigrant client's life by scaring off the prospective sponsor or joint sponsor.

This dilemma is much worse than exists in a typical dual representation scenario. In a typical dual representation, if an irreconcilable conflict of interest arises between co-clients, the lawyer must withdraw from representing both co-clients in that matter, and the lawyer will almost always be off the hook if his representation was honest and competent and included fair and equal communication with both co-clients. In the I-864 context, however, if things blow up, there is

[11] This is the language on the July 2, 2015, version of the form.

always the risk that a sponsor or joint sponsor will go after the lawyer, claiming he was not sufficiently warned of the risks.

The objective risk of things blowing up so badly that it leads to an I-864 enforcement action may be fairly low, but it is far from zero. A chart at *www.visajourney.com* claims to show all reported I-864 enforcement cases, by country, from 1996 through 2015. It claims to show fifty reported enforcement cases over that period. The countries with the most enforcement cases are Russia and Ukraine, each with six.[12] Note that this compilation includes only reported case decisions. There may be many I-864-related decisions in state divorce or other proceedings that do not result in a published decision.

Another important consideration is that a nonlawyer not assisted by a lawyer cannot be expected to understand the extent of his potential liability simply by reading the I-864 form itself. Pages 7 and 8 of the new I-864 give the prospective sponsor or joint sponsor a great deal of information about his obligations under the form, but not really enough for the person to be fully informed without a lawyer's help. In particular, page 8 of the new form states (emphasis added):

> **When Will These Obligations End?**
>
> Your obligations under a Form I-864 that you signed will end if the person who becomes a lawful permanent resident based on that affidavit:
>
> **A**. Becomes a U.S. citizen;
>
> **B**. Has worked, or can receive credit for, 40 quarters [approximately 10 years] of coverage under the Social Security Act;
>
> **C**. No longer has lawful permanent resident status and has departed the United States;
>
> **D**. Is subject to removal, but applies for and obtains, in removal proceedings, a new grant of adjustment of status, based on a new affidavit of support, if one is required; or
>
> **E**. Dies.
>
> **NOTE**: Divorce **does not** terminate your obligations under Form I-864.[13]

That may be clear to a lawyer who has also read the statute and the regulations, but it would not be clear to the average nonlawyer. It certainly does not clearly communicate that the obligations under the I-864 could be unbounded both in extent (because the Poverty Income Guidelines keep rising) and in duration.

Conclusion

On balance, our conclusion is that the lawyer should inform a prospective sponsor or joint sponsor, both orally and in writing, of the possible risks. This perhaps could include a measured statement such as this:

> 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 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.

The bottom line: Our recommendation is that the lawyer give a statement like that 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-

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12 http://www.visajourney.com/wiki/index.php/List_of_I-864_case_law. This website is prepared by nonlawyers and is not always legally reliable or up to date. Some of its I-864-related content is plainly incorrect. Nonetheless, this compendium of I-864 enforcement actions is useful. Quick searches by us on Lexis databases indicate comparable numbers of reported I-864 enforcement decisions.

13 This is from the July 2, 2015, version of the form.

client relationship. Although this approach has perils, 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.

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