

**FOCUS:
IMMIGRATION LAW**


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Introduction and Fact Pattern

Lisa met Michael while he was working abroad in the United Kingdom and she was finishing her undergraduate education. They began dating, then got engaged and married within three months. Michael was asked to relocate back to New York and they moved there together. Michael, a U.S. citizen, sponsored Lisa for her green card and signed a Form I-864, Affidavit of Support. But the relationship soured within a year. Michael became financially controlling and verbally abusive. He refused to consider individual or marriage counseling. Lisa had no job or savings. She was unable to find work and was ineligible for most public assistance because she lacked citizenship. Facing homelessness, she finally consulted with attorneys about her legal options.

For family law attorneys this may initially appear as a simple uncontested divorce with possible domestic violence issues. In brief marriages like this one, getting financial remedies such as spousal support can be difficult. Moreover, spousal support is a minefield of unrealistic expectations and strong emotions, which often requires litigation to resolve. Lisa will need considerable help.

For immigration lawyers, the fact pattern is obvious: CR1, I-130, a conditional green card, upcoming I-751, and possible VAWA petition. There will be some strategic choices to make, with respective pros and cons, but allowing Lisa to remain in the U.S. is likely, although not assured. How she will pay for these services is another matter.

But what about the Affidavit of Support, Form I-864? Michael sponsored Lisa and promised to financially support her. This frequently overlooked and rarely enforced document deserves a second look. For the immigrant spouse, it's a lifeline. Most family law attorneys do not routinely consider the I-864 as part of their case strategy for the non-monied spouse. As a result, this source of support is often entirely overlooked.

It is common for immigration issues to overlap with family law issues when one of the parties is not a citizen. In this article we will focus on the I-864 Affidavit of Support, where a citizen sponsor agrees to financially

Overlapping Issues in Immigration Law and Family Law, Including Financial Support Obligations On Form I-864

support their immigrating spouse—and how it can help a divorce where few other viable options exist.

Whether you are representing the citizen spouse (almost always the monied spouse) or the permanent resident spouse sponsored by the affidavit (usually the non-monied spouse) it is vital to know the rights, responsibilities, risks and obligations involved. Ideally, these are issues that should be addressed in a prenuptial agreement. But prenups, in these situations, are still relatively rare and some courts have not enforced prenups with regards to I-864 obligations. In cases where a married couple includes a spouse holding immigration status, legal issues concerning divorce and immigration can become intertwined.

Waiting for a Green Card While Married

An immigrant who is married to and living with a U.S. citizen enjoys a special privilege. That person only needs to wait three years¹ before applying for U.S. citizenship, instead of meeting the usual five-year residency requirement.

However, in order to benefit from this three-year eligibility period, the immigrant will need to stay married and living with the U.S. citizen for the entire three years, all the way up to the time of being approved for U.S. citizenship. If a divorce occurs first, the immigrant will have to accrue a full five years of permanent residence before becoming eligible to apply for U.S. citizenship.²

Marriage Fraud

A divorce is not automatically viewed as a sign of immigration marriage fraud. Plenty of truly married couples bicker or see their marriage collapse, despite their earlier plans and hopes. Whether someone immigrating through marriage can obtain or keep a green card after a divorce depends on how far along they are in the immigration application process.

Understandably, the U.S. government is concerned with people entering into sham marriages in order to obtain U.S. residency, whether for a payment of money, based on friendship, or something else. Most family law attorneys are familiar with these scenarios. Although every couple is asked for extensive proof that their marriage is bona fide, the U.S. government knows that such things can be faked. It wants to see whether the couple can really uphold the possible fraud for another two years.

To attain full permanent residence status, the conditional resident will, within the 90 days before this two-year testing period is over, need to file a petition (USCIS Form I-751) with U.S. Citizenship and Immigration Services (USCIS). Of course, the 90-day window does not apply to those seeking divorce or abuse waivers.

Ideally this is done as a joint petition signed by both spouses, and includes evidence that the marriage is ongoing. (Children's birth certificates, for example, are an excellent form of proof, and so are photographs of family events. Even records of visiting a marriage counselor can help; couples trying to commit marriage fraud don't ordinarily seek out therapists to help save the relationship.)

What is the I-184 Affidavit of Support?

The I-864 Affidavit of Support is required for almost all immigrants that have U.S. family members, i.e., a sibling, parent, or spouse. The I-864 demonstrates that the immigrant, while residing in the United States, has adequate financial support and will not require public assistance.³

Applicants who seek permanent residency (i.e., a green card) through a U.S. family member, such as a spouse, must be financially sponsored.

By signing an I-864 Affidavit of Support, the sponsor agrees to use their income and assets to support the immigrant family member. The affidavit creates an enforceable contract to help defray the obligations of government entities that provide public assistance.⁴

The Form I-864 is usually one of many documents that are signed during the course of an immigration application. This form is signed not by the intended immigrant but by the "sponsor" who becomes legally bound to financially support the intended immigrant if he or she is unable to do so. Once signed, the I-864 becomes a binding contract between the sponsor and the U.S. government, of which the sponsored immigrant is a beneficiary.

Public Policy Considerations—U.S. Immigration and Form I-864

For better or worse, a century-old bedrock principal of U.S. immigration policy is that the US should not admit those deemed likely to become a "public charge."⁵ For decades, the Form I-864 has been the practical manifestation of that

principal.⁶ Not surprisingly, the I-864 is mandatory in nearly all family-based immigration cases.⁷

The I-864 is essentially a risk-allocating device designed to ensure that U.S. taxpayers bear little of the financial risks associated with this new immigrant. The I-864 accomplishes this with two financial levers.

First, it obligates the sponsor to repay any government assistance (e.g., food stamps, social security insurance, Medicaid, etc.) consumed by the beneficiary. Second, it requires the sponsor to ensure that the sponsored immigrant is always supported with a minimal amount of money; specifically, at least 125% of the federal poverty line.

While the poverty guidelines are updated annually and actual financial amount varies based on geography and personal circumstances, the current (2021) monthly amount is \$1,342 for a single adult. In other words, a sponsor must ensure that the sponsored immigrant earns or receives at least that much a month. Any amount that the sponsored immigrant earns less than \$1,342, the sponsor must make up. In certain situations, these amounts can add up, especially if months or years pass without any financial support. In certain circumstances, like those involving our fictional "Lisa," these amounts can be life changing.

What Are the Financial Obligations of the Sponsoring Spouse?

By signing the affidavit, the sponsor agrees to support their spouse at an annual income that is not less than 125% of the federal poverty line (or, if the sponsoring spouse is on active duty in the U.S. Armed Forces or U.S. Coast Guard, the amount is 100% of the federal poverty line).

A sponsor's responsibilities only terminate upon the following five events:

- The immigrant becomes a U.S. Citizen.
- The immigrant has worked or received credit for 40 quarters of work (about 10 years of employment) as defined by the Social Security Administration.
- The immigrant no longer holds permanent resident status and has left the U.S.
- The immigrant is subject to removal, but seeks and obtains in removal.



proceedings, a new grant of status based upon a new I-864 (if required); or,

- Either spouse dies.

Very clearly, a divorce does not void the contract or end the I-864 financial obligations.

Regardless of the waiver or denial of maintenance, or the allocation of property in a divorce, the sponsor spouse is still obligated to meet their responsibilities under the I-864.

The immigrant can bring suit in federal court to obtain and enforce the promised support. Also, a federal, state, or local agency may sue to enforce reimbursement in the amount of public benefits provided to the immigrant spouse.

Considerations for Divorcing Couples

Even if maintenance is waived or denied in the judgment of divorce, it does not alter the sponsor's obligations under the I-864.

A divorced spouse's "income" and any property awarded in divorce proceedings, can become implicated in an I-864 analysis. If your client signed an I-864, it is important that they know that a divorce judgment may not relieve them of their obligations.

Likewise, if your client is supported by an I-864, it is important that they are aware they are ineligible for certain federal, state, or local means-tested public benefits, because the agency will consider the sponsor's resources in determining eligibility.

Enforcement of the I-864 Against the Sponsoring Spouse

In crafting the I-864, the government recognized that some sponsors may refuse to fulfill their financial obligations to the detriment of both the indigent immigrant and taxpayer-backed support programs on

which sponsored immigrants usually rely. Sometimes sponsors (like our fictional "Michael") do shirk these responsibilities. As a result, lawmakers passed rules that allow sponsored immigrants to sue their sponsors, something which the I-864 explicitly notes, to enforce these financial responsibilities. To encourage sponsor compliance, and the retention of qualified counsel to prosecute such claims, the law also contains a fee shifting provision. Sponsors who are successfully sued must not only pay the money they owe the immigrant but must also pay attorneys' fees and costs incurred to compel such payment.

As a result of these rules, sponsored immigrants are able to hire lawyers on a contingency basis—usually without having to pay any upfront costs—to sue their sponsors. This means that attorneys who handle I-864 cases usually cover all the litigation expenses and only get paid if they win. This is in contrast to how most divorce or immigration lawyers charge their clients on an hourly or flat-fee basis. Indeed, family law cases and the state courts in which they are typically litigated, prohibit contingency fee arrangements.

Federal Court Jurisdiction

While state and federal courts share concurrent jurisdiction, I-864 enforcement actions are best suited for federal court. That is because the legal claim is based entirely on a body of law and immigration policy that is federal in origin, and raises purely federal questions. Moreover, federal judges are more likely to enforce the actual terms and rigid contractual framework of a contract between the defendant-sponsor and the U.S. government, wherein the sponsored immigrant plaintiff is a beneficiary.

In contrast, bringing I-864

claims in state court, especially in the context of a divorce or other domestic state law proceeding, potentially complicates already complex issues and could result in erroneous judicial decisions. This is because state court judges may reflexively apply equitable concepts to what is a strict breach of contract claim for which there are few, if any, defenses. For example, in Family Courts, "income" is often imputed to a party who is not working, or who benefits from living with a family member. However, the federal rules governing I-864 rights specifically define "income" which state court judges may not appreciate.

Finally, most courts have held that state divorce law cannot be used to waive I-864 rights. As the Ninth Circuit held in *Erlar*:⁸

Thus, under federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support. Rather, as the Seventh Circuit has recognized, "[t]he right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law." *Liu v. Mund*, 686 F.3d 418, 419–20 (7th Cir. 2012).

Nevertheless, some courts will entertain the idea that a precisely worded global settlement, separation agreement, or divorce decree may extinguish the financial support obligations of a sponsor. These fact patterns vary widely and are unique enough to require a case by case analysis. Similarly, obtaining citizenship through other means, such as with another sponsor, VAWA or another route that allows for self-sponsorship, presents complications that must be thoroughly vetted before taking any action.

Immigration Fraud and New York Divorce Matters

Whether a sponsor will be on the hook for financial support depends on whether the I-864 has already been submitted to the U.S. government and whether the application for residency gets approved. If it's still early in the process, sponsors can seek to withdraw the I-130 Petition for Alien Relative or refuse to supply the signed I-864.

If, however, all application materials have been submitted and the sponsored immigrant's application for residency has been approved, it's probably too late to back out. While allegations of fraud may undo or fatally affect a residency petition, fraud alone may not be sufficient to extinguish the financial obligations imposed by the I-864. While penalties

for fraud may be imposed, the I-864 contains only five terminating events and fraud is not one of them.

If the I-130 immigrant petition is still pending before USCIS, the agency may ultimately deny it or set it aside if the U.S. petitioner requests its withdrawal.⁹ If the I-130 has already been approved but the case is awaiting an interview at a U.S. consulate or at a USCIS filed office, the government officials handling the case will ask enough questions to uncover the divorce and deny the case at that time.

This will initiate removal (deportation) proceedings in immigration court that may, ultimately, extinguish the I-864 obligations. If not, those obligations remain and can be enforced.

Conclusion

The financial obligations that immigrants are owed based on the Form I-864 is a significant benefit that warrants attention and, in rare instances, enforcement. For the family law attorney, this presents a useful, powerful and underutilized tool. 🗑️

1. <https://www.nolo.com/legal-encyclopedia/how-immigrant-us-citizen-us-citizenship.html>.

2. *Id.*

3. <https://www.uscis.gov/i-864>.

4. <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support>

5. Act of Aug. 3, 1882, 22 Stat. 214.

6. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (creating the binding Affidavit of Support).

7. Section 213(A) of the Immigration and Nationality Act. 8 U.S.C. § 1183a; 8 C.F.R. § 213a.1 – 213a.5.

8. *Erlar v. Erlar*, 824 F.3d 1173 (9th Cir. 2016).

9. <https://www.nolo.com/legal-encyclopedia/what-if-i-change-my-mind-about-petitioning-my-family-member-immigrate.html>.



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