



Reducing Joint Sponsors' Fear of I-864 Enforcement

By Charles Wheeler
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As an immigration practitioner, have you ever felt uneasy explaining to clients what they are agreeing to do by sponsoring a family member? Or assuring a joint sponsor of the unlikelihood that they will ever be forced to support the intending immigrant? What if you were able to offer a way where the joint sponsor might be relieved from future financial responsibility under the affidavit of support? This article proposes a possible way to do that through the execution of a parallel contract immunizing the joint sponsor from enforcement actions brought by the sponsored immigrant.

Contractual Obligations

Form I-864, Affidavit of Support under Section 213A of the INA, is a contract between the sponsor and the U.S. government.¹ The intended beneficiaries are the sponsored immigrant and any federal, state, or local government agency or private entity that provides a means-tested benefit to the sponsored immigrant.² It is used, among other factors, to determine if the adjustment of status or immigrant visa applicant is “likely at any time to become a public charge.”³

Sponsors and joint sponsors who execute an I-864 agree to four things:

- Provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal Poverty Guidelines (FPG) (100 percent if the intending immigrant is the sponsor's spouse or child, and the sponsor is on active duty in the Armed Forces);
- Reimburse any federal or state agency that provides a means-tested benefit to the sponsored immigrant;
- Submit to the jurisdiction of any federal or state court for enforcement of the affidavit; and
- Inform the U.S. Citizenship and Immigration Services (USCIS) of any change of address.⁴

Household members of the sponsor — e.g., spouses, sons, daughters, parents, and siblings residing with the sponsor — can execute Form I-864A, Contract Between Sponsor and Household Member. They agree “to provide the sponsor as much financial assistance as may be necessary to enable the sponsor to maintain the intending immigrants at the annual income level required by ... the Act.”⁵

¹ 8 CFR § 213a.2(d); *Shumye v. Felleke*, [555 F.Supp.2d 1020, 1023](#) (N.D. Cal. 2008).

² *Id.*

³ INA §212(a)(4)(A).

⁴ INA §213A(a)(1), (d).

⁵ 8 CFR § 212a.2(c)(2)(i)(C).

The statute provides that the affidavit of support is legally enforceable against the sponsor or joint sponsor in actions brought by the sponsored immigrant; the immigrant may bring a civil action to enforce the maintenance part of the contract in federal or state court. The affidavit of support has been universally held to be legally enforceable. As expected, almost all the actions have been brought by one spouse against the other one (the sponsor) after a failed marriage.⁶

The statute also provides that the affidavit is legally enforceable against the sponsor in actions brought by a federal, state, or “other entity.” Should the immigrant ever obtain a federal or state means-tested public benefit, the agency or entity that provided it could, at least in theory, seek reimbursement from the sponsor. For a variety of reasons — including the five-year ban on the immigrant’s benefit eligibility, the sponsor’s income being deemed to be that of the immigrant’s, and the relevant state’s election to seek reimbursement — this is very unlikely to happen.⁷ But no agreement entered between the sponsor or joint sponsor and the sponsored immigrant would relieve the sponsor from potential liability for reimbursement to the government for the costs of the public benefit received by the sponsored immigrant.

Pre- and Postnuptial Agreements Waive Rights and Obligations

For decades, marital parties have entered into prenuptial agreements to establish the financial and property rights of each spouse in the event of divorce or death. Such agreements supersede many of the default marital laws that would otherwise apply, such as those that govern the division of property, retirement benefits, savings, and the right to seek spousal support. These agreements set forth specific terms that provide certainty and clarity to each party’s marital rights.

Can the Sponsor’s Maintenance Obligation be Waived?

It is a basic principle of contract law that parties may waive their legal rights and requirements, including those arising from a written contract.⁸ But only a handful of courts have applied this principle in deciding whether a prenuptial or postnuptial agreement could be used to waive the sponsor’s obligations under the affidavit of support. Those that did have almost universally rejected this as an option.⁹ The failure of the parties to specify the legal effect of the affidavit of support was the major obstacle for the courts, in addition to public policy concerns.

Postnuptial Agreements

Postnuptial settlement agreements, much like divorce court judgments, have so far not discharged the sponsor of their duties under the affidavit of support if the terms of the agreement do not specifically include the I-864. For example, in *Cyrousi v Kashyap*, the sponsored immigrant brought an action to enforce the affidavit against his ex-spouse even though he had signed an agreement stating: “the parties

⁶ See, e.g., *Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012); *Younis v. Farooqi*, 597 F. Supp. 2d 522 (D. Md. 2009); *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010 (M.D. Fla. May 4, 2006); *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 2757329 (N.D. Ind. Oct. 25, 2005); *Schwartz v. Schwartz*, No. CIV-04-770-M, 2005 WL 1242171 (W.D. Okla. 2005); *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534 (E.D.N.Y. 2002); *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344 (Ohio Ct. App. 2004).

⁷ For more information, see this [summary](#) by the National Immigration Law Center.

⁸ See, e.g., *Navellier v. Sletten*, [262 F.3d 923, 940](#) (9th Cir. 2001); *Universal Nat’l Bank v. Wolfe*, 279 Md. 512, 522, 369 A.2d 570, 576 (1977); *Hovnanian Land Inv. Group, LLC v. Annapolis Towne Centre at Parole, LLC*, 421 Md. 94, 120, 25 A.3d 967, 982 (2011) (“[O]ur caselaw shows a persistent unwillingness to give dispositive and preclusive effect to contractual limitations on future changes to that contract.”).

⁹ See, e.g., *Erler v. Erler (Erler II)*, 824 F.3d 1173 (9th Cir. 2016); *Toure-Davis v. Davis*, WGC-13-916, 2015 WL 2924344 (D.C. Md. June 23, 2015); *Shah v. Shah*, No. 12-4648 (BBK/KMW), 2014 WL 185914 (D. N.J. Jan. 14, 2014); but see *Blain v. Herrell*, No. 10-72 ACK-KSC, 2010 WL 2900432 (D. Haw. July 21, 2010) (finding that “Plaintiff has waived his right to enforce the Form I-864 by entering into the Pre-Marital Agreement.”).

intend this Agreement to be a final and complete settlement of all of their rights and obligations as between them, including property rights and property claims, and the right of either Wife or Husband to spousal support."¹⁰ According to the agreement "no debt or obligation will be incurred for which the other may be liable."¹¹ The court, nevertheless, found that the affidavit of support was an independent obligation under federal law and remained enforceable.

In another case, the sponsor and sponsored immigrant had split up and signed a separation agreement in which they each waived their rights to "spousal support, which either spouse may now have or ever acquire against the other."¹² The court found, like prior courts, that the affidavit of support obligations exist separate and apart from any obligations to pay spousal support under state divorce laws.

The lesson from these court decisions is that parties who enter into postnuptial agreements, which are entered *after* the affidavit of support is executed, need to specify the sponsor's legal obligations with respect to the I-864 rather than assuming they are covered under the broad term "spousal support."

Prenuptial Agreements

One court found that the sponsored immigrant had waived his right to enforce the maintenance portion of the I-864 by signing an earlier prenuptial agreement "permanently waiv[ing] the right to seek support in any form [from] the other in the event of a separation or the termination of the marriage."¹³ But the federal court's holding was limited to the sponsored immigrant's motion to dismiss the action and did not specifically hold that the premarital agreement controlled. Rather, the federal court simply indicated what it would have held had it not dismissed the complaint.¹⁴

All the other courts have found that a prenuptial agreement, which is typically executed *before* Form I-864, did not address the separate and later-formed obligations set forth in the affidavit of support and therefore did not terminate the sponsor's requirements.

In one case, for example, the sponsor argued that the premarital agreement the parties had signed ended his support obligations under the affidavit of support.¹⁵ The agreement stated that "neither party shall seek or obtain any form of alimony or support from the other."¹⁶ But the agreement did not specifically mention the I-864 contract, which was executed subsequently and had not been contemplated by the parties. The district court ruled that the premarital agreement did not void the affidavit of support.

The appellate court agreed.¹⁷ After listing the five circumstances where the affidavit of support terminates, it simply pointed out that divorce was not one of them. It concluded: "under federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support."¹⁸ It cited a decision from the Seventh Circuit that recognized that "[t]he right of support conferred by federal law

¹⁰ *Cyrousi v Kashyap*, 386 F. Supp. 3 1278, 1283 (C.D. Cal. 2019).

¹¹ *Id.*

¹² *See, e.g., Mao v. Bright*, 645 F.Supp.3d. 805, 810 (S.D. Ohio 2022).

¹³ *Blain v. Herrell*, No. 10-00072ACK-KSC, 2010 WL 2900432 (D. Hawaii July 21, 2010) at *3.

¹⁴ *Id.* at *18 ("Even if the Court were to consider the merits of Plaintiff's claim, the Court would find, as the State Court did, that the Pre-Marital Agreement is a valid and enforceable contract. Thus, the Court would further find that, pursuant to the Pre-Marital Agreement, Plaintiff has waived his right to any and all forms of support from Defendant.").

¹⁵ *Erler v. Erler (Erler I)*, [No. CV-12-2793-CRB](#), [2013 WL 6139721](#) (N.D. Cal. Nov. 21, 2013).

¹⁶ *Id.* at *1.

¹⁷ *Erler v. Erler (Erler II)*, 824 F.3d 1173 (9th Cir. 2016).

¹⁸ *Id.* at 1177.

exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law.”¹⁹

Similarly, another court found that the parties’ prenuptial agreement did not include specific language waiving a claim to support under an I-864.²⁰ Rather, it was limited to claims that were “incident to divorce or separation.” The I-864 has nothing to do with divorce or separation, the court found, and it requires a sponsor to support a sponsored immigrant regardless of the outcome of a marriage.²¹

Another court reached the same result by applying a slightly different legal theory: the prenuptial agreement, being signed before the I-864, was subordinate to the affidavit of support, which was signed subsequently. In other words, the I-864, by being signed later, took precedence and waived that portion of the earlier-signed prenuptial agreement concerning spousal support.²²

In that case the sponsored immigrant had signed an agreement releasing the sponsor “absolutely and forever, for the rest of...her life, from any and all claims and demands for alimony or support...” Months later, the sponsor executed the I-864, which obligated him to provide his spouse any support necessary to maintain her at a minimum of 125 percent of the FPG. The court found that it was the sponsor — not the sponsored immigrant — who waived his rights when he signed the I-864 and agreed to support her for the duration of the federal contract.

The Last Agreement Controls

It is this court’s reasoning that holds the greatest endorsement for the theory that parties to an agreement may, by their later conduct, waive the requirements of a prior written contract. In other words, this decision would appear to permit the enforceability of a postnuptial agreement signed *after* Form I-864, especially if it includes language concerning the I-864. It could also be used to enforce an agreement signed after Form I-864 that ratifies the terms of a prenuptial agreement entered earlier. The right of a sponsored immigrant to enforce the I-864 contract against the sponsor or a joint sponsor could, thus, be waived by the parties’ subsequent action.

Even the federal government when it published a final rule implementing the affidavit of support contemplated that “[i]f the sponsored immigrant is an adult, he or she probably can, in a divorce settlement, surrender his or her right to sue the sponsor to enforce an affidavit of support.”²³ This, in fact, happens all the time. Most of the litigation that is commenced or threatened concerning enforcement of the I-864’s maintenance responsibility results in the parties agreeing to a monetary settlement in exchange for surrendering further rights under the contract. This would, therefore, bolster the theory that the sponsored immigrant may waive any rights they have to enforce the affidavit of support if they are provided with sufficient “consideration.”

In contract law, "consideration" refers to something of value exchanged between parties to a contract. It is one of the essential elements of a valid contract. Consideration can take various forms, such as money, goods, services, promises to do something, promises not to do something, or any other benefit conferred upon one party in exchange for the promise of the other party. For a contract to be legally binding, there must be mutual consideration, meaning both parties must receive something of value and give something

¹⁹ *Liu v. Mund*, 686 F.3d 418, 419–20 (7th Cir. 2012).

²⁰ *Shah v. Shah*, No. 12-4648 (BBK/KMW), 2014 WL 185914 (D. N.J. Jan. 14, 2014).

²¹ *See Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1024 (N.D. Cal. 2008).

²² *Toure-Davis v. Davis*, WGC-13-916 (D.C. Md. Mar. 28, 2014).

²³ 71 Fed. Reg. 35732, 35740 (June 21, 2006)

of value in return. If there is no consideration, the contract is generally considered invalid and unenforceable.

Legal Barriers That Courts Might Impose on a Postnuptial Agreement

Case law related to pre- and postnuptial agreements between a sponsor and intending immigrant can inform a strategy for joint sponsors and their ability to contract their way out of potential future liability. The primary concern of any joint sponsor is their potential financial liability. If the joint sponsor and the intending immigrant were to enter into an agreement that specifically waived the sponsored immigrant's right to enforce the affidavit of support's maintenance agreement against the joint sponsor, that might provide sufficient assurance to persuade a reluctant friend or family member to execute the I-864. Nevertheless, courts might still find such an agreement unenforceable.

One legal impediment might be that the joint sponsor lacks the power to "unilaterally absolve himself of his contractual obligation with the Government by contracting with a third party."²⁴ Remember, the I-864 is a contract between sponsor or joint sponsor and the U.S. government. The joint sponsor in this situation is trying to release himself or herself from enforcement through a subsequent agreement with the intending immigrant, who is a "third party," i.e., not a party to the affidavit of support. The court in the case above concluded that "[b]ecause Defendant's obligation under the Affidavit is to the Government, Plaintiff's right to support under the Affidavit persists regardless of the terms of the divorce judgment."²⁵

But if that were the case, then a sponsor and sponsored immigrant could never modify the maintenance agreement by themselves. They would have to include the government — most likely the USCIS — whenever they wanted to change the terms or terminate the affidavit of support altogether based on a settlement agreement. Parties have been successfully resolving disputes over the enforceability of the affidavit of support and modifying its terms without involving the government for the past 27 years.

Another possible legal barrier would be a court's finding that an agreement waiving the maintenance portion of the affidavit of support violates public policy. This happens when the terms or purpose of an agreement conflict with principles or interests that are considered fundamental to society's well-being.

Some of the same courts previously cited have questioned whether an agreement that included a provision releasing the sponsor from I-864 maintenance obligations wouldn't run afoul of congressional intent. One court, for example, questioned the ability of parties to nullify such obligations through a separate agreement. The court warned: "[i]f that were possible, parties could routinely rely on premarital agreements to undermine the Affidavit's goal of preventing immigrants from becoming public burdens."²⁶

Another court cited the sponsor's requirement, as part of the immigration process, to submit an I-864 that is "legally enforceable against the sponsor by the sponsored" immigrant.²⁷ It, too, found "that it would undermine the purpose of the statute to allow sponsors to present an I-864 to immigration authorities that can never be enforced by the sponsored alien due to a prenuptial agreement that is not disclosed to immigration authorities."²⁸ For the I-864 to be legally valid, the court found, it must be enforceable by the sponsored immigrant against the sponsor.

²⁴ *Erler v. Erler (Erler I)*, [No. CV-12-2793-CRB](#), [2013 WL 6139721](#) at *4 (N.D. Cal. Nov. 21, 2013).

²⁵ *Id.* at *5.

²⁶ *Erler v. Erler (Eller I)*, Civ. No. 12-2793, [2013 WL 6139721](#), at *2.

²⁷ 8 USC § 1183a(a)(1).

²⁸ *Shah v. Shah*, No. 12-4648 (BBK/KMW), 2014 WL 185914 (D. N.J. Jan. 14, 2014) at *7.

A third court has also weighed in forcefully by stating: “[t]o permit a sponsor to unilaterally terminate the Form I-864’s financial support obligation through a separate 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.”²⁹

The issue of whether an agreement where the parties waive the maintenance obligation of the affidavit of support violates public policy is currently unsettled law. No court has held that such an agreement violates public policy; the courts that have weighed in on the matter have simply provided their opinion but decided the cases on different legal principles. And they were opining on an agreement signed by a petitioner/sponsor and not one by a joint sponsor.

If the purpose of the affidavit of support, as the courts profess, is to prevent the sponsored immigrant from becoming a public charge, Congress has already removed that possibility for the vast majority of immigrants. Two months before Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that imposed the new Form I-864 affidavit of support, it passed the Welfare Act of 1996 that barred lawful permanent residents from accessing most federal means-tested programs for five years.³⁰ After that period is over, Congress made these immigrants financially ineligible for those same programs by deeming the sponsor’s income to them.³¹

One way to respond to the courts’ public interest concerns would be to include language that provides some assurances that the sponsored immigrant will not become a public charge during the duration of the contract. The agreement, for example, might include language concerning the immigrant’s health, assets, employability, education, work history and skills, and income-earning potential. These are the same statutory factors that the government should be taking into consideration — in addition to the affidavit of support — to decide the likelihood of the person becoming a public charge. Any agreement that removes the joint sponsor from the maintenance requirements still leaves the petitioning sponsor liable under the contract and weakens any argument that the agreement violates public policy.

Final Words

The affidavit of support has provided a lifeline for many sponsored immigrants who end up leaving their spouse and having few or no resources to fall back on. This is particularly true for victims of domestic violence who have been forced out of an abusive relationship and into short-term housing. State law may provide little right to spousal support or access to basic food or housing programs. The meager allowance that the sponsor and/or joint sponsor is required to provide — \$1,570/month for 2024 — is barely enough to live on in most U.S. cities. But without it, the immigrant would be reliant on churches and other local charitable institutions for their survival.

The notion that an intending immigrant should feel pressured into signing away their rights under the affidavit of support as a condition to having their spouse initiate the immigration process is abhorrent to most practitioners. In fact, the failure of a spouse to petition for them or the placement of any conditions

²⁹ *Golipour v. Moghaddam*, 438 F.Supp.3d 1290, 1299 (D. Utah 2020); see also *Carlborg v. Tompkins*, 10-CV-187-BBC, 2010 WL 4553558, at *4 (W.D. Wis. Nov. 3, 2010) (“The requirement under [§ 1183a](#) that a sponsor promise to maintain the immigrant is intended not only to protect the immigrant from poverty, but to protect the government from a public burden.”).

³⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (August 1, 1996).

³¹ For more information, see NILC’s [Overview of Immigrant Eligibility for Federal Programs](#).

in return for their filing the petition could be the basis for a Violence Against Women Act self-petition. For that reason, we do not advocate the use of any postnuptial agreement that would affect the immigrant's rights to enforce an affidavit of support against their spouse.

At the same time, many couples — especially those who are young and just starting out — do not yet have the income or assets to satisfy the statute's 125-percent-of-poverty requirements. Those couples need a joint sponsor and are having difficulty persuading someone to take on this role. An agreement that limits the joint sponsor's legal liability could prove the difference between their proceeding with the immigration process or being stopped by what some consider to be an unnecessary bureaucratic hurdle.

Included below is a template that might form the basis for such an agreement between the joint sponsor and the intending immigrant. Practitioners are encouraged to model it to the particular facts in their client's case.

Waiver of Maintenance Requirements under Affidavit of Support

This Agreement is entered between _____, Joint Sponsor, and _____, Intending Immigrant.

1. Purpose

The parties acknowledge that they desire to modify their rights under the Form I-864, Affidavit of Support under Section 213A of the INA (“Affidavit”).

Background:

The Joint Sponsor executed Form I-864, Affidavit of Support, on _____, agreeing to provide financial support to the Intending Immigrant in accordance with the requirements of section 213A of the Immigration and Nationality Act.

Waiver of Maintenance Requirements:

The Joint Sponsor and the Intending Immigrant hereby agree to waive the maintenance requirements under the Affidavit of Support that the Joint Sponsor executed on behalf of the Intending Immigrant. The Intending Immigrant acknowledges that they will not require any financial support from the Joint Sponsor for any reason. This is based on the Intending Immigrant’s good health, assets, employability, education, work history, skills, and income-earning potential. In addition, should the Intending Immigrant require additional financial assistance in the future, they will be able to enforce the Affidavit of Support against the Petitioning Sponsor, _____, until the terms of that Form I-864 expire.

In consideration for the Intending Immigrant’s waiving the Joint Sponsor’s maintenance requirements, the Joint Sponsor agrees to keep in regular contact with the Petitioning Sponsor, inquire as to the Intending Immigrant’s wellbeing, and take any necessary and appropriate action to ensure that the Petitioning Sponsor is providing the financial support required by state or federal law.

Release and Discharge:

In consideration of the Joint Sponsor’s agreed upon action contained herein, the Intending Immigrant hereby releases and forever discharges the Joint Sponsor from

all obligations to provide financial support, maintenance, or assistance under the Affidavit of Support.

Acknowledgment:

The Intending Immigrant acknowledges that they have been advised to seek independent legal advice regarding the implications of waiving the maintenance requirements under the Affidavit of Support.

Governing Law:

This Agreement shall be governed by and construed in accordance with the laws of the State of _____.

Entire Agreement:

This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral, relating to such subject matter.

Signatures:

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date written below.

Signature of Joint Sponsor

(Joint Sponsor's Name)

_____ Date

Signature of Intending Immigrant

(Intending Immigrant's Name)

_____ Date