

**SPONSORED IMMIGRANT'S UNJUST ENRICHMENT: IS THERE A SIXTH WAY TO
CUT-OFF A SPONSOR'S OBLIGATION UNDER THE AFFIDAVIT OF SUPPORT
(FORM I-864)?**

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Affidavit of Support under Section 213A of the Immigration and Nationality Act (INA) is required for most family-based and some employment-based immigrants to show that they have adequate means of financial support and are not likely to become public charge. Immigrants who are deemed likely to become public charges may gain admission to the United States if a sponsor signs United States Citizenship and Immigration Services Form I-864, Affidavit of Support, thereby promising to maintain the sponsored immigrant at no less than 125% of the Federal Poverty Guidelines for the immigrant's household size. *See* 8 CFR § 213a.2(c)(2). The Sponsor's promise to maintain the immigrant is intended not only to protect the immigrant from poverty, but to protect the Government from a public burden.

Form I-864 is a "legally binding contract" between the Sponsor and the U.S. Government, which can be enforced by the sponsored immigrant. Note that the Sponsor's support obligation begins not just by signing the Form I-864. It begins when the immigration officer or the immigration judge grants the immigrant's application for admission as an immigrant or for adjustment of status on the basis of an application for admission or adjustment that included an Affidavit of Support. *See* 8 CFR § 213a.2(e)(1).

As stated in the regulations there are only five (5) events which could end Sponsor's obligation. It is important for the Sponsor to note that his/her obligation ends in the event the sponsored immigrant: (1) becomes a U.S. citizen; (2) works (or can be credited with 40 quarters) as defined by the Social Security Act; (3) no longer has lawful permanent resident status and permanently leaves the United States; (4) obtains in a removal proceedings a new grant of adjustment of status as a relief from removal; or (5) dies. *See* 8 CFR § 213a.2(e)(2)(i). Note that divorce does not terminate Sponsor's obligations under Form I-864.

Sure enough, divorce does not terminate sponsor's obligations under this Form I-864. However, what happens when the sponsored immigrant household size changes after divorce and the household income matches or exceeds 125% of the Federal Poverty Guidelines. Does that cut-off Sponsor's obligation under Form I-864?

United States District Court for the Northern District of California addressed this specific issue in the case of *Erler v. Erler*, CV-12-02793-CRB, 2013 WL 6139721, at (N.D. Cal. Nov. 21, 2013). In this case, the plaintiff-beneficiary, a divorced sponsored immigrant (immigrant), alleged that her former husband, defendant-sponsor, breached his obligation under the Affidavit of Support that he signed as part of her naturalization process by

failing to maintain her income at 125% of the Federal Poverty Guidelines since their separation. After separation, the immigrant in *Erler* lived with her adult son, whose income – if imputed to her – would have placed her above 125% of the Federal Poverty Guidelines. Because the immigrant was receiving food stamps as a one-person household, she argued that treating her and adult son as a two-person household would be contrary to the Congressional intent and public policy.

Agreeing with the defendant-sponsor’s argument, the Court agreed that Government’s definition of household size varies depending on the context in which it is to be applied. Per the District Court, the Department of Health and Human Services, which establishes the Federal Poverty Guidelines, does not define “family” or “household,” but instead defers to the various federal programs that apply the Guidelines, so that the program in question can define “household” in a way that best serves its needs.

Although 8 CFR Section 213a.1 does define “household size,” it is limited only for the express purpose of determining whether the intending sponsor’s income is sufficient to support the intending immigrant. 8 CFR Section 213a.1 does not define how to calculate the post-divorce household size. Applying the tool of statutory construction, *Expressio unius*¹, the Court reasoned that because Congress opted to define the term in one context (sponsor’s pre-sponsorship household) and not another (such as immigrant’s post-divorce household), Congress intentionally declined to define post-divorce household size to allow a more flexible definition under these circumstances.

Rejecting the immigrant’s argument that “Congress intended to put the financial obligation of support only on those person(s) who contractually agree to act as sponsor(s)”, the Court held that it would lead to an untenable result: the sponsor would be the only means of support for the immigrant, no matter her living arrangements. To illustrate, the Court provided an example of an immigrant who becomes part of a millionaire’s family would nevertheless qualify as a one-person household because no one in the millionaire’s family is her sponsor. Stating this was an unjust enrichment, the Court went on to state that “[i]t is nonsensical to disregard the millionaire’s support to the hypothetical immigrant while her sponsor remains obligated to maintain her at 125% of the Federal Poverty Guidelines.”

The Court determined that the immigrant lived in a two-person household for purposes of the Affidavit of Support. Specifically, the District Court stated that the situation—an immigrant living with an adult child—is distinguishable from an immigrant living with a dependent child² or temporarily living with friends³. Finally, it stated that Courts must

¹ inclusion of one thing implies the exclusion of the other.

² applying a household size of two where plaintiff lived with her dependant daughter. *See Hrachova v. Cook*, No. 5:09-cv-95-Oc-GRJ, 2009 WL 3674851, *4 n.13 (M.D. Fla. Nov. 3, 2009).

³ applying a household size of one where the plaintiff lived with friends in Carolina, Puerto Rico since the separation. *See Harsing v. Naseem*, Civil No. 11-1240CCC, 2012 WL 140418, at *2 (D.P.R. Jan. 18, 2012).

strike a balance between ensuring that the immigrant's income is sufficient to prevent her from becoming a public charge while preventing unjust enrichment to the immigrant. This conclusion, the Court found, was consistent with the Affidavit, which does not obligate the sponsor to pay the immigrant 125% of the Federal Poverty Guidelines but only to act as a safety net to ensure that, in any given living situation, her overall income does not fall below that level.

Based on the foregoing, if and when, the sponsored immigrant household size changes after divorce, and the changed household income matches or exceeds 125% of the Federal Poverty Guidelines, neither the sponsor nor the Government need to provide for basic needs. Thus, in effect, there are not only five (5) events which could end Sponsor's obligation; there may possibly be a sixth one.