Annulment vs. Divorce

in

Immigration Marriage Fraud Cases

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Note: *I am not an attorney, nor do I profess to be one. I do not engage in the unauthorized practice of law. What follows is based upon my 27+ years of experience and training working for USINS and its successor agency, US Immigration and Customs Enforcement. This is not a substitute for obtaining professional and competent legal counsel from a licensed attorney. I cannot urge anyone strongly enough, who finds themselves in a situation where they believe they have been defrauded by their foreign born spouse into marrying them, and/or are facing charges of domestic violence, and/or are facing allegations of domestic violence in connection with a pending request for a restraining or protection order, to immediately seek the assistance of competent and aggressive legal counsel.*

Basics:

Annulment vs. Divorce

When you can get an annulment instead of a divorce.

Like a divorce, an annulment is a court procedure that dissolves a marriage. *But, unlike a divorce, an annulment treats the marriage as though it never happened.* For some people, divorce carries a stigma, and they would prefer to have their marriage annulled. Others prefer an annulment because it may be easier to remarry in their church if they go through an annulment rather than a divorce.

There are two types of annulment: civil annulment (by the state government) and religious annulment (by a church).

Grounds for Civil Annulment

Grounds for civil annulment vary slightly from state to state. Generally, an annulment requires that at least one of the following reasons exists:

Misrepresentation or fraud. For example, if a spouse lied about her capacity to have children, that she had reached the age of consent, or that she was not married to someone else, an annulment could be granted.

Another possible misrepresentation is the motivation that a spouse had to get married in the first place. If the spouse engaged in a fraud to induce the other spouse to marry them, with the purpose of the marriage being to obtain an immigration benefit, namely permanent residence in the United States, and if it can be shown to the court that the alien spouse fraudulently induced the US citizen to marry them, then an annulment is in order.

Concealment. For example, if a spouse concealed an addiction to alcohol or drugs, a felony conviction, children from a prior relationship, a sexually transmitted disease, or impotency, an annulment might be granted.

Another concealment issue would be if the alien spouse had a pre-existing marital relationship that had not ended in either death or divorce, and failed to disclose this to the US citizen spouse, an annulment could be granted on two grounds. First, the second marriage to the US citizen would be bigamous and therefore illegal; and secondly, it would be a fact concealed from the US citizen and is an error of omission that is relevant to the inducement to marry.

Refusal or inability to consummate the marriage. Refusal or inability of a spouse to have sexual intercourse with the other spouse can be grounds for an annulment.

This is an issue that oftentimes raises its head in sham marriages that are one sided marriage frauds. The alien spouse refuses to consummate the marriage because it was never their intent to enter into a legitimate, loving, caring marital relationship, but rather to obtain an immigration benefit. The failure or refusal to consummate the marriage, in addition to other behavior engaged in by the alien spouse can be clear and convincing evidence of the intent of the alien spouse for entering into a marital relationship with a US citizen.

Misunderstanding. For example, if one person wanted children and the other did not, an annulment might be granted.

Most annulments take place after marriages of a very short duration -- a few weeks or months -- so there are usually no assets or debts to divide, or children for whom custody, visitation, and child support are a concern.

When a long-term marriage is annulled, however, most states have provisions for dividing property and debts, as well as determining custody, visitation, child support, and alimony. Children of an annulled marriage are not considered illegitimate.

Religious Annulments

Within the Roman Catholic Church, a couple may obtain a religious annulment after obtaining a civil divorce, so that one or both people may remarry, within the church or anywhere else, and have the second union recognized by the church. The grounds for annulments in the Catholic Church are different than for civil annulments.

The Enforceable Affidavit of Support (Form I-864)

In an effort to stem the amount of fraud perpetrated by newly arrived elderly foreign nationals, most notably those from Russia and the Former Soviet Union (FSU), Congress enacted certain legislative initiatives when they passed the Illegal Immigration Reform And Immigrant Responsibility Act (IIRAIRA) in 1996. It is the "Immigrant Responsibility" portion of IIRAIRA that deals with the enforceable affidavit of support.

Prior to IIRAIRA's enactment, US citizen and permanent resident sponsors of immigrants, filed an Affidavit of Support (Form I-134) which was not enforceable. Upon enactment of IIRAIRA, the I-134 was replaced with the I-864, Affidavit of Support for those cases involving immigrant visas being issued to family members of US citizens or permanent resident aliens, and to those who were immigrating to the US based upon a work based visa.

There are only four instances in which a petitioning US citizen or permanent resident alien will be released from their contractual obligation under an I-864, Affidavit of Support. The alien dies. The alien naturalizes. The alien works forty qualifying quarters in the U.S. Or the alien loses their permanent residence either by abandonment or by removal from the United States. If the

alien is placed in removal proceedings, and the immigration judge grants relief from removal, and either no affidavit of support is required for that relief or if another affidavit of support is submitted in lieu of the pre-existing one, then the US citizen is no longer obligated under the I-864.

The contract specifically states: " Note that divorce **does not** terminate your obligations under this Form I-864."

However, annulment is somewhat different from divorce. As stated above, an annulment places both parties in a *status quo ante* position as if the marriage ever existed. The marital contract becomes void at its inception because of either legal impossibility (ie. bigamous marriage where there is a pre-existing spouse and that marriage has not been legally terminated by divorce, annulment, or death) or because the marital contract was induced by fraud on the part of one of the parties to the marital contract.

As such, one must ask the obvious question: "If the underlying marriage between a US citizen and an alien is annulled due to fraud in the inducement committed by the alien, is the US citizen still contractually obligated to the government based upon the contract contained within the I-864 Affidavit of Support?

This becomes even more problematic when the alien spouse either files a self petition (Form I-360) alleging spousal abuse or extreme cruelty on the part of the US citizen spouse, or files a self petition to remove conditions of their permanent residency (Form I-751), again alleging domestic violence or extreme cruelty on the part of the US citizen spouse. USCIS appears to be adamantly against relieving any US citizen affiant of their contractual obligations, even if the US citizen spouse / affiant was defrauded by the alien and induced into marrying them under false pretenses. Add to that, allegations of spousal abuse and/or extreme cruelty, and one quickly realizes that the US citizen has lost many of their constitutional protections.

It is my belief that a successful challenge can be mounted against any existing I-864 Affidavit of Support, if the defrauded US citizen spouse obtains an annulment of their marriage to their alien spouse and the judge finds that the alien defrauded the US citizen and fraudulently induced the US citizen spouse to marry them in order to obtain permanent residence in the United States.

The marriage is a contractual matter. The law requires that certain conditions be met before a contract can become enforceable. First, the parties must have the capacity to contract. If one of the parties is incapacitated and cannot legally contract, any contract is void. This is also true if one of the parties remains in a pre-existing marital relationship that has not been legally terminated either by divorce, annulment, or death. Secondly, there must be offer and acceptance. Third, there must be consideration given to enter into the contract. The consideration in a marital contract has traditionally been that the parties will be emotionally supportive of each other, love each other, honor each other, and remain in this contractual relationship until death ends the contract. One of the implied considerations involved in a marital contract is sexual intimacy between the parties.

If the marriage is not consummated, then failure or inability to consummate the marriage can be grounds for an annulment. Any failure to fulfill the provisions of the marital contract, could conceivably be grounds for annulment.
Continuing on, another condition that must be met for a contract to be enforceable is that the subject matter of the contract must be legal. Again, a bigamous marriage makes the marital contract unenforceable and void at its inception because in order to marry, one must not have any pre-existing spouses to whom they remain married and said marriage has not been terminated by death, divorce, or annulment.

The I-864, Affidavit of Support, is a contract between a sponsor of an alien, most likely the alien's spouse, and the government of the United States. In exchange for granting an alien an immigrant visa, the sponsor guarantees that the alien will not become a public charge and will not receive any means tested public assistance. However, the underlying immigrant visa that the United States government issues to the alien, is based upon a marital relationship between that alien and either a US citizen or lawful permanent resident. If the underlying marital relationship is deemed fraudulent, then it stands to reason that any contracts emminating from this fraudulent marriage, are void as is the underlying marriage.

Again, remember, an annulment places the parties in the position as if the marriage never existed. So, if the marriage never existed, the purpose of the immigrant visa never existed. The marital relationship by which the immigrant visa was issued never existed. Therefore, the alien should be placed in removal proceedings. However, once the allegations of domestic violence or extreme cruelty are made, there are all sorts of issues.

That is why it is crucial for a US citizen who has been abused and scammed by an alien into marrying them and who is facing domestic violence or abuse charges, to try and obtain an annulment.

Withdrawal of the I-864 Affidavit of Support

Despite information provided by USCIS to the contrary, yes, a US citizen may, and can, successfully withdraw an I-864 Affidavit of Support. It's a bit involved, but it can be done.

Although the instructions for the I-864 and the actual I-864 itself, clearly state: "Note that divorce does not terminate your obligations under this I-864", the Michael Yates memo dated June 27, 2006, which references and clarifies the Adjudicator's Field Manual (AFM) clearly states:

"(h) Withdrawal of an affidavit of support or Form I-864A. A person who has signed a Form I-864, I-864EZ or I-864A may withdraw the Form. If the person does so, USCIS will adjudicate the application for adjustment of status as if the withdrawn Form I-864, I-864A or I-864EZ had never been filed. In an adjustment of status case, a withdrawal of the Form I-864, I-864EZ or I-864A is not effective unless it is in writing and USCIS actually receives the withdrawal before the final decision on the adjustment application. In an immigrant visa case, once a consular officer has issued an immigrant visa, no Form I-864, I-864EZ or I-864A may be withdrawn unless the visa petitioner also withdraws the visa petition."This passage can be found at 20.5(h) of the AFM.

Furthermore, 20.5(e)(3) states: "No Local Policy Permitted Regarding When Form I-864 Shall be Filed. In the past, USCIS permitted each local office to establish its own policy on whether to require submission of Form I-864 at the time of filing for adjustment or at the time of the adjustment interview. Local offices may no longer do so. Under a policy change that took effect November 23, 2005, USCIS requires all applicants to submit Form I-864 with their adjustment application. If the case was filed prior to November 23, 2005 at an office that required submission at the time of the adjustment interview, USCIS should allow the applicant to submit Form I-864 and the required supporting documentation at the interview."

This is significant, for if the local policy of UCIS where one filed their I-485 Application for Adjustment of Status allowed for the filing of the I-864 at the time of the adjudicative interview, and the interview has not been conducted yet, the US citizen sponsor can withdraw the I-864 and USCIS must adjudicate the pending I-485 as if the I-864 was never filed. [emphasis added]

Once an I-485 Application for Adjustment of Status is approved, or a consular officer issues an immigrant visa, AND the alien enters the United States and is admitted as an immigrant, the I-864 becomes binding.

If, however, the I-864 is withdrawn prior to the final decision on an I-485 is made by USCIS, or if the I-864 is filed in connection with an immigrant visa application, both the I-864 and the underlying visa petition are withdrawn prior to the alien's admission to the United States as an immigrant, then the US citizen is no longer obligated under the contractual provisions of the I-864.

The actual I-864 and the instructions for the I-864, appear to be misleading in that there is no mention of the US citizen's right to rescind the I-864 before the alien's status is finalized. It is at the point of finality of the adjustment adjudications process or the admission of the alien as an immigrant that makes the I-864 binding, not the mere filing of the affidavit. USCIS would like the US citizen to believe that once they file an I-864, that's it. It's over. It's final and there is no recourse. I disagree, as does USCIS' own Adjudicator's Field Manual and the Yates Memo of June 2006.

Where this entire process becomes problematic is when an annulment is obtained after an alien enters the United States as a conditional permanent resident alien or immigrant, or when a pending I-485 is approved while annulment proceedings are pending. It would seem that a common sense approach that USCIS should take would be if annulment proceedings are pending, all adjudicative processes should be put on hold until the annulment petition is ruled upon by the court. After all, if the judge rules that the alien entered into a fraudulent marriage for the purposes of obtaining permanent residence, and USCIS approves the pending I-485 prior to the judge's ruling, the end result could easily be the alien being placed in removal proceedings and the removal case being that more complicated based upon two competing actions going on, each with the potential of negating the other.

The I-864 Affidavit of Support Contract

Part 8. Sponsor's Contract.

Please note that, by signing this Form I-864, you agree to assume certain specific obligations under the Immigration and Nationality Act and other Federal laws. The following paragraphs describe those obligations. Please read the following information carefully before you sign the Form I-864. If you do not understand the obligations, you may wish to consult an attorney or accredited representative.

What is the Legal Effect of My Signing a Form I-864?

If you sign a Form I-864 on behalf of any person (called the "intending immigrant") who is applying for an immigrant visa or for adjustment of status to a permanent resident, and that intending immigrant submits the Form I-864 to the U.S. Government with his or her application for an immigrant visa or adjustment of status, under section 213A of the Immigration and Nationality Act these actions create a contract between you and the U. S. Government. The intending immigrant's becoming a permanent resident is the "consideration" for the contract.

Under this contract, you agree that, in deciding whether the intending immigrant can establish that he or she is not inadmissible to the United States as an alien likely to become a public charge, the U.S. Government can consider your income and assets to be available for the support of the intending immigrant.

What If I choose Not to Sign a Form I-864?

You cannot be made to sign a Form 1-864 if you do not want to do so. But if you do not sign the Form I-864, the intending immigrant may not be able to become a permanent resident in the United States.

What Does Signing the Form I-864 Require Me to do?

If an intending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed, then, until your obligations under the Form I-864 terminate, you must:

Provide the intending immigrant any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household size (100 percent if you are the petitioning sponsor and are on active duty in the U.S. Armed Forces and the person is your husband, wife, unmarried child under 21 years old.)

Notify USCIS of any change in your address, within 30 days of the change, by filing Form I-865.

What Other Consequences Are There?

If an intending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed, then until your obligations under the Form I-864 terminate, your income and assets may be considered ("deemed") to be available to that person, in determining whether he or she is eligible for certain Federal means-tested public benefits and also for State or local means-tested public benefits, if the State or local government's rules provide for consideration("deeming") of your income and assets as available to the person.

This provision does **no**t apply to public benefits specified in section 403(c) of the Welfare Reform Act such as, but not limited to, emergency Medicaid, short-term, non-cash emergency relief; services provided under the National School Lunch and Child Nutrition Acts; immunizations and testing and treatment for communicable diseases; and means-tested programs under the Elementary and Secondary Education Act.

What If I Do Not Fulfill My Obligations?

If you do not provide sufficient support to the person who becomes a permanent resident based on the Form I-864 that you signed, that person may sue you for this support.

If a Federal, State or local agency, or a private agency provides any covered means-tested public benefit to the person who becomes a permanent resident based on the Form I-864 that you signed, the agency may ask you to reimburse them for the amount of the benefits they provided. If you do not make the reimbursement, the agency may sue you for the amount that the agency believes you owe.

If you are sued, and the court enters a judgment against you, the person or agency that sued you may use any legally permitted procedures for enforcing or collecting the judgment. You may also be required to pay the costs of collection, including attorney fees.

If you do not file a properly completed Form I-865 within 30 days of any change of address, USCIS may impose a civil fine for your failing to do so.

When Will These Obligations End?

Your obligations under a Form I-864 will end if the person who becomes a permanent resident based on a Form I-864 that you signed:

Becomes a U.S. citizen;

Has worked, or can be credited with, 40 quarters of coverage under the Social Security Act;

No longer has lawful permanent resident status, and has departed the United States;

Becomes 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

Dies.

Note that divorce **does not** terminate your obligations under this Form I-864.

Your obligations under a Form I-864 also end if you die. Therefore, if you die, your Estate will not be required to take responsibility for the person's support after your death. Your Estate may, however, be responsible for any support that you owed before you died.

30. I,_____,
(Print Sponsor's Name)

certify under penalty of perjury under the laws of the United States that:

a. I know the contents of this affidavit of support that I signed.

b. All the factual statements in this affidavit of support are true and correct.

c. I have read and I understand each of the obligations described in Part 8, and I agree, freely and without any mental reservation or purpose of evasion, to accept each of those obligations in order to make it possible for the immigrants indicated in Part 3 to become permanent residents of the United States;

d. I agree to submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against me to enforce my obligations under this Form I-864;

e. Each of the Federal income tax returns submitted in support of this affidavit are true copies, or are unaltered tax transcripts, of the tax returns I filed with the U.S. Internal Revenue Service; and

f. I authorize the Social Security Administration to release information about me in its records to the Department of State and U.S. Citizenship and Immigration Services.

g. Any and all other evidence submitted is true and correct

31. _____
(Sponsor's Signature) *(Date-- mm/dd/yyyy)*

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
NATIONAL BENEFITS CENTER DIRECTOR

From: Michael Aytes /s/
Acting Director for Domestic Operations

Date: June 27, 2006

RE: Consolidation of Policy Regarding USCIS Form I-864, Affidavit of Support (AFM Update AD06-20)

1. Purpose

This memorandum revises Chapter 20.5 of the Adjudicator's Field Manual (AFM) to conform this chapter to the final rule relating to the use of Affidavits of Support (Forms I-864) under section 213A of the Immigration and Nationality Act (INA), 8 U.S.C. 1183a, as amended. The final rule was published on June 21, 2006 in the *Federal Register* at 71 FR 35732.

This memorandum also (1) clarifies that an Affidavit of Support must be sufficient both at the time the adjustment of status application is filed and at the time the adjustment application is adjudicated, and (2) reiterates that, subject to limited exceptions, an Affidavit of Support is sufficient at the time of the adjudication if it was sufficient at the time it was filed with the Form I-485, Application to Register Permanent Residence or to Adjust Status.

Both the final rule and this memorandum are effective July 21, 2006.

2. Background

On October 19, 1997, USCIS published an interim rule implementing section 213A of the Immigration and Nationality Act. Since that date, the former Immigration and Naturalization Service (INS) and USCIS have issued a May 18, 1998 Federal Register notice (at 63 FR 27193) and several policy memoranda regarding section 213A of the Act, including

- *Clarification of Service policy concerning I-864 affidavit of support* (March 7, 2000);
- *Effect of enactment of the Child Citizenship act of 2000 on the affidavit of support requirement under INA 212(a)(4) and 213A* (May 17, 2001);
- *Whether an affidavit of support is required if the alien already has, or can be credited with, 40 qualifying quarters of coverage* (May 17, 2001);

- *Policy Change - Public Law 107-150, the Family Sponsor Immigration Act of 2002: Use of Substitute Sponsor if Visa Petitioner Has Died"* (June 15, 2002);

- *Affidavit of support, employment letters, and ability to pay determinations* (May 14, 2004); and

- *USCIS policy regarding Form I-864, Affidavit of Support* (November 23, 2005).

On June 21, 2006, USCIS published a final rule in the Federal Register adopting the October 19, 1997 interim rule, with appropriate changes, as a final rule. Effective July 21, 2006, this rule incorporated many of the policies stated in the memos listed above and, in addition, made changes not covered in the memos, such as:

- Eliminating the requirement that sponsors submit as initial evidence pay stub(s) covering the most recent six months and an employer letter.

- Introducing the new EZ Affidavit of Support (Form I-864EZ), a short form Affidavit of Support for certain petitioning sponsors who rely only upon their own employment to meet the affidavit of support requirements.

- Establishing the new Intending Immigrant's I-864 Exemption (Form I-864W), a form specifically designed to standardize the process for determining that a particular immigrant is not required to have an affidavit of support filed on his or her behalf.

- Allowing two joint sponsors per family unit intending to immigrate based upon the same petition. If two joint sponsors are used, each joint sponsor is responsible only for the intending immigrant(s) listed on that joint sponsor's Form I-864, Affidavit of Support.

- Providing a more flexible definition of "household size."

  - Allows, but does not require, sponsors to include as part of household size any relatives in the household who are not dependents if they complete a Contract Between Sponsor and Household Member (Form I-864A) promising to make their income and/or assets available to the sponsor and intending immigrants.

  - Eliminates the requirement that household members must have lived in the sponsor's household for at least six months in order to sign a Form I-864A.

- Reducing the net value of assets that must be shown in order to cover any shortfall in the sponsor's household income when the intending immigrant is seeking to immigrate as:

  - The spouse or child of a U.S. citizen; or

  - An alien orphan who will be admitted as an IR-4 immigrant.

- Clarifying that all income and assets used to meet the Affidavit of Support requirement must come from a lawful source.

For a complete listing and discussion of the changes, see the attached final rule.

3. Field Guidance
USCIS shall follow 8 CFR 213a and Chapter 20.5 of the AFM. Any prior policy memorandum provision that is not consistent with the regulations or Chapter 20.5, as amended by this memorandum, is rescinded.

4. Contact Information
Questions regarding this memorandum and USCIS policy regarding Form I-864, Affidavit of Support, may be directed by email through appropriate supervisory channels to Jonathan Mills, USCIS Office of Regulations and Product Management (RPM).

5. AFM Update

1. Chapter 20.5 of the *AFM* is revised to read:
20.5 Enforceable Affidavits of Support.

(a) Background. Section 213A of the Act and 8 CFR 213a require most family-based and certain employment-based intending immigrants who, on or after December 19, 1997, seek to enter the United States as immigrants or who apply for adjustment of status to establish that they are not inadmissible under section 212(a)(4) of the Act by having a sponsor sign a legally enforceable Affidavit of Support on behalf of the affected intending immigrant(s). The Affidavit is submitted on Form I-864, or, for those sponsors who are eligible to use it, on Form I-864EZ. The new Form I-864, Form I-864A, and Form I-864EZ, and I-864W are all dated January 15, 2006. The Forms are available at www.uscis.gov. To help ensure an orderly transition from the old Form I-864 and I-864A to the new forms, USCIS should continue to accept old versions of Form I-864 and Form I-864A until October 19, 2006, a grace period of 90 days from the effective date of the final rule.

Unless otherwise noted, references to Form I-864, Affidavit of Support, include Form I-864EZ, a short form Affidavit of Support to be used by certain petitioning sponsors who rely only upon their own employment to meet the affidavit of support requirements. Regulations governing the use of Form I-864 are located in 8 CFR 213a.

(b) Persons Required to Have Sponsorship. The following intending immigrants are required to have Form I-864 filed on their behalf:
• Immediate relatives, including K nonimmigrants adjusting to LPR status and orphans (unless the orphan would become a citizen upon adjustment of status pursuant to section 320 of the Act);
• Family based immigrants;

• Employment based immigrants if the petitioning employer is a relative of the alien, and is a U.S. citizen or Lawful Permanent Resident; and
• Employment based immigrants if a relative of the alien has a significant ownership interest (5% or more) in the for-profit petitioning entity, and is a U.S. citizen or a Lawful Permanent Resident.

Note: For employment based cases, an Affidavit of Support is required only if the intending immigrant will work for a relative who is eligible to file a Form I-130 on behalf of the intending. Therefore, for purposes of the Affidavit of Support, a relative is defined as (1) a U.S. citizen or LPR who is the intending immigrant's spouse, parent, child, adult son or daughter, or (2) a U.S. citizen who is the intending immigrant's brother or sister.

Note: An applicant for adjustment of status who filed his or her Form I-485 prior to December 19, 1997, is exempt from the Affidavit of Support requirement even if the interview is conducted and/or the application is adjudicated after that date. [See Section 531(b) of Pub. L. 104-208 and 8 CFR 213a.2(a)(2)(i) (adjustment applicants) and 213a.2(a)(2)(ii)(B) (applicants for admission).]

Some editions of the Form I-864 and Form I-864A include a jurat to be completed by a notary or by a consular or immigration officer to show that the person signed or acknowledged the signing of the Form I-864 or I-864A under oath. The Form I-864 and Form I-864A, however, provide that they are signed "under penalty of perjury." Thus, 28 U.S.C. 1746 (which deals with the legal effect of unsworn statements) makes it unnecessary for Form I-864 and Form I-864A to be signed in the presence of or certified by a notary public or an Immigration or Consular Officer. Note that the jurat has been removed from the January 15, 2006 edition of the Forms I-864 and I-864A. Form I-86EZ is a newer form, and therefore never had the jurat.

Accompanying spouses and children also need to submit Form I-864s. Each spouse or child must submit a photocopy of the principal's I-864, but they do not need to submit a photocopy of the supporting documentation. A spouse or child is considered to be "accompanying" a principal immigrant if they apply for an immigrant visa or adjustment of status either at the same time as the principal immigrant or within 6 months after the date the principal immigrant acquires LPR status.

Following-to-join spouses and children (those who apply for an immigrant visa or adjustment of status 6 months or more after the principal immigrant) require a new Form I-864 at the time they immigrate or adjust status.

(c) Applicants Exempt from Sponsorship. The following intending immigrants do not need to file Form I-864 when applying for adjustment of status:

• Any intending immigrant who falls within an immigrant classification listed in section 20.5(b) above but

  - Has already earned, or can be credited with 40 quarters of coverage pursuant to the Social Security Administration's regulations; or

  - Is classified as the child of a U.S. citizen, if the child's adjustment of status application is approved before the child's 18th birthday, and if the approval will make the child a citizen under section 320 of the Act (i.e., the Child Citizenship Act of 2000).

• Diversity immigrants.

• Special immigrants.

• Employment based immigrants (other than those for whom a relative either filed the Form I-140 or owns 5% or more of the firm that filed the Form I-140).

• Self-petitioning immigrants (including self-petitioning widow(ers) and battered spouses and children).

• Refugees and asylees adjusting status.

• Registrants under section 249 of the INA.

• Any other intending immigrant not falling within a class of admission listed in section 20.5(b) above.

(d) Sponsor Requirements.
(1) General. A sponsor who completes Form I-864 must be all of the following:
• The petitioning relative or the relative who has a significant ownership interest in the petitioning entity;
• An individual (a sponsor cannot be a corporation, organization, or other entity);
• A citizen of the United States or a permanent resident (including conditional residents);
• At least 18 years of age;
• Domiciled in the United States, the District of Columbia, or any territory or possession of the United States (see section (d)(2) below).
• Able to demonstrate the means to maintain an income of at least 125% of the Federal Poverty Guidelines for the sponsor's household size, including the immigrants being sponsored or previously sponsored. A sponsor on active duty in the U.S. Armed Forces, other than active duty for training, who is petitioning for a spouse or child must only demonstrate the means to maintain an income equal to at least 100% of the Federal Poverty Guidelines. Assets of the sponsor, the intending immigrant, or both may be used to demonstrate this requirement.

Note: A non-citizen U.S. national may sign a Form I-864 only as a joint sponsor.
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2) Domicile. Domicile means the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of the Act, with the intention to maintain that residence for the foreseeable future. A United States citizen living abroad whose employment meets the requirements of section 319(b)(1) of the Act is considered to be domiciled in the United States. For purposes of the ability to sign a Form I-864, an LPR living abroad is considered to have a domicile in the United States during a temporary period of residence abroad if he/she has obtained preservation of residence benefits under 316(b) or 317 of the INA. There may be other situations in which a U.S. citizen or LPR can establish that his or her domicile is still in the United States, despite the fact that the citizen or LPR is currently living outside the United States. *Critical issue:* proof that the residence abroad is intended to be only temporary and that sponsor, during the temporary absence, has maintained an intent to keep his or her domicile in the United States, despite the temporary sojourn abroad.

If the sponsor is not domiciled in the United States, the sponsor can still sign and submit a Form I-864 so long as the sponsor satisfies the Department of State officer, immigration officer, or immigration judge, by a preponderance of the evidence, that the sponsor will establish a domicile in the United States on or before the date of the principal intending immigrant's admission or adjustment of status. The intending immigrant will be inadmissible under section 212(a)(4) of the Act, and the intending immigrant's application for admission or adjustment of status must be denied, if the sponsor has not, in fact, established a domicile in the United States on or before the date of the decision on the principal application for admission at a U.S. port of entry on an immigrant visa or adjustment of status.

In the case of a sponsor who comes to the United States intending to establish his or her principal residence in the United States at the same time as the principal intending immigrant's arrival and application for admission at a port-of-entry, the sponsor shall be deemed to have established a domicile in the United States for purposes of this paragraph. If, however, the sponsor is an LPR, and the sponsor's own application for admission is denied, so that the sponsor leaves the United States either under a removal order or as a result of the sponsor's withdrawal of the sponsor's application for admission, the sponsor will not be deemed to have established a domicile in the United States. Thus, the Form I-864 will not be valid and the sponsored immigrant will be inadmissible on public charge grounds.

(3) Use of Spouse's Income. A sponsor's spouse who qualifies as a household member and wishes to have his or her income included as a household member generally needs to complete a Form I-864A. However, if the spouse is not willing to let the sponsor rely on the spouse's income, that is acceptable. In this situation, the

sponsor needs to show his or her own income and which portion of any assets used to qualify can be attributed to him or her.

In some situations, the sponsor's spouse qualifies as a household member and is also the intending immigrant being sponsored. Since a sponsored immigrant cannot agree to support himself or herself, he or she should not complete a Form I-864A. If children are also listed on the Affidavit of Support, and the sponsor intends to rely on the spouse's income to show the ability to support these accompanying family members, then the spouse must complete Form I-864A in order for the sponsor to be able to rely on the spouse's income.

(4) Use of Intending Immigrant's Income. If the sponsor does not meet the income requirement on the basis of his or her own income and/or assets, the sponsor may also count the intending immigrant's income if (1)(a) the intending immigrant is either the sponsor's spouse or (b) has the same principal residence as the sponsor, and (2) the preponderance of the evidence shows that the intending immigrant's income results from the intending immigrant's lawful employment in the United States or from some other lawful source that will continue to be available to the intending immigrant after he or she acquires permanent resident status. The prospect of employment in the United States that has not yet actually begun does not count toward meeting this requirement.

Note: The revised definition of "household income" retains the requirement that, unless the intending immigrant is the sponsor's spouse, the intending immigrant must have the same principal residence as the sponsor in order for the sponsor to rely on the sponsored immigrant's income. It is no longer required, however, that the intending immigrant must have had the same principal residence as the sponsor for at least 6 months.

Note: The interim rule did not directly address the ability of a sponsor to rely on an intending immigrant's income from unauthorized employment in meeting the Poverty Guidelines threshold for the sponsor's household income. In response to a specific comment relating to the issue of the sponsor's reliance on an intending immigrant's income, the revised definition of "household income" now makes it clear that income from an intending immigrant's unauthorized employment may not be considered in determining whether the sponsor's anticipated household income meets the applicable Poverty Guidelines threshold. The basis for this clarification is the clear public policy, as stated in INA §§ 245(c)(2) and 274A, 8 U.S.C. §§ 1255(c)(2) and 1324a, against unauthorized employment. Unauthorized employment, admittedly, is not always a bar to adjustment of status. Nevertheless, sections 212(a)(4)(C) and 213A clearly assume that it is primarily the sponsor himself or herself who must meet the income threshold for the Form I-864. This principle is gravely undermined by permitting the sponsor to rely on the intending immigrant's income, if it is derived from unlawful employment.

If there is an accompanying spouse and/or child listed on the Affidavit of Support, then the sponsored intending immigrant must also complete a Form I-864A. If, however, the sponsored intending immigrant is the only person included on the Affidavit of Support, then he or she does not need to complete a Form I-864A.

(5) Use of Intending Immigrant's Assets. If the sponsor does not meet the income requirement using his or her own income and/or assets, the sponsor may include the net value (the total value of the assets less any offsetting liabilities) of the intending immigrant's assets. The instructions to Part 6 of Form I-864 indicate that the intending immigrant does not need to complete Form I-864A if he or she is using his or her assets to qualify even if he or she has an accompanying spouse and/or children. Instead, the intending immigrant only needs to provide documentation showing the net value of all assets.

The required total net value of assets depends upon the basis upon which the sponsored alien intends to immigrate. For more information, see section (j)(7)(B) below.

(6) Substitute Sponsorship.

(A) For the primary intending immigrant, and accompanying family members.
If the visa petitioner dies **before** USCIS approves the visa petition, the statute does not permit anyone else to file the Form I-864.

If the visa petitioner dies **after** USCIS approves the visa petition, however, P.L. 107-150 provides discretion to permit the beneficiary to immigrate.
Under this provision, it is appropriate for USCIS to reinstate approval of the visa petition if the request to reinstate approval is supported by a properly completed Form I-864 signed by an eligible substitute sponsor (and by a joint sponsor, if necessary). The substitute sponsor must be the sponsored alien's: spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild or legal guardian. For more information regarding P.L. 107-150, see section 21.2(g)(1)(C) of this Field Manual.

Note that the final Affidavit of Support rule includes a special accommodation for the spouse of a citizen, if the citizen spouse has died. If, at the time of the citizen spouse's death, the alien spouse qualifies as a surviving "widow(er)" under section 201(b)(2)(A)(i) of the Act, then 8 CFR 204.1(i)(1)(iv) "converts" the citizen spouse's Form I-130 so that it will be deemed to be a widow(er)'s Form I-360. If the Form I-130 was approved before the citizen spouse died, it will be deemed to be an approved Form I-360. If it was still pending, it can be approved as a Form

I-360. In either case, the alien spouse will no longer need to have a Form I-864, since he or she will be adjusting status as a widow(er).

If the citizen spouse and alien spouse had not been married for at least two years when the citizen spouse died, then this "conversion" option is not available and the alien spouse remains subject to the Affidavit of Support requirements. As with any other Form I-130, if USCIS approved the Form I-130 before the citizen spouse's death, USCIS has discretion to reinstate the approval if there is a qualified substitute sponsor.

(B) For a family member who is following to join the principal sponsored immigrant.

In those cases where the petitioner has died after the principal sponsored alien has obtained permanent resident status but before a dependent following to join under section 203(d) has obtained permanent resident status, another person may file a Form I-864 on behalf of the following-to-join dependent, if that person meets all requirements and files a Form I-864 on behalf of the following-to-join dependent. Under the interim rule (8 CFR 213.2(f)), this sponsor is not required to be someone who would qualify as a substitute sponsor. The sponsor could even be the principal sponsored alien, who, by the time the following-to-join dependent immigrates, would be an alien lawfully admitted for permanent residence.

(7) Joint Sponsor.

(A) Joint Sponsor Needed. If the petitioner or substitute sponsor cannot demonstrate the ability to maintain an income of at least 125% (or 100% when applicable) of the Federal Poverty Guidelines, the intending immigrant may meet the Affidavit of Support requirement by obtaining a joint sponsor who is willing to accept joint and several liability with the principal sponsor as to the obligation to provide support to the sponsored alien and to reimburse agencies who provide means-tested benefits to the sponsored alien during the period that the Affidavit is enforceable. The joint sponsor must demonstrate income or assets that independently meet the requirements to support the sponsored immigrant(s). It is not sufficient for the combination of incomes of the primary sponsor, sponsored immigrant and joint sponsor to meet the threshold.
The regulations at 8 CFR 213a.2(c)(2)(iii)(C) allow, but do not require, two joint sponsors per family unit intending to immigrate based upon the same family petition. No individual may have more than one joint sponsor, but it is not necessary for all family members to have the same joint sponsor.

Each joint sponsor must execute a Form I-864 that is submitted in addition to the Form I-864 submitted by the petitioner or substitute sponsor. A joint sponsor does not have to be related to the petitioning or substitute sponsor, or the sponsored alien. However, a joint sponsor must otherwise meet the same requirements as a petitioning or substitute sponsor. The use of a joint sponsor does not eliminate the requirement that there be a signed Form I-864 from the petitioner or substitute sponsor with his or her most recent Federal tax return (or proof that there was no obligation to file). The petitioner or substitute sponsor, as well as the joint sponsor, has full financial responsibility for immigrant(s) they sponsor. If two joint sponsors are used, each joint sponsor is responsible for supporting only the intending immigrant(s) listed on that joint sponsor's Form I-864.

(B) Joint Sponsor Not Needed. If the petitioning or substitute sponsor meets the income requirements based on his or her own income, there can be no joint sponsor. If any additional Form I-864s from joint sponsors are included in the record, they should be removed from the file and returned to the intending immigrant. It is very important to remove all unneeded Form I-864s from the file so there is no confusion about who is legally responsible for the immigrant and any deeming or enforcement actions.
(e) Sufficiency of Form I-864.

(1) In general. When determining the sufficiency of a Form I-864, USCIS shall first consider the sponsor's anticipated income for the year the sponsor signed Form I-864. Thus, during the initial evidence review, USCIS shall as a general rule determine the sufficiency of a Form I-864 based on the sponsor's reasonably anticipated household income for the year in which the sponsor signed the Form I-864.

IMPORTANT: If the income is at least 125% (or 100% as applicable) of the governing Poverty Guideline in the Form I-864P, Poverty Guidelines, from the year in which the Form I-864 was filed, the Form I-864 is sufficient.

IMPORTANT: An Affidavit of Support must be sufficient both at the time the adjustment of status application is filed and at the time the adjustment application is adjudicated. USCIS has determined that an Affidavit of Support is generally sufficient at the time of the adjudication if it was sufficient at the time it was filed with the Form I-485. That is, if the Form I-864 was sufficient when the sponsored immigrant filed the Form I-864 with the adjustment application, USCIS will generally infer from that finding that the alien is not inadmissible under section 212(a)(4) as of the date of adjudication. *In particular*, if the sponsor's Federal income tax return shows an income that was at least 125% (or 100% as

applicable) of the governing Poverty Guideline for the year the Form I-864 was filed with the sponsored immigrant's adjustment application, USCIS will generally infer that the sponsor's income has remained and will remain sufficient at the time of adjudication.

Therefore, if the Form I-864 was sufficient at the time it was filed with the Form I-485, USCIS should not request any further documentation (e.g., more recent evidence of employment or income) unless more than one year has elapsed since the Form I-864 was submitted and there is a specific reason (other than the passage of time) to question whether the evidence of income is no longer reliable.

Recent practice has been for the Form I-864 to be vetted at the National Benefit Center as part of the process of preparing the Form I-485 for adjudication. If the NBC vetting process indicates that the Form I-864 was sufficient when reviewed, an adjudicator may generally rely on that determination, unless it is determined, on the basis of specific reasons, that a request for evidence is appropriate, as outlined in paragraph 20.5(e)(2).

(2) Requesting updated information. There are two limited, specific situations in which the general rule stated in section 20.5(e)(1) will not apply:

- The first exception applies if both of the following criteria are met:
  - The most recent income tax return, the anticipated household income listed for the year the sponsor signed the Form I-864, and the evidence for the income for the year of filing all show an income that is less than 125% (or 100% as applicable) of the governing Poverty Guideline for the year the Form I-864 was filed, and
  - A joint sponsor has not filed a sufficient Form I-864.
- The second exception applies if at least one year has elapsed since the Form I-864 was submitted, and the facts in the case, as supported by the evidence in the record, provide a specific reason (other than simply the passage of time) to believe that the sponsor's income is no longer sufficient.

If USCIS determines that either of these situations exists, USCIS should issue a request for evidence. However, the request for evidence should only be for the current year's income information, not for additional evidence concerning the year in which the Form I-864 was filed. For example, if the Form I-864 was filed in 2004 with a tax return from 2003 and employment information for 2004, a request for evidence issued after April 15 of any given year would request the tax return for the immediately preceding year (e.g., a 2005 return, if requested in 2006), and employment information for the current year. In this situation, the sufficiency of the

Form I-864 is determined based upon the additional evidence as it relates to the applicable threshold set forth in the Form I-864P in effect when the USCIS issues the request for evidence, rather than the Form I-864P that was in effect when the Form I-864 was signed. USCIS may direct the Form I-485 applicant to submit the additional evidence either by mail or by appearing for a rescheduled interview.

IMPORTANT: USCIS may encounter a case in which the sponsor (i.e., a petitioning sponsor, substitute sponsor, or joint sponsor) neglected to file evidence corroborating the sponsor's claims about his or her employment and anticipated income for the year in which the sponsor signed the Form I-864. Strictly speaking, failure to submit this evidence would be a sufficient reason to issue a request for evidence and to deny the Form I-485 if the requested evidence is not submitted. Before issuing a request for evidence, however, USCIS should consider whether other evidence in the record supports the conclusion that the sponsor's claims on the Form I-864 about the sponsor's current employment and anticipated income are true. Remember, the sponsor's statements about his or her employment and anticipated income are made under penalty of perjury. Thus, these statements on the Form I-864 are themselves evidence.

Other evidence in the record may already tend to corroborate those statements. For example, the sponsor's claims about his or her anticipated income for 2006 may well be consistent with the income tax return for 2005. A request for additional evidence may be appropriate if the evidence of record supports a specific reason (other than the passage of time) to believe the sponsor's claims to be false. But if the other evidence tends to support the conclusion that the sponsor's claims are true, USCIS may decide, as a matter of discretion, that a request for evidence is not necessary.

Note: For most Form I-485s filed before November 23, 2005, the sponsor should have filed the three most recent income tax returns. USCIS may encounter a case in which the sponsor has included the most recent income tax return but not one or both of the two earlier returns. Given the change of policy reflected in the final rule, USCIS is no longer required to request the missing earlier return(s).

Note: USCIS may also decide that a request for evidence is not necessary in a case in which the sponsor filed a photocopy, instead of a transcript, but forgot to submit the Forms W-2 or 1099. A decision not to request additional evidence will be proper if USCIS concludes that the evidence of record, taken as a whole, makes it reasonable to infer that the information on the tax return is true.

(3) No Local Policy Permitted Regarding When Form I-864 Shall be Filed. In the past, USCIS permitted each local office to establish its own policy on whether to require submission of Form I-864 at the time of filing for adjustment or at the time of the adjustment interview. Local offices may no longer do so. Under a policy change that took effect November 23, 2005, USCIS requires all applicants to submit Form

I-864 with their adjustment application. If the case was filed prior to November 23, 2005 at an office that required submission at the time of the adjustment interview, USCIS should allow the applicant to submit Form I-864 and the required supporting documentation at the interview.

(f) Sponsor Use of Benefits. Question 4B of the September 26, 2000 version of the Form I-864 asks if the sponsor or any member of his or her household has used means-tested benefits during the past 3 years. Do not disqualify a sponsor based on a positive response to this question. The reason for this question is to ensure that the value of any such means-tested public benefits is not considered as income on the Affidavit of Support. Federal means-tested benefits currently include SSI (Supplemental Security income), TANF (Temporary Assistance for Needy Families), food stamps, Medicaid, and State Child Health Insurance Programs (SCHIP). State and local means-tested benefits vary by jurisdiction. Earned benefits such as Social Security retirement, Unemployment Compensation, and Workman's Compensation may be included as income.

(g) U.S. Citizen Children. Any U.S. citizen children of the intending immigrant should not be listed in part 3 of the Form I-864. The Affidavit of Support places no obligation on a sponsor or joint sponsor to support any U.S. citizen children of the sponsored immigrant. Such U.S. citizen children should only be included in household size if they are actually resident in the sponsor's or joint sponsor's household or listed as dependents on the sponsor's most recent tax return.

(h) Withdrawal of an affidavit of support or Form I-864A. A person who has signed a Form I-864, I-864EZ or I-864A may withdraw the Form. If the person does so, USCIS will adjudicate the application for adjustment of status as if the withdrawn Form I-864, I-864A or I-864EZ had never been filed. In an adjustment of status case, a withdrawal of the Form I-864, I-864EZ or I-864A is not effective unless it is in writing and USCIS actually receives the withdrawal before the final decision on the adjustment application. In an immigrant visa case, once a consular officer has issued an immigrant visa, no Form I-864, I-864EZ or I-864A may be withdrawn unless the visa petitioner also withdraws the visa petition.

(i) Documentation.

(1) Federal Tax Returns. Each sponsor must submit either a transcript or a copy of his or her most recent US. Federal individual income tax return (Form 1040, 1040A or 1040EZ), including all Schedules filed with the IRS. If the sponsor submits a copy of the tax return, he or she must also include copies of any and all IRS Forms W-2 and 1099 that reflect income used to qualify. The second note under paragraph 20.5(e)(2) provides guidance regarding what to do if a W-2 or 1099 is missing. Note, however, that it is not necessary to submit the Forms W-2 or 1099 if a transcript, rather than a copy, of the tax return is submitted. State or foreign income tax returns are not acceptable; if submitted, they must be returned to the intending immigrant.

The sponsor must submit with the Form I-864 the sponsor's U.S. Federal income tax return for the most recent tax year (that is, the completed tax year immediately preceding the date the sponsor signs the Form I-864). USCIS may generally expect a sponsor, after April 15 of any given year (or April 16 or 17, in a year in which April 15 is on a Saturday or Sunday), to have completed his or her tax return for the previous year. If the sponsor requested an extension, the sponsor should provide proof of filing for the extension. If the sponsor did not file a tax return, the sponsor must prove that he or she was not required to file. If a sponsor should have filed, the sponsor must file retroactively and provide proof of filing. Note that U.S. citizens generally have an obligation to file a tax return on non-U.S. earnings even if there was no tax liability.

EXAMPLE 1: Sponsor signs the Form I-864 on March 1, 2006. The US Federal income tax return for 2005 is not due until April 17, 2006. Therefore, the sponsor must submit his or her 2004 U.S. Federal income tax return.

EXAMPLE 2: Sponsor signs the Form I-864 on May 5, 2006. The sponsor must submit his or her 2005 U.S. Federal income tax return.

EXAMPLE 3: Sponsor signs the Form I-864 on May 5, 2006. However, the sponsor also filed with IRS a Form 4868, obtaining an extension of the 2005 income tax filing deadline. The sponsor must submit his or her 2004 U.S. Federal income tax return.

Note: Typical proof that a sponsor was not required to file a tax return for a particular year would consist of a written statement from the sponsor, signed under penalty of perjury, attesting to the amount of his or her income for the relevant year and to the fact that a tax return was not required by law. USCIS adjudicators handling Form I-864 issues should be aware of the income threshold for the requirement of filing a tax return for the last several years, so that an RFE for evidence of the law is not necessary. In particular, the Instruction booklets for each year's Forms 1040, 1040A, and 1040EZ specify the income threshold below which a person is not required to file a return.

Note: IRS permits and encourages electronic filing of Forms 1040, 1040A and 1040EZ. An electronically filed tax return may also be signed electronically. When a person signs and files the tax return electronically, a "hard copy" of the original tax return will not exist. In this situation, it is acceptable for the person to submit a plain copy printout, showing the tax return as it would have looked, had it been filed on paper, together with the IRS-issued "declaration control number." By signing the Form I-864 or I-864A "under penalty of perjury," the person certifies that the copy is a copy of what was submitted to IRS. As with paper-filed returns, it is also acceptable for the person to submit an IRS transcript of the electronically filed return.

A sponsor may submit an IRS-issued transcript instead of a photocopy of the sponsor's tax return. A sponsor may obtain a transcript by filing IRS Form 4506-T with the IRS. Currently, the IRS does not charge a fee for transcripts. Tax transcripts provide proof that the returns were filed with IRS, are easier to read, take up less room in the file, and are easily obtained. If a sponsor submits a transcript rather than a photocopy of the tax return, it is not necessary for the sponsor to include copies of any Forms W-2 or 1099.

(2) Job Letters and Proof of Income. Pay stub(s) showing income for the most recent 6 months and letters from all current employers are no longer required as initial evidence. The applicant, however, may submit either or both of these items (1) in response to a request for additional evidence (RFE), or (2) with a Form I-864 if the applicant believes doing so would help establish that the sponsor meets the governing income/assets threshold. If submitted, letters from current employers should show dates of employment, the nature of the job, wages or salary earned, number of hours/weeks worked, and prospects for future employment and advancement. It should be sufficient for the employer to say that the employment is of indefinite duration or words of similar effect. Promises of future employment are not required.

(3) Household Members. The sponsor may use the income of any member of his or her own household who is at least 18 years old to help meet the household income requirement. The sponsor and household member must complete Form I-864A, which must include a copy or transcript of the household member's most recent tax return and sufficient documentation of all income and assets he or she lists on the Form I-864A. USCIS shall use the same standards for documentary evidence of income and assets listed on a Form I-864A as are used for documentary evidence of income and assets listed on Form I-864.

(j) Use of Poverty Guidelines. HHS publishes new Poverty Guidelines in the Federal Register each year. These guidelines become effective for USCIS purposes on the first day of the second full month following their release. For example, in 2006, new Poverty Guidelines were published in the Federal Register on January 22 and therefore became effective for USCIS purposes on March 1, 2006. To assist sponsors and intending immigrants, USCIS publishes the governing guideline for the location and size of each household on Form I-864P, Poverty Guidelines. The Poverty Guidelines for each year remain in effect during the next year until the effective date of the new guidelines.

Note: The correct Form I-864P should already be included in the record, since 8 CFR 213a.2(a)(1)(ii) requires the Form I-485 or immigrant applicant to include the current Form I-864P when the applicant submits the application. If the Form I-864P is missing, that fact alone would not warrant a request for evidence, since the USCIS office should maintain past versions of the Form I-864P. When copying a Form I-864P for addition to

the record, please be sure to copy the Form I-864P that was in effect when the Form I-485 was filed, rather than any later version.

Note: If, as specified in paragraph 20.5(e)(2) of this chapter, it is necessary to request additional evidence, the sufficiency of the Form I-864 is determined according to the Poverty Guidelines in effect when the request for evidence is made. Therefore, a copy of the current Form I-864P should be included in the record of proceeding and sent with the request for evidence.

(k) USCIS Review. The following items must be considered by USCIS when reviewing a Form I-864 or Form I-864EZ:

(1) Part 1: Verify That Sponsor Has Checked the Correct Box(es). If Form I-864EZ is being used, then "Yes" must be checked on boxes a, b, and c. If Form I-864 is being used and box "d" has been checked indicating a single joint sponsor, USCIS should ensure that there are two Form I-864s: one from the petitioner and one from the joint sponsor. If Form I-864 is being used and box "e" has been checked indicating two joint sponsors, USCIS should ensure that there are three Form I-864s: one from the petitioner, one from the first joint sponsor, and one from the second joint sponsor.

(2) Parts 2-4 of Form I-864 or Parts 2-3 of Form I-864EZ: Verify These Have Been Completed Correctly. Compare the information provided with information from other documents included in the application and/or verifying data with the sponsored immigrant at the time of the interview.

If the sponsor is using Form I-864, only "accompanying" family members should be listed in the chart in Part 3. Be sure that the first and last name of each accompanying family member is listed. Family members "following to join" (i.e., intending to immigrate more than 6 months after principal intending immigrant) should not be listed in Part 3.

(3) Part 5 of Form I-864 or Part 4 of Form I-864EZ: Sponsor's Household Size. The sponsor's total household size is used to determine the correct Federal Poverty Guideline. For purposes of Form I-864, a household size includes the total of the following groups of individuals:

• Sponsor;

• Person(s) the sponsor is sponsoring on the Affidavit of Support (will always be one if the sponsor is using Form I-864EZ instead of Form I-864);

• Sponsor's spouse, if the sponsor is married;

• All of the sponsor's children, as defined in section 101(b)(1) of the Act, except those that have (1) reached the age of majority (i.e., are at least 18 years old) or are emancipated under the law of the person's domicile, and (2) are not claimed as dependents on the sponsor's most recent Federal income tax return;

• Other persons lawfully claimed as dependents on the sponsor's tax return for the most recent tax year; and

• The number of siblings, parents, and/or adult children who (1) have the same principal residence as the sponsor, and (2) have combined their income with the sponsor's income by submitting Form I-864A.

Note: When calculating household size, do not count any person more than once.

(4) Part 6 of Form I-864 or Part 5 of Form I-864EZ: Sponsor's Income and Employment

(A) General Rule and Active Duty Military Exception. Either the petitioning sponsor, substitute sponsor, or a joint sponsor must generally demonstrate the ability to maintain his or her annual household income at 125% of the governing Federal Poverty Guideline threshold.

A petitioner on active duty in the U.S. Armed Forces, other than for training, only needs to demonstrate the means to maintain an annual income equal to at least 100% of the Federal Poverty Guidelines if he or she is petitioning for a spouse or child.

Note that a substitute sponsor or joint sponsor is not eligible to claim the 100% income level based on the *petitioner's* relationship to the intending immigrant, or the *petitioner's* military status. A substitute sponsor or joint sponsor may claim the 100% income level only if the substitute sponsor or joint sponsor, *himself or herself*, is on active duty in the U.S. Armed Forces (other than for training) and the intending immigrant is the spouse or child of the substitute sponsor or joint sponsor.

To qualify for this exception, the petitioner must have provided evidence that he or she is on active duty, such as a military dependent's identification card for the sponsored intending immigrant (the spouse or child), or a photocopy of the military identification card of the sponsor (the spouse or parent).

Regardless of whether a sponsor qualifies for the military exception, all of his or her income counts toward the 125% (or 100%) income requirement, including (in

the case of Armed Forces personnel) any allotments received for the dependents.

(B) Poverty Guidelines. Form I-864P, Poverty Guidelines, provides the Federal Poverty Guidelines calculated at both the 100% level and 125% level for the 48 contiguous states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands and Guam. Separate guidelines are published for Alaska and Hawaii.

The Form I-864P guidelines are based on household sizes of 2 to 8. A dollar amount is provided to add for each additional household member or dependent. To determine the requirement for a household size of 10, USCIS should take the poverty line for a household size of 8 and add the additional dollar amount multiplied by 2.

Form I-864P is based upon the Federal Poverty Guidelines that the Department of Health and Human Services (HHS) publishes annually in the Federal Register (usually in February or March). (See “Federal Register Publications” under the “Immigration Law and Regulations” button on *I-LINK*). In concert with the Federal Poverty Guidelines, USCIS annually updates Form I-864P, Poverty Guidelines. USCIS begins to apply the updated Form I-864P guidelines to adjustment of status applications received on the first day of the second month after the HHS guidelines are published.

(C) Determining the Sponsor’s Ability to Provide Sufficient Support. If the sponsor is using Form I-864EZ, he or she must only use his or her salary or pension as shown on his or her most recent Federal income tax return. If the sponsor provides a photocopy of the return, the sponsor must include a copy of any Form(s) W-2 provided by the sponsor’s employer(s) to prove income from employment and/or Form(s) 1099 to show pension income; if a W-2 or 1099 is missing, follow the guidance in the second note under paragraph 20.5(e)(2). As with other sponsors, these copies are not needed if the sponsor provides an IRS transcript of the return. (See Part 1(a) of Form I-864EZ.) If sponsor relies on other types of income, the sponsor must use Form I-864. The sponsor must also use Form I-864, rather than Form I-864EZ, if the sponsor will be submitting any Forms I-864A.

Regardless of the form the sponsor uses, he or she must provide evidence of any income (and/or assets in the case of Form I-864) used to demonstrate the means to maintain the sponsored immigrant.

Sponsors who use Form I-864 may qualify based only upon their own income and/or assets if either or both are sufficient to reach the income requirement. If, however, the sponsor’s combined income and assets are not sufficient to meet

the governing threshold, the sponsor may include the income and/or assets of another household member if the household member:

• Is at least 18 years old;

• Is included in the calculation of household size;

• Has the same principal residence as the sponsor (or is the sponsor's spouse); and

• Has completed and signed a Form I-864A.
USCIS should ensure that each Form I-864A is completed and signed by the sponsor and the household member.

As noted above, the intending immigrant does not need to sign a Form I-864A if he or she is immigrating alone (that is, has no accompanying dependents). In this situation, the intending immigrant should be listed on line 24(e) and should be the only person listed in 24(b), with his or her income listed on that line and value of assets listed on the appropriate line(s) in item 28.

(D) Federal Tax Return(s). No matter whether a sponsor submits Form I-864 or I-864EZ, the sponsor must provide a copy or an IRS-generated transcript of the sponsor's Federal income tax return for the sponsor's most recent tax year. Each Federal tax return must include all the supplements and attachments that were sent to the IRS with the tax return. For purposes of demonstrating means to maintain income, the determining income amount is the income, before deductions, on the sponsor's income tax return. In other words, income means an individual's total income (adjusted gross income for those who file IRS Form 1040EZ) for purposes of the individual's U.S. Federal income tax liability, including a joint income tax return (e.g., line 22 on the 2005 IRS Form 1040, line 15 on the 2005 IRS Form 1040-A, or line 4 on the 2005 IRS Form 1040EZ or the corresponding line on any future revision of these IRS Forms).

Note that, by signing the Form I-864 or Form I-864EZ under penalty of perjury, a sponsor certifies that the transcript or photocopy is true and correct. This certification meets the statutory requirement of presenting a "certified" copy of the transcript of photocopy. Certification of the returns by the IRS is not necessary; the sponsor's certification under penalty of perjury is sufficient.

If a sponsor filed a joint tax return with a spouse, but is qualifying using only his/her own individual income, the sponsor must submit evidence of that individual income. This evidence would include, for example, the sponsor's own W-2(s), Wage and Tax Statement, and if necessary to reach the income

requirement, evidence of other income reported to IRS which can be attributed to him/her, usually on Forms 1099.

(E) Other Evidence of Income. For purposes of demonstrating means to maintain income, the total income, before deductions, in the sponsor's tax return for the most recent taxable year will be generally determinative. There is no requirement to determine whether the sponsor would have met 125% (or 100%) of the governing Poverty Guideline before the most recent tax year. Income tax information from these years should only be used to take the earning trend into consideration when assessing current and future earning capability. USCIS, however, may consider other evidence of income (e.g., pay stub(s), employer letter(s), or both), if (1) the sponsor establishes that he/she was not legally obligated to file a Federal income tax return for the most recent tax year, or (2) USCIS determines that the income listed on the Federal tax return for the sponsor's most recent tax year does not meet the governing threshold.

In other words, if the sponsor's current income is sufficient, it can establish that the Form I-864 itself is sufficient even if the tax return without any other documentation might warrant a finding that it is not sufficient. For example, if the sponsor recently started a new job (that USCIS is satisfied will likely continue) and the income from the job now meets or exceeds the legal requirement, USCIS may find the Affidavit of Support to be sufficient, notwithstanding information included in the transcript or copy of the tax return(s).

By contrast, 8 CFR 213a.2(c)(2)(ii)(C) permits USCIS to conclude that a Form I-864 is not sufficient, even if the sponsor's household income meets the Poverty Guideline threshold. USCIS should make this conclusion only if the evidence of record makes it "reasonable to infer that the sponsor will not be able to maintain his or her household income at a level sufficient to meet his or her support obligation." For example, if the sponsor's income is from a job that is merely temporary or seasonal, USCIS might reasonably conclude that the income is likely not to continue, and could also conclude that the Affidavit of Support, for that reason, is not sufficient.

If the household income meets the Poverty Guidelines threshold, however, USCIS will generally conclude that the Form I-864 is sufficient. There must be some specific reason, supported by evidence in the record, to conclude that the Form I-864 is not sufficient.

(F) Means-Tested Public Benefits Received by the Sponsor. USCIS has decided that, as a matter of policy, it will require the sponsor to disclose his or her receipt of means-tested public benefits and not consider the fact that a sponsor has received such means-tested public benefits in the past to be an adverse factor in evaluating a Form I-864 or Form I-864EZ. However, the

sponsor may not include any means-tested benefits currently being received in calculating the household income.

(G) Compare Total Household Income with Governing Poverty Guideline. If the sponsor's total household income (line 24c of Form I-864 or line 18 of Form I-864EZ) is greater than or equal to the governing Poverty Guideline threshold, the sponsor does not need to show evidence of assets and does not require a joint sponsor. In this case, USCIS may move to Part 8 of Form I-864 or Part 6 of Form I-864EZ.

If a Form I-864EZ does not demonstrate means to maintain the required income, USCIS may choose to request that the adjustment of status applicant submit a new Form I-864 from the sponsor (if the applicant seeks to qualify based on showing "significant assets"), or to submit a sufficient Form I-864 from a joint sponsor. Note that this request for evidence would go to the applicant, not the sponsor.

If a Form I-864 does not demonstrate means to maintain the required income, USCIS should consider the assets listed in Part 7 of the form.

(5) Part 7 of Form I-864: Use of Assets to Supplement Sponsor's Income. If a sponsor cannot meet the Poverty Guideline requirement based upon total household income listed on line 24c, he or she may show evidence of assets owned by the sponsor, and/or members of the sponsor's household, that are available to support the sponsored immigrant(s) and can be readily converted into cash within 1 year.

For assets of the intending immigrant and/or household member to be considered, the household member must complete and sign Form I-864A. USCIS should check to make sure that the Form I-864A is completed and signed by the sponsor and the household member.

(A) Evidence of assets. Evidence of the sponsor's assets should be attached to the Form I-864. Evidence of the principal sponsored immigrant's and/or household member assets should be attached to Form I-864A. In each instance, the evidence should establish the location, ownership, and value of each listed asset, including any liens or liabilities for each listed asset. Evidence of assets includes, but is not limited to:

• Bank statements covering the last 12 months, or a statement from an officer of the bank or other financial institution in which the sponsor has deposits, including deposit/withdrawal history for the last 12 months, and current balance;

• Evidence of ownership and value of stocks, bonds, and certificates of deposit,

and dates acquired;

• Evidence of ownership and value of other personal property and dates acquired; and

• Evidence of ownership and value of any real estate and dates acquired.

(B) Amount of assets required. In order to qualify using assets, the total net value of all assets must generally equal at least five times the difference between the sponsor's total household income and the minimum income requirement for the current year.

Example for a household size of 4:
125 percent of 2006 Poverty Guideline $25,000
Sponsor's income $19,500
Difference $5,500
Multiply by 5 x 5
Minimum Required Net Value of Assets $27,500

There are two exceptions, however:
• If the adjustment of status applicant intends to immigrate as a spouse of a U.S. citizen or as the child of a U.S. citizen who will not become a citizen under section 320 of the Act because the child has already reached his or her 18th birthday, the "significant assets" requirement will be satisfied if the assets equal three times, rather than five times, the difference between the applicable income threshold and the actual household income.

Example for a household size of 4:
125 percent of 2006 Poverty Guideline $25,000
Sponsor's income $19,500
Difference $5,500
Multiply by 3 x 3
Minimum Required Net Value of Assets $16,500

• If the adjustment of status applicant intends to immigrate as an IR-4 immigrant (orphans coming to the United States for adoption), the parents' assets only need to equal or exceed the difference between the applicable income threshold and the actual household income.

Example for a household size of 4:
125 percent of 2006 Poverty Guideline $25,000
Sponsor's income $19,500

Difference (Minimum Required Net Value of Assets) $5,500

(6) Joint Sponsors. If the petitioner or substitute sponsor cannot demonstrate ability to maintain a household income of at least 125% (or 100% when applicable) of the Federal Poverty Guidelines, the intending immigrant may meet the Affidavit of Support requirement by obtaining a joint sponsor who is willing to accept joint and several liability with the principal sponsor as to the obligation to provide support to the sponsored alien and to reimburse agencies who provide means-tested benefits to the sponsored alien during the period that the Affidavit is enforceable. The regulations at 8 CFR 213a.2(c)(2)(iii)(C) allow but do not require two joint sponsors per family unit intending to immigrate based upon the same family petition. Further guidance regarding joint sponsors may be found at paragraph (d)(7) above.

(7) Part 8 of Form I-864 or Part 6 of Form I-864EZ. Part 8 of Form I-864 or Part 6 of Form I-864EZ constitute the bulk of the contract and covers the purpose of the Affidavit of Support, which is to overcome the public charge grounds of inadmissibility. It also includes the notice of change of address requirements (the sponsor must notify the Secretary of Homeland Security of the sponsor's new address within 30 days of any change of address by filing Form I-865 with USCIS), means-tested benefit prohibitions and exceptions, consideration of the sponsor's income in determining eligibility for benefits and the civil action to enforce the Affidavit. Additionally, it requires a certification under penalty of perjury that the sponsor is aware of the legal ramifications of being a sponsor under section 213A of the Act.
After placing the sponsor under oath, USCIS should verify that the portion under "Concluding Provisions" has been completed.

Once signed, the concluding provisions satisfy the statutory requirement that the sponsor must make a written statement under penalty of perjury indicating that the copies of the Federal income tax returns submitted with the Affidavit of Support are true copies of the returns filed with the Internal Revenue Service.

A photocopy of the signed Form I-864 may be submitted for each spouse and/or child of the principal beneficiary of the adjustment of status application. Copies of supporting documentation are not required.

(8) USCIS Completion of "Agency Use Only" Box. In adjustment cases adjudicated by USCIS, USCIS must complete the "Agency Use Only" box on the first page of the Form I-864 or Form I-864EZ. If the petitioner sponsor does *not* qualify, USCIS should check the box "Does not meet." In order for the applicant to be approved, there must be in the file another Form I-864 that meets the requirements from a joint sponsor. In such a case, USCIS must check the "Meets" box, and then sign, date, and note the office code for location.

In cases adjudicated by an immigration judge where the judge did not complete the Agency Use Only box, USCIS will complete the processing of the case after the judge's decision by completing the box on the USCIS copy of the Form I-864 by checking either the "Meets" or the "Does not meet" box. USCIS must then add a notation, "Adjustment application approved (or denied) by U.S. Immigration Court at (place) on (date)." USCIS will then sign, date, and note the office code for location.

(9) Verification of Information. The Government may pursue verification of any information provided on or with Form I-864, I-864EZ, I-864A (e.g., employment, income, and/or assets) with the employer, financial or other institutions, the Internal Revenue Service, or the Social Security Administration.

If USCIS finds that a sponsor, joint sponsor, or household member has concealed or misrepresented material facts concerning income, household size, or any other material fact, USCIS shall conclude that the Affidavit of Support is not sufficient to establish that the sponsored immigrant is not likely to become a public charge. In this situation, the sponsor or joint sponsor may be liable for criminal prosecution under the general statutes relating to the submission of fraudulent immigration documents. Failure of the sponsor or joint sponsor to provide adequate evidence of income and/or assets will result in the denial of the application for adjustment to lawful permanent residence status.

(l) Insufficient Affidavits Submitted in Support of Adjustment Applications. The Affidavit of Support is not a separate application. It is supporting documentation for an adjustment of status application. Correspondence regarding insufficient Affidavits of Support should be sent to the adjustment applicant and his/her legal representative, but not to the sponsor. If the Form I-864 or I-864EZ is insufficient, and procedures for requesting additional evidence have been exhausted, the entire adjustment of status application should be denied because the intending immigrant is inadmissible on public charge grounds in addition to any other reasons why the adjustment case may be denied.

The following language should be included in a denial letter of an adjustment of status application which does not fulfill the requirements under section 213A of the Act:

You are not eligible for adjustment of status under INA 245 (a)(2), because you are inadmissible as an alien who is likely at any time to become a public charge pursuant to INA 212(a)(4)(C). 8 USC 1182(a)(4)(A) and 1255(a)(2). If you are an alien seeking adjustment of status as (insert appropriate category: an immediate relative, a family based immigrant, or an employment based immigrant who will be employed by a relative or a relative's firm) you are inadmissible under this

ground unless an Affidavit of Support that meets the requirements of INA 213A, 8 U.S.C. 1183a, has been filed on your behalf. The Affidavit(s) of Support provided in your case does not meet the requirements of section 213A because (insert appropriate language/deficiency; e.g. failure to meet the income requirement, ineligible sponsor, etc.)

Note: This language must be modified in order to address the specifics of each case, including any other reasons for denial. If the applicant is denied due to an ineligible sponsor, be sure to include the reason why the sponsor is ineligible, e.g., the sponsor cannot be a corporation, organization, or other entity, the sponsor is not at least 18 years of age, etc. Details regarding the sponsor's personal financial matters should not be revealed in the denial letter to the adjustment applicant unless the denial is based at least partially upon such information.

(m) Service Center Processing. The processing of the packet of forms which subsequently produce an alien registration card (I-181, I-485 or OS-155A) includes data entry of Affidavits of Support when they are required by statute.

If an applicant fails to submit an Affidavit of Support when one is required, USICS will request that an Affidavit of Support be submitted before the case can be adjudicated. In those instances where one or more Affidavits of Support are contained in the packets, data from each of them will be entered into CLAIMS as a subscreen of the I-485 or visa to which it is attached. .

The types of data entry at the Service Centers will be:

• Forms I-864 attached to a Form OS-155A, immigrant visa received from Ports of Entry;

• Forms I-864 attached to a Form I-485 filed and adjudicated at the Service Center; or

• Forms I-864 attached to Form I-485 filed and/or adjudicated at local offices. The data entry

in most of these cases will be attached to the data entry of a "copy 3" of Form I-181. All Forms I-864 will be maintained in the same A or T File in which the controlling form is stored. There is no data entry of information from Form I-864A.

(n) Statistical Reporting. Effective October 1, 2005, hours and actions are tracked on Form G-23.3, Line 171S. Reporting Instructions are provided in the document entitled, "Examinations Activity: G-22.2, G-22.2a, G-22.3, G-22.3a Adjudications Summary Procedures." These procedures implement Administrative Manual (AM) Policy Statement 3.1.101.

(o) Termination of Sponsor's Obligation and Enforcement. The obligations created under Form I-864 and I-864A terminate when the sponsored alien:

• Becomes naturalized;

• Is credited with at least 40 quarters of employment in the Social Security system;

• Loses or abandons his or her lawful permanent resident status; or

• Dies.

Note: For any qualifying quarter to be creditable for any period beginning on or after December 31, 1996, the alien must not have received any Federal means-tested public benefit during that quarter. A Federal means-tested public benefit is any public benefit funded in whole or in part by funds provided by the Federal Government that the Federal agency administering the Federal funds defines as a Federal means-tested public benefit under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104-193). Federal means tested benefits include: SSI (Supplemental Security income), TANF (Temporary Assistance for Needy Families), food stamps, Medicaid, and State Child Health Insurance Programs (SCHIP). State and local means tested benefits vary by jurisdiction.

Note: The qualifying quarters worked by a parent of, or the spouse of such alien during the marriage to the alien may often be credited to the alien beneficiary.
If the sponsored immigrant is the sponsor's child, the legal obligation made in the Affidavit of Support is not terminated by the child's adoption after acquiring permanent residence.
If the sponsored immigrant is the sponsor's spouse, divorce will not terminate the legal obligation made in the Affidavit of Support.

Even when the support obligation has been terminated, the sponsor, or the sponsor's estate may still be held liable for any reimbursable amount that accrued before the termination of the obligation.

(p) Reimbursement Requests. USCIS is not directly involved in enforcing an Affidavit of Support sponsor's obligation to reimburse an agency for means tested public benefits. USCIS does, however, make information about the sponsor available to an agency seeking reimbursement. Upon the receipt of a duly issued subpoena, USCIS will provide the agency with a certified copy of a sponsor's Form I-864.
In addition, USCIS routinely provides the sponsor's name, address, and Social Security number to Federal, state, and local agencies providing means-tested benefits. This information is used to determine whether a sponsored immigrant who is applying for benefits is eligible for them. These queries are submitted to USCIS on Forms G-845, G-845S, and the G-845 Supplement.

(q) Sponsor's Address Change Notification. Under section 213A(d) of the Act, the sponsor must notify the Secretary of Homeland Security of the sponsor's new address within 30 days of any change of address. The sponsor meets this obligation by completing and filing Form I-865 with USCIS. USCIS is obligated by statute to maintain the address and social security number of all sponsors in an automated system.

If a sponsor fails to satisfy this requirement, USCIS may, after notice and opportunity to be heard, impose on the sponsor a civil penalty of not less than $250 or more than $2,000, or if such failure occurs with knowledge that the sponsored alien has received any means-tested public benefits (other than benefits described in 401(b), 403(c)(2), or 411(b) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) not less than $2,000 or more than $5,000.

2. The *AFM* **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD 06-20 June 27, 2006	Chapter 20.5	This memorandum replaces Chapter 20.5 of the *Adjudicator's Field Manua* (*AFM*) with a revised Chapter 20.5.