Can an Affidavit of Support be Withdrawn?

In the case of an application for adjustment of status, a sponsor may withdraw the affidavit of support at any time before the Immigration Officer or Immigration Judge grants the application for adjustment of status. This is the same time at which the affidavit of support becomes enforceable. In the case of an individual applying for an immigrant visa at a consulate abroad, the affidavit of support may be withdrawn at any time before the Officer issues the immigrant visa. However, the affidavit only becomes enforceable at the time the sponsored immigrant is admitted to the U.S. as a permanent resident. [8 CFR 213.2(f) and 8 CFR 213a.2(e)(1).]

Even if the affidavit of support is not withdrawn, it is possible that a joint sponsor or household member will not be bound by the terms of the affidavit of support if the adjudicating officer or Judge makes a specific finding that the petitioner/sponsor or a substitute sponsor has sufficient income and/or assets to meet the affidavit of support obligation without the additional affidavit. [8 CFR 213a.2(e)(1).] Therefore, in cases in which the petitioner/sponsor appears to have sufficient income/assets to meet the burden, but an affidavit of support has also been submitted from a joint sponsor or household member, the practitioner should request that the officer make a finding on this issue. It is unclear that the officer will comply with this request but it is worth trying.

If the I-130 petitioner (or substitute petitioner) or the relative who owns a substantial interest in the I-140 petitioning entity withdraws his or her affidavit of support, the foreign national’s application for residence will be denied because these individuals are required to submit the form I-864 affidavit of support. [8 CFR 213a.2(b)(2).] However, if a joint sponsor withdraws his or her I-864 before the visa is granted or the application for adjustment of status is granted, an I-864 from a new joint sponsor may be submitted for consideration. A withdrawal of an affidavit of support must be made in writing.[8 CFR 213a.2(f)(1).]

Practice Pointer: If prior to the interview you learn that the financial situation of a joint sponsor has changed such that he or she is no longer able to meet the affidavit of support obligations, it is best to advise your client to obtain a new joint affidavit and the previously submitted affidavit should be withdrawn. If, on the other hand, the principal sponsor’s situation improves by the time of the interview and the joint sponsor is no longer required, additional evidence should be brought to the interview and the joint sponsor’s affidavit may be withdrawn. It is important that you make a case by case determination in such situations as the withdrawal of the joint sponsor’s and/or family member’s affidavit will free him or her from the obligations under the I-864 but will leave the principal sponsor with sole responsibility for fulfilling the obligations thereunder. In many cases this will be acceptable to all parties. However, the consequences of such a withdrawal should be carefully explained. In cases in which it appears that there may be a conflict of interest, the parties should be advised to seek advice from separate counsel.

Will the Affidavit of Support be Enforced?

The legal obligations incurred by signing the affidavit of support remain in effect until the foreign national is naturalized; has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act or can be credited with such qualifying quarters; ceases to hold the status of an alien lawfully admitted for permanent
residence and departs the United States; obtains a new grant of adjustment of status as relief from removal in a removal proceeding; or he dies. [8 CFR 213a.2(e).]

The I-864 Affidavit of Support is enforceable by the federal government, any state government or subdivision thereof, by any private entity that provides any means-tested benefits and by the beneficiary of the affidavit of support. [INA §213A(a)(1)(B).] It is not directly enforced by USCIS. In signing the I-824, the sponsor agrees to submit to the jurisdiction of any federal or state court in which an action is brought to enforce the affidavit. [INA §213(A)(1)(C).]

If an agency wishes to seek reimbursement for means tested benefits, it must first send the sponsor a request for reimbursement which contains an itemized statement supporting the claim for reimbursement. If reimbursement is not made within 45 days, the agency may institute legal action against the sponsor in civil court. [8 CFR 213a.4(a)(1).] To the authors’ knowledge, to date this provision of the law has not been actively enforced partially due to the fact that permanent residents are ineligible for means tested benefits for five years after becoming permanent residents. Also, the states haven’t established procedures for seeking reimbursement. Nonetheless, it should be noted that the regulations don’t list a cap on the amount to be reimbursed. Does this mean that an individual signing the I-864 is responsible for a potentially much higher reimbursement than 125% of the poverty guidelines? This appears inconsistent with the sponsor’s income requirements and would undoubtedly result in lawsuits.

The area in which enforcement of affidavits of supports has gained traction is in the area of divorce. Many courts have determined that the sponsored immigrant is entitled to 125% of the federal poverty guidelines from the sponsor ex-spouse. Most courts have held that the sponsor is obligated to make monthly support payments in the amount of the 125% of the poverty guidelines for a family of two less the amount earned by the immigrant. Some courts have even held that the sponsored immigrant does not have an obligation to seek employment or to otherwise mitigate the sponsor’s obligation. [See, Moody v. Sorokina, 830 NYS 2d 399 (NY App Div 2007); Yoonis v. Farouqui, 597 FSupp 2d 552 (D MD 2009); Naik v. Naik, 399 NJ Super 390, 944 A2d 713 (App. Div NJ 2008); and Love v. Love, 2011 PA Super 268 (12/14/2011).] Interestingly, none of these cases discuss the effect of the sponsored immigrant’s subsequent remarriage on the affidavit of support obligation. While the immigration regulations do not discuss the sponsored immigrant’s remarriage as a terminating event of the affidavit of support obligations, the continued enforcement of the affidavit of support in this situation would be contrary to traditional U.S. matrimonial law.

Practice Pointer: When preparing an affidavit of support in a marriage case, the fact that it remains enforceable after divorce should be explained to the clients, no matter how uncomfortable this may be. In the event the parties do divorce and the affidavit of support becomes relevant, it is best if you don’t provide any further advice to either party regarding its enforceability. Rather, you should advise both parties to seek other counsel as this is a definite conflict of interest.

What if the Petitioner Lives Abroad?

One of the requirements for an I-864 sponsor is that he be domiciled in the U.S. One may be considered domiciled in the U.S. if he lives abroad temporarily, if he is a permanent resident who has traveled abroad after having filed an application to preserve his residence or a citizen who lives abroad and is engaged in the type of employment that would qualify under Section 319(b)(1) of the Act. [8 CFR 213a.2(c)(1)(ii)(A).] Additionally, the sponsor may meet the domicile requirement if he proves by a preponderance of the evidence that he will establish a domicile in the U.S. on or before the date the sponsored immigrant is admitted to the U.S. or has his status adjusted.

Practice Pointer: Sponsors living abroad should be advised to present clear evidence of their intention to live in the U.S. such as offers of employment, proof of renting or buying a home, establishing a bank account, etc.
It should be remembered that, when completing the I-864, the sponsor must provide his adjusted gross income, as stated on his federal income tax return, for the previous three years. He must also present a copy of his most recent federal tax return. The regulations provide that an affidavit of support will not be considered to satisfy the requirements of Section 213A of the INA unless the sponsor has filed a tax return for the year for which a copy must be submitted unless the sponsor can demonstrate by a preponderance of the evidence that he was not required to file the tax return. This is so despite the fact that the sponsor is able to demonstrate sufficient income to meet the required financial obligations. [8 CFR 213a.2(c)(2)(i)(D).] There are many U.S. citizens living abroad, especially those who have never lived in the U.S., for whom this may pose a problem as they may not even be aware of their U.S. tax obligations.

In fact, U.S. citizens residing abroad are subject to the same income tax filing requirements that apply to U.S. citizens living in the United States. All U.S. citizens must file a federal individual income tax return each year, on their worldwide income, if their gross income from all sources meets the minimum amounts required for filing. There are certain exceptions and tax credits for citizens living abroad as well as treaties with specific countries which limit tax liability on money earned abroad. However, these provisions do not eliminate the requirement to file the tax return. While clients may be willing to file tax returns for the relevant years, they should be reminded that the filing of the return may alert the IRS to the fact that they have not previously filed returns. On a brighter note, it seems the IRS acknowledges that such individuals may not be aware of their filing obligations and has issued a fact sheet entitled “Information for U.S. Citizens or Dual Citizens Residing Outside the U.S. which can be found on the IRS website at http://www.irs.gov/newsroom/article/0,,id=250788,00.html. Among other details, the fact sheet mentions that individuals in this situation will generally only be required to file returns for six years. Further, it mentions that penalties will not always be imposed if it can be shown that the failure to file was due to reasonable cause and not willful neglect.

Practice Pointer: Before contacting the IRS, sponsors living abroad, who have not filed U.S. tax returns should be advised to consult with an accountant familiar with tax filings for individuals residing abroad.