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Immigration: The New Affidavit of Support—Questions, Answers, and Issues

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Summary

The Immigration and Naturalization Service (INS) has issued the new affidavit of support form required by 1996 immigration and welfare legislation. This is a legally binding contract with new income and reimbursement requirements to be signed by U.S. sponsors of immigrants. Its purpose is to satisfy the immigration law requirement that immigrants establish they are not likely to become a public charge; and to make sponsors financially responsible for sponsored immigrants. It must be used by immigrants applying for immigrant status on the basis of a family relationship beginning December 19, 1997.¹

Questions and Answers

1. Are affidavits of support a new requirement?

They are a new *statutory* requirement. Their administrative use dates back to the 1930s when they started being required by the State Department and INS as one way of meeting the public charge requirement. This practice had no specific basis in statute or regulation. Court decisions beginning in the 1950s held that the administratively required affidavits of support were not legally binding on the sponsors.

2. What are the principal differences between the new statutory affidavit of support and the previous administrative one?

There are four major differences, discussed in more detail below: (1) all family immigrants must have sponsors who sign the new affidavit of support, whereas previously, the affidavit of support was one option for meeting the public charge requirement; (2) sponsors must satisfy income and other mandatory requirements that did not exist before;

¹The regulations accompanying this form are published as an interim rule, effective December 19 with a comment period through February 17 (*Fed. Reg.*, October 20, 1997, pp. 54346-54356). They implement Section 213A of the Immigration and Nationality Act (INA) as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(3) the new affidavit of support is a legally binding contract between the sponsor and the U.S. government, which the previous affidavit was not; and (4) the new affidavits are in effect until the immigrant either naturalizes or meets the 40 quarter work test (approximately 10 years; see #8). Under prior law, the sponsor's responsibilities usually lasted for 3 years after the immigrant entered the U.S.

3. Who is required to have an affidavit of support?

Beginning December 19, 1997, the following applicants for immigrant status must include the new affidavit of support (INS Form I-864) as part of their application:

- Immediate relatives of U.S. citizens (i.e., spouses, unmarried children under age 21, and parents of U.S. citizens who are at least age 21);
- Family preference immigrants (i.e., unmarried and married adult children of U.S. citizens, siblings of adult U.S. citizens; and spouses and unmarried minor and adult children of immigrants);
- Employment-based preference immigrants who are being petitioned for by a relative or by companies of which relatives own more than 5% ("relative" is defined by the regulations to include spouse, minor or adult child, or sibling).

4. May the new affidavit of support be used to meet the public charge requirement by other categories of immigrants?

No. There are now two different INS affidavit of support forms, the new I-864 and the old Form I-134, "Affidavit of Support (other than INA Section 213A)." According to INS, the new affidavit of support is to be used only for the immigrant categories enumerated above (see #3). Other categories of aliens (e.g. diversity immigrants, some nonimmigrants and parolees) needing affidavits to satisfy the public charge requirement must use Form I-134. According to the interim regulations, these aliens and their sponsors are not bound by the obligations of the new affidavit of support.

5. What are the requirement for sponsors who sign the new affidavits of support?

The INA sets forth a series of requirements people must meet in order to be eligible to sponsor immigrants. A sponsor must:

- Be at least 18 years of age;
- Live in the United States or a U.S. territory or possession;
- Be citizen or alien lawfully admitted for permanent residence;
- Be the petitioner for the immigrant on the basis of family relationship or, in the case of employment-based immigrants, be related to the immigrant and own at least 5% of the petitioning company;
- Demonstrate the ability to maintain an annual income of at least 125% of the federal poverty line (100% for sponsors who are on active duty in U.S. Armed Forces), or share liability with a joint sponsor who meets the income requirement.

6. How does INS determine if the sponsor (or joint sponsor) meets the required income level?

According to INS regulations, the income of the sponsor's household relative to the poverty level determines whether the sponsor meets the income requirement. The "household" consists of family, dependents and the sponsored immigrant. The federal poverty level is calculated on the basis of household size, and is published annually by the Department of Health and Human Services in the *Federal Register*. Using the most recent poverty level (published on March 10, 1997), an income of \$20,062 is required to support a family of four at 125% of the current poverty level.

The sponsor can establish the ability to satisfy the income requirement:

- By submitting, with the Form I-864, federal income tax returns for each of the 3 most recent taxable years, if the sponsor has a legal duty to file; or
- By submitting, with the Form I-864, federal income tax returns for each of the 3 most recent taxable years, of other household members who have agreed to assist the sponsor in supporting the sponsored immigrants and who have signed a written contract with the sponsor on Form I-864A; or
- By demonstrating "significant assets" such as savings accounts, stocks, bonds, certificates of deposit, or real estate.

7. What is the role of a joint sponsor(s)?

If the sponsor does not have adequate income or significant assets to meet the income test, the sponsor may secure the assistance of a joint sponsor who meets the requirements for sponsorship (other than being the petitioner—see #5). The joint sponsor must demonstrate sufficient income or assets to maintain an annual income of at least 125% of the federal poverty line, independent of the sponsor's income and assets. A joint sponsor must submit a separate Form I-864, and is jointly and separately liable for the immigrant. More than one joint sponsor is permissible, but all must meet the financial requirements.

8. What responsibilities do sponsors assume for sponsored immigrants, and how long do these responsibilities last?

Sponsors are required to maintain the income of the sponsored immigrant at a level at least 125% of the federal poverty line. Sponsors must reimburse federal, state, or local agencies for designated public means-tested benefits which the sponsored immigrant receives. These obligations last until the sponsored immigrant either (a) naturalizes or (b) meets the 10-year work requirement: i.e., work covered by Social Security performed by the immigrant, the immigrant's spouse, or the immigrant's parents when the immigrant was under 18. During this time period, sponsors are required to report changes of address to INS, and subject to civil fines if they fail to do so.

9. How is the affidavit of support enforced?

The affidavit of support is a legally binding contract, and the sponsored immigrant and any public agencies dispensing means-tested benefits to the immigrant can sue the sponsor for failure to meet the obligations assumed under it. Forms I-864A signed by household members are also legally enforceable contracts, and sponsors can sue to enforce

those contracts. Upon notification that a sponsored alien has received designated means-tested benefits, the federal, state, or local entity which has provided the benefit must request reimbursement by the sponsor for an amount equal to the cost of the benefit. If the sponsor does not respond to the request in 45 days, the agency may sue the sponsor in a federal or state court. There is a 10-year limit on actions to obtain reimbursement.

10. What is sponsor-to-alien deeming?

Under the so-called “deeming” provision, the income and assets of the sponsor (and spouse) are assumed (or “deemed”) to be available to the immigrant in order to determine whether the immigrant meets the financial eligibility test for means-tested benefits. Deeming remains in effect during the period sponsors are responsible for sponsored immigrants (see #8). Deeming is mandatory for federal mean-tested benefits, and authorized but not required for state and local means-tested programs.

11. What federal means-tested benefits are sponsored immigrants ineligible to receive (and sponsors liable for reimbursement), and how is this determined?

The term “means-tested public benefit” is not statutorily defined. INS interim regulations rely on each federal agency to determine which of its programs is means tested. To date, only the Department of Health and Human Services (HHS) and the Social Security Administration (SSA) have issued such determinations. Three programs have been determined to be—quoting from the supplementary information accompanying the INS regulation—“Federal means-tested public benefits’ paid by that agency which are not otherwise exempted from reimbursement and relevant provisions” of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). These are Temporary Assistance for Needy Families (TANF) and Medicaid (both HHS), and Supplemental Security Income (SSI) for the Aged, Blind, and Disabled (SSA).

Since immigrants, sponsored or otherwise, are statutorily barred from SSI (with a few limited exceptions), only Medicaid and TANF are generally covered under affidavits of support. Both are state option programs. That is, qualified aliens entering after August 22, 1996 are barred from participation for 5 years after entry. For each program, states then have the option of continuing to bar all immigrants, or of allowing all immigrants to participate. Sponsored immigrants will be subject to deeming.

The following programs are exempted by statute from sponsor-to-alien deeming as means-tested programs: emergency Medicaid; short-term, non-cash emergency assistance; services provided under the National School Lunch and Child Nutrition Acts; immunizations and testing and treatment for communicable diseases; community programs necessary for life or safety; student assistance under the Higher Education, Elementary and Secondary Education, and Public Health Service Acts; certain foster care and adoption assistance; Head Start; and Job Training Partnership Act programs. (For more information, see *Alien Eligibility for Public Assistance*, CRS Report 96-617.)

12. Who determines what state and local programs are means-tested? Can states sue sponsors for reimbursement if they choose not to apply the deeming rules?

A “State mean-tested public benefit” is defined by the INS regulations as “any public benefit for which no Federal funds are provided that a State, State agency, or political

subdivision of a State has determined to be a means-tested public benefit.” Accordingly, states are allowed to make their own determinations, with exceptions prescribed by the welfare law.² A state may sue sponsors for reimbursement of means-tested benefits received by sponsored immigrants regardless of whether the state has opted to deem sponsors’ income available to the sponsored immigrants.

13. Are there any exemptions from deeming for sponsored immigrants?

Yes. There is an indigence exemption and a special rule for battered children and spouses. The *indigence exemption* requires an agency determination that the immigrant would be unable to obtain food and shelter if the agency did not provide the means-tested benefit. In that case, the amount of the sponsor’s income deemed to be available to the immigrant is limited to the amount actually provided. The special rule for *battered children and spouses* waives the deeming requirement for 12 months if there is a substantial connection between their being battered or subjected to extreme mental cruelty and their need for public benefits. That is, the sponsor’s income is not counted in determining whether they qualify for means-tested benefits.

Issues

The new affidavit of support requirement and its implementation by the Clinton Administration have raised two major issues. The first concerns the Administration’s narrow definition of “federal means-tested benefit,” which has the effect of limiting the application of the affidavit of support requirement to Medicaid and TANF. The second is the possible impact of the income requirement on the ability of U.S. citizens and permanent resident aliens to sponsor close family members.

Definition of “federal means-tested benefit”. As noted above (#9), there is no statutory definition of the term “means-tested public benefit.” In its interim regulations, INS defines the term “federal means-tested public benefit” as “any public benefit funded in whole or in part by funds provided by the federal government that the federal agency administering the federal funds has determined to be a federal means-tested public benefit under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193” (8 CFR 213a.1; *Federal Register*, October 20, 1997, p. 54352).

Both HHS and SSA published notices in the *Federal Register* on August 26, 1997 interpreting the term “federal means-tested public benefit” as used throughout Title IV of PRWORA, most notably in Section 403 (the 5-year bar for “qualified aliens” entering after August 22, 1996) and Section 421 (pertaining to attribution of income and resources of sponsors to sponsored immigrants). Both agencies define the term as applying only to benefits provided by federal means-tested *mandatory* spending programs. They argue that means-tested programs under which the spending is *discretionary* are not included. This interpretation is based on legislative history reviewed in both notices. Briefly, the argument is made that a definition of “federal means-tested public benefits” included in

²These are emergency medical assistance; short-term, non-cash emergency assistance; services comparable to those provided under the National School Lunch and Child Nutrition Act; immunizations and testing and treatment for communicable diseases; payments for foster care or adoption; and community programs necessary for life or safety.

early versions of the welfare reform bill could have encompassed both mandatory and discretionary means-tested programs. However, this definition was dropped in the Senate under the so-called Byrd Rule which applies to budget reconciliation bills. Both agencies then concluded, “The legislative history of PRWORA indicates that the Senate understood the significance of the Byrd Rule objection in terms of limiting the scope of the definition of ‘Federal means-tested public benefit’ to mandatory spending programs, while leaving discretionary programs unaffected” (*Federal Register*, August 26, 1997, p. 45257).

This reading of the legislative history has been strongly criticized, most notably by Representative Lamar Smith, the chairman of the House Judiciary Subcommittee on Immigration and Claims and author of the new affidavit of support provisions (INA, Section 213A). In a letter to Attorney General Janet Reno dated July 29, 1997, Representative Smith argues that the Administration is misreading the Byrd rule and improperly relying on it for statutory interpretation. He argues further that their reading is contradicted both by the structure of PRWORA, which specifically lists programs *not* included under the definition of “Federal means-tested benefits.” Quoting, “Conspicuously absent from ... [the] list of exceptions is ‘benefits provided under a discretionary program.’” He argues additionally that the controlling legislative history is the conference report, which states “that ‘[i]t is the intent of the conferees that [the definition dropped by the Senate under the Byrd Rule] ... be presumed to be in place for the purposes of this title’ [H.Rept. 104-725, p. 382]. The deleted definition was the one quoted at the beginning of this letter that made no distinction between ‘mandatory’ and ‘discretionary’ benefits.”

Impact of sponsors’ income requirement. Critics argue that the requirement that sponsors have income and resources totaling 125% of the poverty level (an income of \$20,062 for a family of four at the current level) is a backdoor way of restricting immigration. They argue that only the comparatively affluent will be able to sponsor family members, and that this will have an adverse impact on high sending countries. A draft study sponsored by INS of immigrants entering in 1994 showed that roughly half of immigrants from Mexico and El Salvador, one-third of Dominicans and Koreans, and one-quarter of Chinese and Jamaicans could not have met the new income requirement for sponsoring family members.³ In general, it is argued that immigrants are poor compared to the population as a whole. The Urban Institute reported in a recent study that almost 1 in every 4 of the 4.7 million immigrants who entered between 1980-1985 lived below the poverty level—twice the poverty rate for the U.S. as a whole.⁴

Supporters of the income requirement for sponsors argue that the intent of the law is to prevent sponsored immigrants from becoming public charges, and that sponsors cannot perform this function if they themselves are poor. They also note that the option of joint sponsorship makes it possible for the petitioning family member to obtain assistance from someone who meets the income requirement.

³Dugger, Celia W., “Immigrant Study Finds Many Below New Income Level,” *New York Times*, March 16, 1997, p. 39. INS is expected to release this study by early 1998.

⁴Enchautegui, Maria and Aaron J. Sparrow, *Poverty among Long-term U.S. Immigrants*, The Urban Institute, May 1997, p. 3.