

By [Catharine M. Venzon](#)¹ and [William Z. Reich](#)²

If you think that New York State Supreme and Family Court are the only avenues to sue for spousal support, think again. A foreign national spouse may be eligible for support from a sponsor and can sue to enforce that support through federal court. Thus, a caution to U.S. sponsors that by signing Form I-864, you are agreeing “to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines.” (See attached [Affidavit of Support Form I-864](#) at 4).

This form is most commonly used for family-sponsored immigrants seeking admission to the United States or adjustment of their immigration status as a lawful permanent resident. Form I-864 is required as an affidavit of support filed by a U.S. citizen on behalf of an immigrant to establish that the immigrant is not excludable from the U.S. as a public charge. The Immigration and Naturalization Act (INA) requires that this affidavit of support be enforceable as a contract. 8 U.S.C. § 1183a(a)(1). Additionally, several federal courts have “consistently found that Form I-864 constitutes a legally binding and enforceable contract between a sponsored immigrant and the sponsor executing the form.” *Cheshire v. Cheshire*, 2006 U.S. Dist. LEXIS 26602 at *9 (M.D. Fl. May 4, 2006). Government agencies as well as the sponsored immigrant have standing to sue the sponsor for enforcement of the affidavit and support for the alien. By signing Form I-864, the sponsor “acknowledge[s] that section 213A(a)(1)(B) of the INA grants the sponsored immigrant(s) . . . standing to sue . . . for failing to meet . . . obligations under this affidavit of support.” See [Form I-864](#) at 6.

A sponsor’s obligation to support the sponsored foreign national continues until the obligation expires by law. *Cheshire*, 2006 U.S. Dist. LEXIS 26602 at *19. For U.S. citizens who sponsor their spouse, the obligation to support does not end upon separation or divorce. There are only five circumstances that terminate the financial obligations of an affidavit of support: 1) the sponsor’s death; 2) the sponsored alien’s death; 3) the sponsored alien becomes a U.S. citizen; 4) the sponsored alien permanently leaves the U.S.; or 5) the sponsored alien obtains 40 qualifying quarters of work. 8 U.S.C. § 1183a(a)(2),(3). Therefore, divorce does not invalidate the contract or its enforceability. Foreign nationals, don’t be fooled! A sponsor is required to support your annual income equal to 125% of the federal poverty line even after divorce. If you are not receiving your support, you have the right to sue for enforcement of the affidavit of support in federal court and to receive your full entitlement to support, even back-support. You also do not have to be receiving public benefits or be a permanent resident alien to sue for

enforcement of the affidavit of support. Stump, 2005 U.S. Dist. LEXIS 26022 at *3-5.

However, if you thought you could just sit back and collect support in the amount of 125% of the poverty line, think again. The Affidavit of Support only requires the sponsor to provide whatever support is necessary to maintain the sponsored immigrants annual income at a level of at least 125% of the federal poverty guidelines. The statute “does not say a sponsored immigrant is entitled to a lifetime of payments in the amount of 125 percent of the poverty level. It simply ensures that an immigrant will have access to support that is at least that much. That means that sponsors are only required to pay support if the sponsored immigrant has an annual income of less than 125% of the poverty line. Any income a sponsored immigrant makes is deducted from the amount that the sponsor is required to pay in support. In addition, one court has indicated that once a sponsored immigrant has sufficient assets, earnings or earning capability of at least 125 percent of the federal poverty level, she would not be entitled to continuing payments from the sponsor. Ainsworth, 2004 U.S. Dist. LEXIS 28962 at *5. It is not clear whether the court meant that the sponsored immigrant would not be entitled to support payments for that year (which is consistent with other case law) or that acquiring such assets and income would actually terminate the support obligations under the Affidavit of Support.

However, a sponsored immigrant “is not precluded from enforcing an Affidavit of Support if she has not attained employment or otherwise sought to support herself.” Stump v. Stump, 2005 U.S. Dist. LEXIS 26022 at *19 (N.D. Ind. Oct. 25, 2005). Rather, such information will be considered in calculating the amount of damages to be awarded to the sponsored immigrant. While courts have not specifically required sponsored immigrants to mitigate their damages and show that they have been actively working or seeking employment in order to collect support from their sponsor, the court in Stump held that “the duty to mitigate, or avoid, damages is a basic tenet of contract law.” Stump, 2005 U.S. Dist. LEXIS 26022 at *20. The court further held that as long as the sponsored immigrant could show that reasonable efforts had been made to obtain employment and be self-sufficient, the sponsored immigrant would be able to collect support from their sponsor. In another recent federal court decision, the court noted that there was no requirement that the sponsored immigrant continue to work. Cheshire, 2006 U.S. Dist. LEXIS 26602 at *20, footnote 12. By contrast, the court in Ainsworth v. Ainsworth held that “[i]f the sponsored immigrant is earning, or is capable of earning, that amount or more, there obviously is no need for continued support.”

The federal poverty guidelines are based on household size. Therefore, the amount of support for a sponsored immigrant will differ depending on whether the foreign national is married to the sponsor or divorced. The court in Stump held that the appropriate household size for an alien

who is no longer married to and living with the sponsor is one person, and that such a sponsored immigrant would not be entitled to 125% of the poverty level for the original household size. 2005 U.S. Dist. LEXIS 26022 at *15-16. This amount may be significantly less than the original amount of support that the alien was receiving while married to the sponsor. In addition, because the federal poverty line is subject to change annually, the amount of the sponsor's financial obligation will also change annually.

In addition, a foreign national that is divorced from her sponsor is not required to seek maintenance in connection with the divorce in order to enforce the Affidavit of Support or to collect the full amount. Stump, 2005 U.S. Dist. LEXIS 26022 at *20.

U.S. sponsors of foreign nationals beware of what you are agreeing to when signing a [Form I-864](#). And foreign nationals, be sure that you know your rights associated with being financially supported by your sponsor. You may be entitled to more than you might think.

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