Affidavits of Support on Behalf of Immigrants [71 FR 35732] [FR 23-06]

DOCUMENT NUMBER: FR 23-06

FEDERAL REGISTER CITE:71 FR 35732

DATE OF PUBLICATION: June 21, 2006

BILLING CODE: 4410-10-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Parts 204, 205, 213a and 299

[DHS 2004-0026; CIS No. 1807-96]
RIN 1615-AB45

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1205 and 1240

[EOIR No. 150F; AG Order No. 2824-2006]
RIN 1125-AA54

Affidavits of Support on Behalf of Immigrants

AGENCIES: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule adopts, with specified changes, an interim rule published by the former Immigration and Naturalization Service on October 20, 1997. This final rule clarifies several issues raised under the interim rule regarding who needs an affidavit of support, how sponsors qualify, what information and documentation they must present, and when the income of other persons may be used to support an intending immigrant's application for permanent residence. These changes are intended to make the affidavit of support process clearer and less intimidating and time-consuming for sponsors, while continuing to ensure that sponsors will have sufficient means available to support new immigrants when necessary. The final rule also makes clear that, when an alien applies for adjustment of status in removal proceedings, the immigration judge's jurisdiction to adjudicate the adjustment application includes authority to adjudicate the sufficiency of the affidavit of support.

DATES: This final rule is effective July 21, 2006.

FOR FURTHER INFORMATION CONTACT: Concerning amendments made by this Final Rule to 8 CFR parts 204, 205, 213A and 299: Jonathan Mills, Immigrant Program Management Branch, Office of Regulations and Product Management, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Room 3214, Washington, DC 20529; telephone (202) 272-8530 (not a toll free call); or Lisa S. Roney, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave, NW., Room 4062, Washington, DC 20529; telephone (202) 272-1470 (not a toll free call).

Concerning amendments made by this Final Rule to 8 CFR parts 1205 and 1240: MaryBeth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305-0470 (not a toll free call).

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I. Background

Section 531(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, Division C, amended section 212(a)(4) of the Immigration and Nationality Act (Act) to provide that an alien is inadmissible as an alien likely to become a public charge if the alien is seeking an immigrant visa, admission as an immigrant, or adjustment of status as: (a) An immediate relative, (b) a family-based immigrant, or (c) an employment-based immigrant, if a relative of the alien is the petitioning employer or has a significant ownership interest in the entity that is the petitioning employer. Sections 212(a)(4)(C)-(D) and 213A of the Act, 8 U.S.C. 1182(a)(4)(C)-(D) and 1183a. To avoid a finding of inadmissibility as a public charge, the alien must be the beneficiary of an affidavit of support filed under section 213A of the Act, 8 U.S.C. 1183a. Section 213A of the Act specifies the conditions that must be met in order for an affidavit of support to be sufficient to overcome the public charge inadmissibility ground.

A. The Interim Rule

The former Immigration and Naturalization Service (Service) published an interim rule implementing these requirements in the Federal Register on October 20, 1997, at 62 FR 54346. The interim rule adopted 8 CFR part 213A, defining the procedures for submitting affidavits of support under section 213A of the Act, defining a sponsor's ongoing obligations under the affidavit of support, and specifying the procedures that Federal, State, or local agencies or private entities must follow to seek reimbursement from the sponsor for provision of means-tested public benefits. In conjunction with the interim rule, the Service also created three new public use forms: Form I-864, Affidavit of Support Under Section 213A of the Act; Form I-864A, Contract Between Sponsor and

Household Member; and Form I-865, Sponsor's Notice of Change of Address. The interim rule was effective on December 19, 1997.

On March 1, 2003, the Service ceased to exist and its functions were transferred from the Department of Justice to the Department of Homeland Security (DHS), pursuant to the Homeland Security Act of 2002, Public Law 107-296. The Secretary of Homeland Security is the issuing authority for most of the provisions of this final rule, since the Homeland Security Act transferred immigration services functions to U.S. Citizenship and Immigration Services (USCIS) of DHS. The Attorney General, however, continues to have authority relating to the Executive Office for Immigration Review. The Attorney General, therefore, is the issuing authority for the provisions of this final rule that relate to the jurisdiction of the immigration judges.

B. Synopsis of the Final Rule

This current rulemaking adopts the interim rule as a final rule, with the changes discussed in this Supplementary Information. The changes reflect the response of USCIS and the Department of Justice to the comments received relating to the interim rule. USCIS also notes that it has adopted two additional public use forms to comply with the requirements of the final rule. USCIS designed Form I-864EZ, EZ Affidavit of Support, for use by a sponsor who relies only on his or her own employment to meet the income requirements under section 213A of the Act and the final rule. An intending immigrant uses Form I-864W, Intending Immigrant's I-864 Exemption, to establish that a Form I-864 is not required in his or her case. More information about these new Forms is included in the section of this Supplementary Information relating to the Paperwork Reduction Act. Also, pursuant to section 213A(i) of the Act, the final rule makes clear that USCIS may disclose a sponsor's social security number, as well as the sponsor's last known address, to a benefit granting agency seeking to obtain reimbursement from the sponsor.

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her claim that he or she had income that was not subject to taxation, including the source and amount of the income. If the claim that the sponsor had no duty to file is based on the sponsor's income being too low to require a return, proof that the income was below the threshold will be enough to establish that the sponsor had no duty to file. If the sponsor claimed that the sponsor had no duty to file for some reason other than the sponsor's income level, this burden may require the sponsor to provide the officer with information, including citations to or copies of statutes, treaties, or regulations that support the claim that the sponsor had no duty to file.

One commenter asked, for example, about the situation in which the sponsor claimed that a tax treaty affects the sponsor's tax liability under United States law. The sponsor would have to include a copy of the relevant treaty provision. The other commenter asked what sort of evidence a sponsor may submit to show he or she had no duty to file, and asked whether a joint sponsor would always be required. The sponsor would submit whatever evidence the sponsor has to support the claim, such as proof that the sponsor's income was below the level at which a return is required for the year in question. The visa petitioner must file an affidavit of support even if the visa petitioner had no duty to file an income tax return for one or more of the past three years. A joint

sponsor would be necessary if the sponsor's income did not meet the 125 percent income threshold in section 213A of the Act.

The most common situation in which there is a claim that the sponsor had no duty to file a Federal income tax return will probably involve sponsors who reside in Puerto Rico. These sponsors, under 26 U.S.C. 933(1), may exclude from their taxable income any income from a source in Puerto Rico (other than from U.S. Government employment in Puerto Rico). If a sponsor had no income from a source outside Puerto Rico, it may well be the case that he or she will have considerable income, none of which is subject to the Federal income tax. In this case, the sponsor will have to present other evidence to substantiate his or her claimed income. In most cases, the sponsor's Puerto Rico income tax return, if any, would be the most probative alternative evidence. Those who reside in Guam, the U.S. Virgin Islands, or the Commonwealth of the Northern Mariana Islands would also need to present evidence in accordance with the special tax provisions that apply to persons living in those places.

Proof of Income Through Self-Employment

Finally, one commenter believed that, for self-employed persons, the sponsor's income should be taken from line 7 of Schedule C to IRS Form 1040. That is to say, the self-employed sponsor's income should be the gross receipts of the person's business, minus the cost of goods sold, but without subtracting legitimate deductions the sponsor has taken. USCIS cannot adopt this suggestion. The focus of concern is the sponsor's ability to provide the necessary support to the intending immigrant(s). Money paid for expenses included in part II of Schedule C is not available for this purpose. Moreover, it is the amount of income after deduction of expenses that is carried over from Schedule C to the Form 1040 itself. Consequently, the final rule retains the original definition of income, but clarifies that total income means the entry for total income shown on the appropriate line of the relevant Federal individual income tax return, IRS Form 1040, 1040A, or 1040EZ, not the preliminary calculation of gross income on Schedule C. The final rule also tracks the language on IRS Forms 1040 and 1040A by using the term “total income” rather than “gross income” in relation to those forms, and the term “adjusted gross income” in relation to Form 1040EZ.

Use of Photocopies of Forms I-864 and I-864A for Accompanying Family Members

The interim rule required that, for accompanying family members, the sponsor could file copies of the Forms I-864 and I-864A filed for the principal intending immigrant, so long as the copies bore original signatures and notarizations. On May 18, 1998, however, the Service announced, at 63 FR 27193, that the sponsor could submit complete photocopies of these original Forms I-864 and I-864A for the accompanying family members, so long as the forms for the principal intending immigrant bear original signatures and notarizations. The final rule incorporates this change.

The Service also revised Form I-864 so that the sponsor now signs the Form “under penalty of perjury under the laws of the United States,” thus making it unnecessary to sign or acknowledge the Form I-864 before an officer authorized to administer oaths or take acknowledgements. The November 5, 2001, edition of the Form I-864 still includes the notary's jurat block, for those who may wish to have the Form I-864 notarized. Under 28 U.S.C. 1746, however, signing before a notary is not necessary.

Significant Assets

Ten commenters objected to the requirement that the assets of the sponsor or intending immigrant must equal at least five times the difference between the applicable income threshold and the actual household income. One of these ten commenters argued that this requirement could impose a special hardship on large families, forcing “painful choices of bringing only part of the family.” One commenter, on the other hand, supported this requirement.

Those who objected to this requirement believed that a lower figure, such as twice the difference between the applicable income threshold and the actual household income, would be sufficient to qualify as “significant assets.” The purpose of the requirement, however, is to ensure that a sponsor whose income is not sufficient will nevertheless be able to provide the needed support until the sponsorship obligation ends. In most cases, an alien is not eligible for naturalization until he or she has been a permanent resident alien for at least 5 years. It is likely, therefore, that the sponsor's obligation will last at least that long. One commenter did point out that the spouse of a citizen can naturalize after 3 years. Thus, the final rule modifies the “significant assets” requirement slightly. If the intending immigrant is immigrating as the spouse or child of a citizen (but 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. As noted, many IR-4 immigrants (orphans coming to the United States for adoption) will become citizens soon after admission, as soon as the adopting parents complete the adoption in the United States. As long as the parents' assets equal the difference between the applicable income threshold and the actual household income, they will be deemed to have met the “significant assets” requirement.

Beginning and End of the Sponsor's Support Obligation

The interim rule did not specify precisely when the obligations under Form I-864 or Form I-864A actually commence. No comments were received on this issue. Nevertheless, the final rule clarifies that the mere signing of Form I-864 or Form I-864A does not