THE NEW AFFIDAVIT OF SUPPORT AND OTHER 1996 AMENDMENTS TO IMMIGRATION AND WELFARE PROVISIONS DESIGNED TO PREVENT ALIENS FROM BECOMING PUBLIC CHARGES

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I. INTRODUCTION

This article provides an introduction to the amendments enacted by the 104th Congress that pertain to the eligibility of aliens for various public benefit programs, and to the inadmissibility of aliens who are likely to become public charges. The two principal enactments are the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The new legislation provides more stringent restrictions on the eligibility of aliens for benefits available under Federal law. Congress has also authorized States to adopt similar restrictions for their own benefit programs. Finally, Congress has made the traditional use of “affidavits of support” mandatory in certain cases, and, more importantly, made the affidavit of support enforceable by civil action.

II. BACKGROUND

At least since 1882, United States immigration law has provided that an alien “unable to take care of himself or herself without becoming a public charge” was to be denied admission to the United States. Congress continued this provision in effect under the Immigration Act of 1917. Moreover, an alien who was admitted, but who became a public charge within 5 years of admission, was subject to arrest and deportation. These grounds of inadmissibility and deportability remain in effect.

2. Illegal Immigration Reform and Immigrant Responsibility Act §§ 531, 551, supra note 1, 110 Stat. at 3009-673, 3009-675.
4. Id. §§ 1621-1624.
5. Id. §§ 1182(a)(4)(C), (D), 1183a(a)(1)(B), (b)(2).
8. Id. § 19, 39 Stat. at 889.
9. 8 U.S.C.A. §§ 1182(a)(4)(B), 1229a(e)(2)(A)-(B) (West Supp. 1997). The grounds of inadmissibility apply to an alien who has not been admitted to the United States. Id. § 1229a(e)(2)(A). The grounds of deportability apply to an alien who has been admitted, but who has engaged in conduct making the alien subject to removal. Id. § 1229a(e)(2)(B). Since April 1, 1997 issues of both inadmissibility and deportability are tried in a “removal proceeding” as distinct from the two different “exclusion” and “deportation” proceedings. Id. §§ 1226, 1229, 1229a, 1252. An alien can avoid removal under this provision by “affirmatively showing” that he or she became a public charge as a result of some cause that arose since admission. Id. § 1251(a)(5).
Enforcement of these provisions, in recent decades, has been something less than vigorous. Between fiscal year 1941 and fiscal 1984, the Immigration and Naturalization Service ("INS") obtained and executed exclusion orders against only 1,301 aliens on the basis that they were likely to become public charges.\textsuperscript{10} From fiscal year 1941 through fiscal year 1980, INS executed deportation warrants against only 407 aliens for having become public charges.\textsuperscript{11}

The difficulties of enforcement arose from administrative practice. First, both the 1917 Act and current law permitted admission of an alien who was likely to become a public charge, if the alien (or someone on the alien's behalf) posted a bond to assure that the alien would not become a public charge.\textsuperscript{12} Despite this statutory provision, the Department of State and the INS began to accept "affidavits of support," filed by individuals or, occasionally, judicial personalities, who undertook to ensure that the alien would not become a public charge.\textsuperscript{13} If the consular or immigration officer was satisfied that the person who completed the affidavit of support had the resources and intention to support the alien, the issue of posting a bond simply did not arise.

It is not clear when this administrative practice began. The practice began many decades ago, however, as reflected in\textit{Dept. of Mental Hygiene for the State of California v. Renel},\textsuperscript{14} a 1958 decision of the Appellate Division of the New York State Supreme Court.\textsuperscript{15} In\textit{Renel}, the defendants had filed affidavits of support on behalf of their immigrant nephews in 1948.\textsuperscript{16} One of the nephews came under the care of the California Department of Mental Hygiene.\textsuperscript{17} When the California authorities sued to recover the costs of his care, the Appellate Division held that the affidavit of support imposed only a "moral" obligation on the defendants, and that Congress had not given the Executive the authority to make the sponsors sign affidavits of support that were

\begin{itemize}
\item \textsuperscript{10} 1996\textsuperscript{ }Statistical Yearbook of the Immigration and Naturalization Service ("1996 INS Yearbook") 175 tbl.60. The 1996 INS Yearbook does not desegregate public charge exclusions for fiscal years 1985-96.
\item \textsuperscript{11} \textit{Id.} at 183 tbl.65. The 1996 INS Yearbook does not desegregate public charge deportations for fiscal years 1981 through 1996.
\item \textsuperscript{12} Immigration Act of 1917, § 21, 39 Stat. at 891; cf. 8 U.S.C.A. § 1183.
\item \textsuperscript{13} The INS developed a standard form, INS Form I-134, for use as an affidavit of support. INS regulations provide a separate affidavit of support, INS Form I-361, for use in cases involving Amerasian children of United States citizens. 8 C.F.R. § 204.4(f)(1)(ii)(A).
\item \textsuperscript{16} \textit{Renel}, 173 N.Y.S. 2d at 233.
\item \textsuperscript{17} \textit{Id.} at 234.
\end{itemize}
enforceable by civil action. The Supreme Court of Michigan and the California Court of Appeals reached the same conclusion when the scope of the sponsor's obligation under an affidavit of support came before them. More recently, Congress gave some legal effect to affidavits of support by providing that the sponsor's income was to be deemed to be the sponsored alien's income, for the first three years after the sponsored alien's entry to the United States, in determining the sponsored alien's eligibility for Food Stamps, Supplemental Security Income ("SSI"), and Aid to Families with Dependent Children ("AFDC"). Despite these provisions, the Michigan Supreme Court held that Michigan public assistance agencies could not consider the income of a person who executed an affidavit of support to be an alien's income in determining the alien's eligibility for State public assistance programs.

Congress also contributed to the problem of receipt of public assistance by aliens present illegally. In the statutes defining eligibility criteria for the unemployment compensation, AFDC, SSI, and Medicaid programs, Congress provided for payment of benefits, not only to lawful immigrants, but to aliens "permanently residing under color of law." Under what came to be known as the "PRUCOL" (Permanently Residing Under Color of Law) doctrine, expounded by the United States Court of Appeals for the Second Circuit in Holley v. Lavine, even an alien who was unquestionably present in the United States contrary to law could be PRUCOL. Thus, if the INS was aware of the alien's unlawful presence, but was not actively pursuing his or her deportation, the alien was eligible for benefits. During the Reagan Administration, in response to further litigation, the Social Security Administration amended the regulations gov-

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18. Id. at 235-36. Neither Renel nor the cases that followed, apply to the INS Form I-361 used in cases of Amerasian children. 8 C.F.R. § 204.4 (1997). The INA expressly provides that the Amerasian immigrant may sue the sponsor to enforce the Form I-361 affidavit of support. 8 U.S.C. § 1154(f)(4)(B).
27. Id. § 1396b(v)(1).
28. Id.
29. 553 F.2d 845 (2d Cir. 1977).
30. Holley v. Lavine, 553 F.2d 845, 850-51 (2d Cir. 1977).
31. Holley, 553 F.2d at 850-51.
32. See, e.g., Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985).
erning the SSI program to incorporate the Holley court’s interpretation of the PRUCOL concept. The Health Care Financing Administration similarly amended its regulations for the medical assistance program during the Bush Administration. Thus, aliens with no legal right to remain in the United States could nevertheless be eligible for public assistance.

For the deportation ground, enforcement became difficult because of a different administrative decision. In 1948, the Attorney General held that an alien could not be deported for having become a public charge simply because the alien had received, within five years of admission, public assistance on the basis of a factor existing at the time of admission. In order for the deportation charge to be sustained, the INS had to prove that receipt of the assistance imposed on the alien, or on some other person responsible for the alien’s care, a legally enforceable obligation to repay the assistance. Moreover, the assistance agency had to have made an actual demand for reimbursement, and the demand had to have gone unsatisfied. No doubt part of the reason there were few public charge deportations is that assistance agencies had little incentive to pursue debts that were likely to go unsatisfied, merely to permit the deportation of an alien who continued to need care.

III. RESTRICTIONS ON THE ELIGIBILITY OF ALIENS FOR PUBLIC BENEFITS

A. “QUALIFIED ALIENS” AND THE ABOLITION OF THE PRUCOL DOCTRINE

The linchpin of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), as it relates to the eligibility of aliens for public benefits, is the new statutory definition of a “qualified alien.” Section 1641(b) lists seven immigration categories

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35. See generally, 1 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 6.07; Daniel Stein & Steven Zanowic, Permanent Resident Alien Under Color of Law: The Opening Door to Alien Entitlement Eligibility, 1 GEO. IMM. L. J. 231 (1986).
37. Id.
38. Id. at 327.
that give an alien the status of a "qualified alien." It is important to note that the term "qualified alien" means, rather than includes an alien in one of the seven categories. Thus, an alien who has not been:

- lawfully admitted for permanent residence under the Immigration Nationality Act ("INA"), 8 U.S.C.A. §§ 1101 et seq. (West Supp. 1997);
- granted asylum under INA § 208, 8 U.S.C.A. § 1158 (West Supp. 1997);
- admitted as a refugee under INA § 207, 8 U.S.C.A. § 1157 (West Supp. 1997);
- granted withholding of deportation under INA § 212(d)(5), 8 U.S.C.A. § 1253(h) (West Supp. 1997);
- granted conditional entry under INA § 203(a)(7), 8 U.S.C.A. § 1153(a)(7) (West Supp. 1997); or
- paroled into the United States for at least one year under INA § 212(d)(5), 8 U.S.C.A. § 1182(d)(5) (West Supp. 1997),

is not a qualified alien, regardless of what status the alien may hold under the immigration laws. The only exception is that an alien who is not within the definition of a "qualified alien" is treated as a qualified alien if the alien has presented at least a prima facie case for approval of a visa petition or for cancellation of removal (formerly known as suspension of deportation) as the battered spouse or child of a citizen or resident alien, and the assistance agency finds a substantial connection between the abuse of the alien and the alien's need for assistance. To qualify for this exception, the visa petition or application for cancellation of removal must either have been approved, or at least must be actually filed, and awaiting approval.

The necessary implication of the definition of "qualified alien" is that the PRUCOL (Permanently Residing Under Color of Law) doctrine from Holley is abolished. It is true that the expression "permanently residing under color of law" remains in the statutes cited earlier. But, with a few exceptions clearly specified by statute, an alien "who is not a qualified alien is not eligible for any Federal public benefit." The statute defines the term "Federal public benefit" quite capriciously, rendering an alien who is not a qualified alien ineligible for

40. Id.
41. Id. Special status is given Cuban and Haitian entrants. 8 C.F.R. § 212.5(g) (1997).
42. 8 U.S.C.A. § 1641(c) (West Supp. 1997).
43. Id.
44. See supra notes 25-28 and accompanying text.
46. Id. § 1611(b).
any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.47

Congress has also made many aliens ineligible for public benefits available under State or local law.48 The definition of "State and local public benefit" corresponds to the definition of "Federal public benefit."49 In contrast to Federal public benefits, however, an alien who is not a qualified alien may be eligible for State or local public benefits if the alien has been lawfully admitted as a nonimmigrant or has been paroled into the United States for a period that will not exceed one year.50 Despite this broad ineligibility for public benefits, aliens who are not qualified aliens are permitted to receive certain specified Federal public benefits.51 There are also four specific exceptions from the prohibition on receipt of State and local public benefits.52

47. Id. § 1611(c)(2)(A)-(B). The prohibition does not apply if the alien has been admitted with a nonimmigrant visa related to the contract, professional license or commercial license in question, if the alien is a citizen of a freely associated state and seeks the benefit in accordance with the relevant compact of free association, or if the Attorney General, after consulting the Secretary of State, determines that the prohibition cannot be enforced in a given case because of "reciprocal treaty agreements," Id. § 1611(c)(2)(A)-(B).
49. Compare id. § 1621(c), with 8 U.S.C.A. § 1611(c).
50. 8 U.S.C.A. § 1621(a)(2)-(3). An alien who has been paroled for a period of at least one year, of course, is a qualified alien. Id. § 1641(b)(4).
51. 8 U.S.C.A. § 1611(b). The available benefits include medical assistance for emergency medical care (unrelated to organ transplants), short-term, in-kind, non-cash emergency disaster relief; public health assistance related to immunizations and to treatment of the symptoms of a communicable disease (even if the disease did not cause the symptoms); in-kind services (such as soup kitchens, etc.) designated by the Attorney General as necessary to the protection of life and safety; assistance under Housing and Urban Development programs, if the alien was receiving the assistance on August 22, 1996. Id. § 1611(b)(1). Also available are Social Security benefits that the United States must pay under an international agreement, or that are based on an application filed in or before August 1996, or that are the result of the alien's lawful employment in the United States and certain benefits under the Railroad Retirement and Railroad Unemployment Insurance Acts. Id. § 1611(b)(2).
52. 8 U.S.C.A. § 1621(b). The available benefits include emergency medical care (unrelated to organ transplants), short-term, in-kind, non-cash emergency disaster relief; public health assistance related to immunizations and to treatment of the symptoms of a communicable disease (even if the disease did not cause the symptoms); in-kind services (such as soup kitchens, etc.) designated by the Attorney General as necessary to the protection of life and safety. Id.
Even "qualified aliens" are ineligible for "Federal means-tested public benefits" for a period of five years after becoming "qualified aliens."\(^{53}\) This five-year wait does not apply to refugees, asylees, aliens granted withholding of deportation or removal, Cuban and Haitian entrants, or aliens admitted as Amerasian immigrants ("Amerasian immigrants").\(^{54}\) Also exempt are honorably discharged veterans who served on active duty for at least twenty-four months (or the full term of active service, if less) and Armed Forces personnel currently on active duty (other than active duty for training). The spouses and unmarried dependent children of veterans and active duty personnel are also entitled to this exemption.\(^{55}\)

This five-year wait for eligibility for Federal means-tested public benefits is somewhat of an anomaly. First, the provision does not define "Federal means-tested public benefit."\(^{56}\) The Senate struck, pursuant to the "Byrd Rule," a proposed statutory definition of "means-tested public benefit" from the legislation that was eventually enacted as PRWORA.\(^{57}\) Secondly, the five-year wait does not apply to eleven specific eligibility programs, ranging from in-kind forms of emergency assistance to participation in the Head Start and Job Training Partnership Act programs.\(^{58}\)

More noteworthy still is that Congress has provided stricter eligibility requirements in order for "qualified aliens" to receive SSI.\(^{59}\) States, moreover, may restrict the eligibility of "qualified aliens" for assistance under the Temporary Assistance for Needy Families


\(^{54}\)  Id. § 1613(b)(1), (d).

\(^{55}\)  Id. § 1613(b)(2). The "Armed Forces" means the Army, Navy, Marine Corp, Coast Guard, and Air Force. 10 U.S.C.A. § 101(a)(4) (West Supp. 1997). A serviceman's widow or service woman's widower also qualifies for this exception, if the marriage met the requirements of 38 U.S.C. § 1304, and the widow(er) has not remarried. 8 U.S.C.A. § 1613(b)(2)(C) (West Supp. 1997).


\(^{58}\) 8 U.S.C.A. § 1613(c) (West Supp. 1997). The benefits within the scope of this exception are: medical assistance related to treatment of medical emergencies, but not including organ transplants; short-term, non-cash, in kind emergency disaster relief; assistance under the National School Lunch and Child Nutrition Acts; public health assistance related to immunizations and to treatment of symptoms of communicable diseases (even if the symptoms are not caused by the disease); specified forms of foster care and adoption assistance; in-kind assistance (such as soup kitchens, short-term shelter, etc.), as designated by the Attorney General as necessary to the protection of life or safety; certain forms of student assistance for higher education; means-tested programs under the Elementary and Secondary Education Act; Head Start Act benefits; Job Training Partnership Act benefits.  Id. § 1613(c).

(TANF, the successor to AFDC), Medical Assistance, and Social Services Block Grant programs.\textsuperscript{60} In each case, a permanent resident alien must have worked (or must be eligible to be credited with) forty qualifying quarters of coverage under the Social Security Act.\textsuperscript{61} A person cannot be credited with more than four qualifying quarters in any calendar year.\textsuperscript{62} Thus, a single person would have to work at least ten years in order to have forty quarters of coverage.

In determining eligibility under these programs, the person may not rely on any quarter of coverage actually earned after December 31, 1996, if the person received any Federal means-tested benefit during that quarter.\textsuperscript{63} Spouses, however, may be credited with each other's qualifying quarters, so long as the quarters were earned during the marriage and they remain married.\textsuperscript{64} An alien is also entitled to rely on the quarters of coverage earned by his or her parents before his or her eighteenth birthday.\textsuperscript{65} It is possible, therefore, that five, rather than ten, years of at least part-time employment in the United States may relieve married permanent residents and their alien children of the restrictions on eligibility for assistance under the TANF, SSI, Food Stamps, Medical Assistance, and Social Service Block Grant programs.

There are other exceptions to the restrictions on eligibility under these programs. First, honorably discharged veterans, active duty Armed Forces personnel (other than those on active duty only for training), and the spouses (including qualified unmarried widow(er)s) and unmarried dependent children of veterans and active duty personnel are eligible for benefits under these programs, without having to work for at least forty qualifying quarters of coverage.\textsuperscript{66} Second, refugees, asylees, aliens granted withholding of deportation or removal, Cuban and Haitian entrants, and Amerasian immigrants are not subject to the restrictions on SSI and Medicaid eligibility until they have been in the United States for at least seven years.\textsuperscript{67} They are also relieved of the restrictions on eligibility for TANF, Food

\textsuperscript{60} Id. § 1612(b)(1), (3).
\textsuperscript{61} Id. § 1612(a)(2)(B)(ii)(I), 1612(b)(2)(B)(ii)(I).
\textsuperscript{62} 20 C.F.R. § 404.143(a) (1997). In 1998, a person must have $700.00 in earnings subject to the FICA tax in order to earn a quarter of coverage. Affidavits of Support, 62 Fed. Reg. 58,762 (1997).
\textsuperscript{64} Id. § 1645(2). This privilege remains if one spouse has died. Id. To qualify as “spouses,” the persons must be partners in a legally recognized, heterosexual monogamous marriage. 1 U.S.C. § 7 (1994).
\textsuperscript{65} 8 U.S.C.A. § 1645(1).
\textsuperscript{66} Id. § 1612(a)(2)(C), 1612(b)(2)(C).
\textsuperscript{67} Id. § 1612(a)(2)(A)-(B), 1612(b)(2)(A)-(B).
Stamps, and Social Services Block Grant assistance for the first five years after their admission. 68

An alien who is residing lawfully and who was receiving SSI on August 22, 1996, remains eligible for SSI. 69 There are additional exceptions for certain Native Americans, for “very old applicants,” and for blind or disabled aliens who were residing in the United States lawfully on August 22, 1996. 70 Native Americans and others entitled to receive SSI are also exempt from the restrictions on Medicaid eligibility. 71

There is also a potentially significant exception that Congress did not make. As noted above, if the INS or an immigration judge has accorded an alien classification as a battered spouse or child, or if the alien has, at least, filed a petition or application that makes a prima facie case for this status, the alien is considered to be a “qualified alien.” The alien, therefore, would not be ineligible, because of his or her immigration status, for many Federal, State and local public benefits. 72 But Congress did not grant these aliens an exception from the limits on the receipt of Federal means-tested benefits, nor from the more specific restrictions on the receipt of assistance from the SSI, TANF, Food Stamp, Medicaid, and Social Service Block Grant programs. 73

The statutory text, of course, is the strongest evidence of the legislator's intent. 74 Two other provisions of the 1996 Acts, however, seem to counter the seemingly apparent legislative choice not to extend means-tested assistance to this particularly sympathetic class of aliens. First, a legally-enforceable affidavit of support is not required in the case of an alien who is accorded permanent resident status as a battered spouse or child. 75 Secondly, if an alien is battered by his or her sponsor after immigrating on the basis of the new affidavit of support, the abusive sponsor's income and resources are not to be considered in determining the alien's eligibility for assistance. 76 Statutes dealing with the same subject should, if possible, be read in harmony. 77 For this reason, it would probably be reasonable for agencies administering means-tested public benefit programs to find an im-

68. Id. § 1612(a)(2)(B)(ii), 1612(b)(2)(B)(ii).
69. Id. § 1612(a)(2)(D).
70. Id. § 1612(a)(2)(F) to (H).
71. Id. § 1612(b)(2)(E), (F).
72. Id. §§ 1611(a), 1622(a).
73. Id. §§ 1612(a)(2)(A), 1612(b)(2)(A), 1613(b).
76. Id. § 1631(f)(1)(A).
77. Erlenbaugh v. United States, 409 U.S. 239, 244 (1972).
plicit exception to the restrictions on the receipt of these benefits in
favor of aliens recognized as battered spouses and children.

The Department of Justice has developed and promulgated guidelines for determining the effect an alien's immigration status has on the alien's eligibility for various benefits. The Attorney General has also made a preliminary designation of the types of in-kind services she has considered to be necessary to protection of life or safety, and has requested public comment on this designation. It is important to note that, even if none of the PRWORA provisions disqualify an alien, the alien must still comply with the basis eligibility criteria that apply for each particular program.

B. A WORD ABOUT FREE PUBLIC EDUCATION FOR ALIENS UNLAWFULLY PRESENT

In 1982, the Supreme Court held, in *Plyler v. Doe*, that Texas could not constitutionally require alien children who were present in the United States unlawfully to pay tuition in order to attend public schools in Texas. The Court reached this conclusion, over a vigorous dissent joined by four justices, despite the majority's determination that "illegal aliens" are not a "suspect class," and that a free public education is not a fundamental right. Because Congress had never suggested, by legislation, that a State could adopt the policy that Texas adopted, the Court concluded that the policy could survive only if Texas could show that the policy was needed to serve a substantial State interest.

There was an attempt during the 104th Congress to provide the Congressional sanction that the Court found lacking in *Plyler*. Instead, Congress asserted that nothing in Title IV of PRWORA "may be construed as addressing alien eligibility for a basis public education as

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85. *Id.* at 224-25, 230.
determined by” the Plyler decision. Nevertheless, Title IV, in light of other legislation of the 104th Congress, could provide a basis for the overruling of the Plyler doctrine. First, Congress has declared removing “the incentive for illegal immigration provided by the availability of public benefits” to be “a compelling government interest.” A State that follows Federal classifications in determining an alien’s eligibility for “public assistance” is to be “considered to have chosen the least restrictive means available for achieving the compelling governmental interest . . .” An additional new consideration is that an alien may no longer come to the United States as a lawful nonimmigrant F-visa student in order to attend a public elementary school. A lawful non-immigrant student may attend a public secondary school only if the student pays the school district for the “full, unsubsidized per capita cost” of the education; moreover, the student may not hold F-nonimmigrant status for an aggregate period exceeding twelve months, in order to attend a public secondary school. Adherence to the Plyler doctrine would create a perverse incentive—as it relates to public education, there would be a greater benefit to breaking the law than to complying with it. The point is neither to speculate that the Court would, nor advocate that it should, overrule Plyler, but to note, simply, the significant change in the legal landscape since 1982.

IV. THE NEW, ENFORCEABLE, AFFIDAVIT OF SUPPORT

New INA § 213A overrules prior court holdings by providing the statutory basis for making affidavits of support enforceable that the courts in those cases found to be lacking. Congress first enacted § 213A through § 423(a) of PRWORA. Before that version of § 213A entered into force, however, Congress enacted IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act), with a new version of § 213A. The INS published an interim rule implementing § 213A, together with a request for comments. The INS promulgated the new affidavit of support, INS Form I-864, on the same day.

87. 8 U.S.C.A. § 1643(a)(2).
88. Id. § 1601(6).
89. Id. § 1601(7).
90. Id. § 1184A(1)(A).
91. Id. § 1184(1)(B)(i)-(ii).
92. Id. § 1183a.
93. See supra notes 15-20 and accompanying text.
95. Illegal Immigration Reform and Immigrant Responsibility Act § 551(a), supra note 1, 110 Stat. at 3009-675.
97. Id. at 54,348.
Because Congress enacted that the new § 213A was to enter into force between sixty and ninety days after promulgation of the Form, the new affidavit of support regulation entered into force on December 19, 1997, which was sixty days after the INS published the regulation.98 The comment period, however, extended to February 17, 1998.99

Not all affidavits of support, however, are subject to the new requirements. Under consular and INS practice, affidavits of support have been used, in at least some cases, for nonimmigrants and refugees, as well as for immigrants.100 Section 213A seems to apply to affidavits of support used in these cases, since the statute directs that "[n]o affidavit of support may be accepted" unless it is in the form of a legally enforceable contract.101 The public charge exclusion ground, however, expressly requires the affidavit of support in cases involving immediate relatives, family sponsored immigrants, and employment based immigrants who will be employed by a relative or a relative's firm.102 Moreover, in order to be eligible to sign an INS Form I-864 as the sponsor, a person must be the one who "is petitioning for the admission of the alien under [INA] section 204."103 Petitions under § 204 pertain only to immigrant visa petitions.104 For this reason, the regulation requires the use of the new INS Form I-864 only in the cases involving immediate relatives, family sponsored immigrants, and employment based immigrants who will be employed by a relative or a relative's firm.105 The INS preserved the option of using the old Form I-134 in other cases in which consular and immigration officers have accepted Form I-134.106 The sponsor of an Amerasian immigrant will still be required to file Form I-361, rather than Form I-864.107

A. WHEN AN INS FORM I-864 WILL BE REQUIRED

As noted, the new affidavit of support regulation applies only to aliens seeking immigrant visas, admission for permanent residence, or adjustment of status as immediate relatives, family sponsored imm-

98. Id. at 54,346. It was not, strictly speaking, possible to delay entry into force for the maximum 90-day period, since the corresponding amendment to the public charge exclusion ground was to enter into force not more than 60 days after promulgation of the new affidavit of support form. Id.
99. Id.
100. See supra notes 12-14 and accompanying text.
102. Id. § 1182(a)(4)(C), (D).
103. Id. § 1183(a)(7)(1)(D).
105. Affidavits of Support, supra note 96, at 54,353.
106. Id. at 54,356.
107. Id.
migrants, and employment based immigrants who will be employed by a relative or a relative's firm.\textsuperscript{108} This requirement, however, does not apply to every case decided after the new regulation enters into force. By statute, the new public charge provisions requiring use of the affidavit of support apply to "applications submitted on or after" the effective date, but do not apply to aliens who had "an official interview with an immigration officer" before the requirement entered into force.\textsuperscript{109} The new requirement applies, therefore, only to aliens who file their applications for an immigrant visa or for adjustment of status on or after December 19, 1997.\textsuperscript{110} An alien need not comply with the requirement if he or she filed an adjustment application before this date, nor if he or she applies for admission with an immigrant visa issued before then.\textsuperscript{111}

The widow(er)s of United States citizens who are eligible to file visa petitions on their own behalf, and their accompanying children, are not required to file the new INS Form I-864.\textsuperscript{112} Also exempt are aliens who are the beneficiaries of approved visa petitions classifying the aliens as eligible for immigrant visas as the battered spouses or children of citizens or permanent residents.\textsuperscript{113}

In order for the new INS Form I-864 requirement to apply to an employment based immigrant and his or her family, the principal immigrant must be seeking admission or adjustment as a permanent resident in order to accept employment with "a relative of the alien (or [with] an entity in which such relative has a significant ownership in-

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 54,353.
\item \textsuperscript{110} \textit{Affidavites of Support, supra} note 96, at 54,353. As originally published, this provision seemed to apply to cases "filed on or before December 19, 1997." \textit{Id.} (Emphasis added). The Federal Register later corrected its typographical error. Corrections, 62 Fed. Reg. 64,048 (1997).
\item \textsuperscript{111} \textit{Affidavites of Support, supra} note 96, at 54,353. In order to include those obtaining immigrant visas within this exception, the Commissioner designated consular officers as immigration officers, solely for purposes of the regulation. \textit{Id.} at 54,346. Although this designation is somewhat unusual, it is within the Commissioner's authority. 8 U.S.C. § 1101(a)(18); 8 C.F.R. § 2.1. The Commissioner justified this designation because of the "massive administrative burden that would result," if aliens who obtained immigrant visas before the regulation entered into force, but who applied for admission after that date, were made to comply with the new regulation. \textit{Affidavites of Support, supra} note 96, at 54,346.
\item \textsuperscript{112} \textit{Affidavites of Support, supra} note 96, at 54,353; 8 U.S.C.A. § 1154(a)(1)(A)(ii). To file a petition on one's own behalf as the widow(er) of a citizen, the surviving spouse must have been married to the citizen at least two years before the citizen's death, the spouses must not have been separated at the time of death, the surviving spouse must file the petition within two years of the death, and the surviving spouse must not have remarried. 8 U.S.C. § 1151(b)(2)(A)(i).
\item \textsuperscript{113} \textit{Id.} § 1154(a)(1)(A)(iii)(I), (iv), (B)(ii), (iii).
\end{itemize}
The statute defines neither who is a “relative,” nor what is a “significant ownership interest” for purposes of this requirement. The INS has, by regulation, defined “relative” to mean the alien’s husband, wife, father, mother, child, adult daughter, brother or sister. Note that these are the same family relationships that would support the filing of an immediate relative or family-based visa petition. The regulation defines “significant ownership interest” to mean ownership of at least 5% of the equity of a for-profit entity. For Example, if Mom owns 5% of the company that filed the petition on her daughter Sue’s behalf, then Mom must file an INA Form I-864 in order for Sue to avoid public charge inadmissibility. But Uncle Joe does not need to file one on Julius’ behalf, even if Uncle Joe owns 100% of the company that filed a visa petition on his nephew Julius’ behalf.

B. Sponsorship Requirements

The statute and regulation refer to the visa petitioner who must sign the INA Form I-864 as the “sponsor.” The beneficiary is the “sponsored immigrant.” The sponsor must be the person who filed the visa petition on the sponsored alien’s behalf, but the sponsor must meet other requirements as well. First, the sponsor must be a “citizen or national of the United States or an alien lawfully admitted for permanent residence.”

115. Affidavits of Support, supra note 96, at 54,352.
117. Affidavits of Support, supra note 96, at 54,353.
118. Id.
119. Id.
120. 8 U.S.C.A. §§ 1183a(a)(1), (f)(1); Affidavits of Support, supra note 96, at 54,352.
121. Affidavits of Support, supra note 96, at 54,352. This term includes any spouse or child(ren) who accompany or follow to join the principal beneficiary of the immigrant visa petition. If a spouse or child follows to join the principal beneficiary, rather than accompanying him or her, the sponsor must file a new affidavit of support, based on the circumstances existing when the spouse or child follows to join. Id. at 54,355.
122. 8 U.S.C.A. § 1183a(f)(1)(D); Affidavits of Support, supra note 96, at 54,353. For employment-based immigrants, the sponsor must be the relative who either filed the petition or who owns at least 5% of the for-profit entity that did so. 8 U.S.C.A. § 1183a(f)(4); Affidavits of Support, supra note 96, at 54,352-53.
123. 8 U.S.C.A. § 1183a(f)(1)(A); Affidavits of Support, supra note 96, at 54,353. A national is a person who owes permanent allegiance to the United States, without being a citizen. 8 U.S.C.A. § 1101(a)(22). A person born in American Samoa or Swains Island under circumstances that do not result in acquisition of citizenship is a non-citizen national. Id. §§ 1101(a)(29), 1401, 1408. Non-citizen nationals are not eligible to file immediate relative and 1st, 3rd and 4th preference family-sponsored immigrant visa petitions, because the visa petitioner in these cases must be a citizen. Id. §§ 1151(b)(2)(A)(i), 1153(a)(1), (3), (4), 1154(a).

The statute also precludes a non-citizen national from filing a second preference family-sponsored immigrant visa petition. Id. § 1153(a)(2). In these cases, the petitioner must be an alien, id., and a non-citizen national is not an alien. Id. § 1101(a)(3).
old. The alien spouse of a citizen or resident alien, therefore, will not be able to overcome inadmissibility on public charge grounds, if the citizen or resident alien is under eighteen. The sponsor must also be “domiciled” in the United States or in a United States territory or possession. The beneficiary of a visa petition filed by a citizen or resident alien who resides permanently abroad will also be inadmissible on public charge grounds, until the petitioner re-establishes a domicile in the United States. The sponsor must also show that he or she demonstrates the ability to maintain his or her income at an annual level that is at least 125% of the Federal poverty line. An income that is at least 100% of the Federal poverty line is sufficient, if the sponsor is on active duty (other than for training) in the Army, Navy, Marine Corps, Coast Guard or Air Force, and the sponsored alien is the sponsor’s spouse or child. The statute directs the use of the Federal poverty guidelines revised annually by the Secretary of Health and Human Services in determining these income thresholds.

The sponsor must file a separate INS Form I-864 on behalf of the principal beneficiary of the visa petition and of the spouse and each child of the principal beneficiary who accompanies or follows to join

plain statutory requirement, the Board of Immigration Appeals has permitted non-citizen nationals to file second preference family-sponsored immigrant visa petitions. Matter of Ah San, 15 I. & N. Dec. 315 (BIA 1975); Matter of B- I & N Dec. 555 (BIA 1955). These cases, certainly, were wrongly decided, and cannot supplant the plain meaning of the statute. See INS v. Phinpathya, 464 U.S. 183 (1984). The INS cannot simply ignore these decisions, however, until the INS persuades either the Board or the Attorney General to overrule them. 8 C.F.R. § 3.1(g).

125. 8 U.S.C.A. § 1183a(f)(1)(C); Affidavits of Support, supra note 96, at 54,353.
126. 8 U.S.C.A. § 1183a(f)(1)(C); Affidavits of Support, supra note 96, at 54,353. The INS has specified two situations in which it will consider a person residing abroad to have maintained a domicile in the United States: that of the permanent resident who obtained permission under 8 U.S.C. § 1427(b) or 1428, to retain his or her residence in the United States while engaged in qualifying employment abroad, and that of a citizen who is residing abroad under circumstances within the scope of 8 U.S.C. § 1430(b)(1). Affidavits of Support, supra note 96, at 54,352. It may be possible that others, too, may be able to prove they are still domiciled in the United States, since the regulation adopts the generally accepted meaning of the term "domicile." Whether someone is able to do so, of course, depends on the facts of the particular case.

128. 8 U.S.C.A. § 1183a(f)(3); Affidavits of Support, supra note 96, at 54,353; 10 U.S.C. § 101(a)(4) (1994) (defining "Armed Forces"). Note that, because of the statutory definition of "child," this exception does not apply to the adult son or adult daughter of a person on active duty in the Armed Forces, nor to a married son or daughter who is still under 18 years old. 8 U.S.C.A. § 1101(b)(1).
the principal beneficiary.\textsuperscript{130} For those accompanying the principal beneficiary, the sponsor may submit photocopies of one completed Form I-864, so long as each photocopy bears the sponsor's original signature.\textsuperscript{131} If a family member follows to join the principal beneficiary, the sponsor must submit an INS Form I-864 that reflects the sponsor's economic situation when the family member immigrates, not when the principal beneficiary did so.\textsuperscript{132}

C. INCOME REQUIREMENTS

1. Calculation of income

The statute and regulations provide the basis for determining the specific income threshold that applies to a particular case in relation to the sponsor's household size.\textsuperscript{133} Of course, the sponsored immigrants may or may not intend to live in the sponsor's actual household.\textsuperscript{134} The regulation, therefore, contains a special definition of the sponsor's household. The sponsor's household size includes:

- the sponsor;
- all persons living at the same residence as the sponsor, who are related to the sponsor by birth, marriage, or adoption;
- any other persons whom the sponsor has lawfully claimed as a dependent on the sponsor's Federal individual income tax return for the most recent tax year;
- the number of aliens to be sponsored under the current INS Form I-864; and
- the number of aliens sponsored under any prior INS Form I-864, if the sponsor's support obligation has not terminated.\textsuperscript{135}

For example, suppose that Sue filed a visa petition for her brother Fred, and his priority date is current. His wife and three children will immigrate with him. Sue lives with her husband and two children; a third child, still supported and claimed as a dependent by her parents, is away at school. For purposes of the affidavit of support rule, Sue's household will consist of ten persons, even if Fred and his family will not actually live in Sue's house. In order for Sue's Form I-864 to be sufficient to overcome Fred's family's inadmissibility on public charge

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\textsuperscript{130} Affidavits of Support, supra note 96, at 54,353.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 54,355. If the original sponsor has died, then there must be a joint sponsor; the joint sponsor may be the principal visa petition beneficiary whom the family member is following to join, if the principal visa petition beneficiary can meet the sponsorship requirements. Id.
\textsuperscript{133} 8 U.S.C.A. § 1183a(f)(6)(A)(iii); Affidavits of Support, supra note 96, at 54,354.
\textsuperscript{134} Affidavits of Support, supra note 96, at 54,354.
\textsuperscript{135} Id. at 54,352.
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grounds, her annual household income would have to be at least $40,462.\textsuperscript{136}

It is not necessary for Sue, by herself, to make that much money. She may rely on the income of her husband and other persons living with her and related to her by birth, marriage or adoption, so long as they have been members of her household for at least six months.\textsuperscript{137} She may also rely on the income of lawfully-claimed dependents who do not actually live in the household.\textsuperscript{138} She may even rely on the income of Fred and his family, if they have been actually living in Sue's home for at least six months.\textsuperscript{139} The sponsor and other household members may "pool" their income in order to meet the income threshold.\textsuperscript{140}

In order to rely on the income of these other persons, however, they must agree to make their income available to support Fred and his family.\textsuperscript{141} As a result of this agreement, they are jointly and severally liable with the sponsor for the support of the sponsored immigrants.\textsuperscript{142} They take on this agreement by signing new INS Form I-864A, Contract Between Sponsor and Household Member.\textsuperscript{143} The sponsored immigrant need not sign Form I-864A if the sponsor will rely on the sponsored immigrant's income only to show the ability to support the sponsored immigrant; the sponsored immigrant will have to sign if the sponsor will rely on the sponsored immigrant's income to show the ability to support the sponsored immigrant's spouse or child(ren).\textsuperscript{144}

2. \textit{Proof of Income}

To prove that he or she meets the income threshold, the sponsor must provide copies of his or her complete Federal individual income tax return for each of the most recent tax years.\textsuperscript{145} The statute itself expresses this requirement somewhat awkwardly, requiring a "certified copy" of each return, and a "written statement, executed under oath or . . . penalty of perjury. . . . that the copies are certified cop-

\textsuperscript{136} The poverty line for a family of 10 is $32,370, and $40,462 is 125\% of that figure. \textit{Id.} at 10,857.
\textsuperscript{137} \textit{Affidavits of Support, supra} note 96, at 54,352.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.} at 54,353.
\textsuperscript{142} \textit{Id.} at 54,354.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.} at 54,353; 8 U.S.C.A. \textsection{} 1183a(f)(6)(A)(i). The sponsor is not required to submit a copy of a return for any year for which the sponsor had no legal obligation to file a return, provided the sponsor provides an adequate explanation. \textit{Affidavits of Support, supra} note 96, at 54,354.
ies. The statute does not require that the certified copy be certified by the Internal Revenue Service. The regulation provides instead that the sponsor himself or herself must certify, under penalty of perjury, that the copies are true and correct copies of the returns that the sponsor actually filed with the IRS. The INS Form I-864 includes this certification.

Should the sponsor rely on the income of other members of the household, the sponsor must provide copies of their Federal individual income tax returns. These individuals must certify, under penalty of perjury, that the copies are true and correct copies of the returns they actually filed with the IRS. As with the INS Form I-864, INS Form I-864A also includes the necessary certification.

3. Assets as a supplement to income

Even if the sponsor cannot meet the income threshold, the Form I-864 may be adequate if the sponsor, the sponsored immigrant, or both have "significant assets" available for the sponsored immigrant's support. The regulation considers the assets of any person who signed Form I-864A, as well as those of the sponsor and sponsored immigrant, in meeting this alternative requirement. To be sufficient, "the combined cash value of all these assets must exceed five times the difference between the sponsor's household income and the Federal poverty line for the sponsor's household size." The Service considered the five year period of ineligibility for many means-tested benefits and the five year period before many aliens are first eligible to apply for naturalization in deriving this requirement. Recall that Sue must have a household income of $40,462 in order to show that Fred and his family are not inadmissible on public charge grounds.

147. The INS estimated that there may be as many as 565,000 immigrants each fiscal year on whose behalf sponsors or joint sponsors will have to file affidavits of support. Affidavits of Support, supra note 96, at 54,351. Requiring that form of certification from literally hundreds of thousands of sponsors each year would be quite an undertaking.
149. Id. at 54,348.
150. Id. at 54,354.
151. Id.
152. Id.
155. Id.
156. Id. at 54,349, citing 8 U.S.C. § 1613. Recall that immigrants may be ineligible for SSI, TANF, Food Stamps, Medicaid and Social Service Block Grants for as long as 10 years after immigrating. See supra notes 62-65 and accompanying text.
157. See supra note 135 and accompanying text.
If her household income were only $35,462, the total net value of assets would have to be at least $25,000.01.158

4. Joint sponsors

If neither the income nor the assets of the sponsor's household, coupled with the sponsored immigrant's assets, are sufficient, the sponsored immigrant is inadmissible unless someone is willing to be a joint sponsor.159 There must also be a joint sponsor if, although the sponsor appears to meet the income or asset requirements, the immigration or consular officer is not satisfied that the sponsor will actually be able to meet the support obligation.160 The joint sponsor must meet the same requirements as the sponsor, except that the joint sponsor would not, of course, be the visa petitioner.161 In fact, the joint sponsor need not be related to the sponsored immigrant at all; any natural person may take on joint sponsorship.162 The willingness of another person to be a joint sponsor does not relieve the visa petitioner of the obligation to be a sponsor; both the visa petitioner and the joint sponsor must sign an INS Form I-864, and each is jointly and severally liable with the other.163

The joint sponsor may rely on the income or assets of all the members of the joint sponsor's household in meeting the income threshold.164 As with the sponsor, other members of the joint sponsor's household will need to sign INS Form I-864A in order for the joint sponsor to rely on their income or assets.165 But there are two important differences. First, the regulation does not permit the sponsor and joint sponsor to "pool" the income of their respective households.166 If the sponsor's household cannot meet the threshold on its own, the joint sponsor's household must meet the income threshold on

158. Affidavits of Support, supra note 96, at 54,354. "The combined cash value of all the assets (total value of the assets less any off setting liabilities) must exceed five times the difference between the sponsor's household income and the Federal poverty line for the sponsor's household six (including all immigrants sponsored in an affidavit of support in force under this section)." Id.
159. 8 U.S.C.A. § 1183a(f)(5); Affidavits of Support, supra note 96, at 54,354.
160. Affidavits of Support, supra note 96, at 54,354. Cases where this might happen might involve sponsors who just barely meet the requirements, or whose employment is not sufficiently secure, or who have a history of having received means-tested benefits themselves. Id.
161. Affidavits of Support, supra note 96, at 54,354.
162. Id. at 54,343-44. A corporation or other juridic person may not act either as sponsor or as joint sponsor. Id. at 54,347. This restriction reflects the requirement that the sponsor and joint sponsor must be citizens, nationals or resident aliens. 8 U.S.C.A. § 1183a(f)(1)(A).
163. 8 U.S.C. § 1183a(f)(5); Affidavits of Support, supra note 96, at 54,354.
164. Affidavits of Support, supra note 96, at 54,354.
165. Id. at 54,354-55.
166. Id. at 54,354.
its own. Secondly, the joint sponsor, who is less likely than the sponsor to be the spouse or parent of the immigrant, may not invoke the lower income threshold available to persons on active duty (other than for training) in the Armed Forces.

D. Legal Effect of Affidavit of Support

The sponsor’s signing of the affidavit of support creates a contract between the sponsor and the United States Government. The sponsored immigrant is entitled to sue to enforce the sponsor’s obligation. Any Federal, State, local, or private agency or entity may also sue to recover the cost of any means-tested public benefits provided to the sponsored alien. The sponsor must provide the sponsored immigrant with whatever support is necessary to maintain the sponsored immigrant at an annual income that is at least 125% of the Federal poverty guideline. Moreover, the income and assets of the sponsor (and his or her spouse) will be attributed to the sponsored immigrant, in determining the sponsored immigrant’s eligibility for any means-tested benefit for which he or she may apply.

The sponsor’s obligation to support the sponsored immigrant ends when the sponsored immigrant naturalizes. If the sponsored immigrant does not naturalize, the sponsor’s obligation endures until the sponsored immigrant has worked (or can be credited with) 40 quarters of coverage under Title II of the Social Security Act. As with the restrictions on receipt of SSI, TANF, Food Stamps, Medicaid, and Social Service Block Grants, the sponsored immigrant can rely on the quarters of coverage earned by his or her spouse, during the marriage, and on the credits earned by the sponsored immigrant’s parents before the sponsored immigrant’s eighteenth birthday. By regulation, the

167. Id.
168. Id.
170. Id.
171. Id.
172. Id. § 1183a(a)(1)(A); Affidavits of Support, supra note 96, at 54,354.
173. 8 U.S.C.A. §§ 1631(a),1632(a). The attribution of income is mandatory for Federal means-tested public benefits. Id. § 1631(a). States may, but are not required to, attribute the income and assets of the sponsor (and his or her spouse) to the sponsored immigrant for the purpose of State means-tested programs. Id. § 1632(a). States may not use this authority with respect to the State public benefits available even to aliens who are not qualified aliens, and with respect to foster care and adoption assistance and to programs “comparable” to National School Lunch Act of Child Nutrition Act programs. Id. § 1632(b).
174. 8 U.S.C.A. § 1183a(a)(2); Affidavits of Support, supra note 96, at 54,354.
176. 8 U.S.C.A. § 1183a(a)(3)(B). The sponsored immigrant may not rely on any quarter of coverage if the sponsored immigrant received any means-tested benefits during the period that he or she earned that quarter of coverage. Id.
INS has also provided that the obligation ends if the sponsor or the sponsored immigrant dies, or if the sponsored immigrant ceases to hold the status of an alien lawfully admitted for permanent residence and leaves the United States. The termination of the support obligation does not relieve the sponsor (or the sponsor’s estate) for any liability that accrued before the obligation ended.

1. Attribution of the sponsor’s income and assets to the sponsored immigrant

One difficulty with the provisions for attributing the income and assets of the sponsor (and his or her spouse) to the sponsored immigrant (“deeming”) is that neither § 213A nor the deeming statutes includes a definition of “means-tested public benefit.” By regulation, each agency that provides a means-tested public benefit should provide public notice of the agency’s determination that the program is a means-tested public benefit program. These notices have been published for the TANF, Medicaid, and SSI programs.

The deeming requirement is a “belt and suspenders” approach to the prevention of improper use of public assistance. As noted, qualified aliens are not eligible for Federal means-tested benefits for the first five years after they become qualified aliens. By then, many aliens will have become eligible to seek naturalization. For TANF, SSI, Food Stamps, Medicaid, and Social Service Block Grants, the forty quarters of coverage that removes the alien’s ineligibility also terminates the sponsor’s support obligation.

The deeming requirement will, however, have real practical effects for those means-tested benefits that a lawfully present resident...
("LPR") is permitted to receive during the first five years of his or her sojourn. Consideration of the sponsor’s income and assets could result in denial of these benefits in some cases.\textsuperscript{186} There are two significant exceptions to the deeming requirements for Federal means-tested benefits programs. First, for a twelve month period, only the amount of support that the sponsor has actually supplied will be deemed to the sponsored immigrant if, without assistance under the means-tested program, the sponsored immigrant would be unable to obtain food and shelter.\textsuperscript{187} Secondly, there is an exception from the deeming requirement for an alien who qualifies as a battered spouse or child of a citizen or resident alien, if the assistance agency finds a "substantial connection" between the events that qualify the alien's for this status and the alien's need for assistance.\textsuperscript{188} This exception lasts for twelve months, but is extended indefinitely if the batterer is the sponsor and the alien has been formally recognized as a battered spouse or child.\textsuperscript{189} The battered spouse or child loses this exception if he or she lives with the "individual responsible for [the] battery or cruelty."\textsuperscript{190}

Note that these two exceptions only relieve the sponsored immigrant of the deeming requirements. The exceptions do not, by their express terms, relieve the sponsor of his or her obligation to reimburse the agency for the cost of the benefits that the sponsored immigrant receives because of one of the exceptions.

2. Enforcement

The sponsored immigrant is entitled to sue the sponsor, if the sponsor does not comply with the support obligation.\textsuperscript{191} Unlike the benefit agency's right to sue, section 213A does not indicate what remedies the sponsored immigrant can seek.\textsuperscript{192} Given the unusual scope of the sponsor's obligation (to maintain the sponsored immigrant at 125\% of the Federal poverty line), it would seem reasonable that the sponsored immigrant could recover the difference between his or her own household income and the amount that would equal at least 125\% of the poverty line for his or her household.

An agency that provides the sponsored immigrant with a means tested public benefit is entitled to reimbursement of the cost of the

\textsuperscript{186} 8 U.S.C.A. § 1612. For at least some State programs, the States may not deem the sponsor's income and assets to the sponsored immigrant, even if the programs are means-tested. \textit{Id.}
\textsuperscript{187} 8 U.S.C.A. § 1631(c).
\textsuperscript{188} \textit{Id.} § 1631(f)(1).
\textsuperscript{189} \textit{Id.} § 1631(f)(1)(B).
\textsuperscript{190} \textit{Id.} § 1631(f)(2).
\textsuperscript{191} \textit{Id.} § 1183a(a)(1)(B); Affidavits of Support, \textit{supra} note 96, at 54,354.
\textsuperscript{192} 8 U.S.C.A. § 1183a(b).
The sponsor need not, however, reimburse the cost of the benefits that an alien can lawfully receive during his or her first five years as a qualified alien. Before the agency can actually sue the sponsor, the agency must request reimbursement. The agency must do so in writing, and must serve the request on the sponsor by personal service. The sponsor has forty-five days to either pay the reimbursement or to establish a payment schedule. If the sponsor fails to respond or, responding, fails to pay, the agency can then sue. The agency must bring the suit within ten years of the last date on which the alien received a means-tested benefit for which the sponsor must make reimbursement.

By signing INS Form I-864, the sponsor agrees to submit to the personal jurisdiction of any court that has subject matter jurisdiction of a suit to enforce the sponsor’s obligation. In addition to the cost of the means-tested public benefit, the agency may seek legal fees and other costs of collection. To enforce a judgment, the agency may rely on a judgment lien, writ of execution, judicial installment payment order, garnishment order, or corresponding remedies under State law. A Federal agency may resort to standard procedures for collection of debts owed to the Federal Government, including deducting the amount of the debt from the sponsor’s Federal income tax refund.

Other enforcement tools relate, not to the support obligation itself, but to the good faith of those persons who complete the Forms required under the regulation. A sponsor or joint sponsor is subject to criminal prosecution for falsehoods or fraud in completing INS Form I-864 or I-865. A member of the household may also be prosecuted for fraud in completing INS Form I-864A. If the officer deciding the case detects fraud, the officer must find the sponsored immigrant inadmissible on public charge grounds. If the sponsored immigrant is a party to the fraud, the sponsored immigrant will be inadmissible.
for this reason as well, and may also be subject to criminal prosecution.207

E. CHANGE OF ADDRESS REQUIREMENT

The statute requires each sponsor to "notify the Attorney General and the State in which the sponsored alien is currently a resident" of any change in the sponsor's address.208 The sponsor must give this notice within thirty days of the change.209 If the sponsor fails to do so, the Attorney General has authority to impose a civil penalty.210 Ordinarily the civil penalty will range from $250 to $2,000.211 But if the sponsor fails to give the notice "with knowledge that the sponsored alien has received any means-tested benefits," the civil penalty must be at least $2,000, and may range as high as $5,000.212

This requirement presents two practical difficulties. First, how is a sponsor to know who is entitled to receive this notice on behalf of "the State in which the sponsored alien is currently a resident?" Secondly, how is the INS to prove (or the sponsor to disprove) the sponsor's failure to give this notice? The INS regulation resolves this difficulty. The sponsor complies with § 213A(d) sufficiently to avoid the penalty by completing INS Form I-865, Sponsor's Notice of Change of Address, and filing the Form I-865 with the INS within thirty days of the change of address.213 Filing the Form I-865 is sufficient notice to the State, because the State will have access to the sponsor's address through the INS system for verifying the immigration status of aliens seeking benefits.214 The sponsor is to send the INS Form I-865 to the Service Center specified in the instructions to the Form I-865, depending on the sponsor's new address.215

The local district director and the INS National Fines Office have jurisdiction to impose the fine, following its established procedures.216 As with other cases involving civil penalties and fines, the INS will initiate a penalty proceeding by issuance of a notice of intent to fine.217 The sponsor will have thirty days to submit a response to the

209. Id.
210. Id. § 1183a(d)(2).
211. Id. § 1183a(d)(2)(A).
212. Id. § 1183a(d)(2)(B).
214. Id. at 54,349.
215. Id. The instructions on an INS Form have the force of law, as they are incorporated into INS regulations. 8 C.F.R. § 103.2(a)(1) (1997).
notice of intent to fine. If the decision is adverse to the sponsor, the sponsor may appeal to the Board of Immigration Appeals.

V. CONCLUSION

PRWORA and IIRIRA should greatly strengthen the long-stated policy that immigrants should not become public charges. First, the law now provides stronger restrictions on the improper receipt of public assistance. Secondly, those sponsoring new immigrants must prove that they are actually able to provide the promised support, and are liable to civil judgment if they fail to do so.

218. *Id.* § 280.12.

219. *Id.* § and 280.13(b).