

## 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:**

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**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background
  - A. The Interim Rule
  - B. Synopsis of the Final Rule
- II. Description of and Response to Comments
  - A. Employment Sponsored Immigrants
  - B. Effect of an intending immigrant's Work History
  - C. Effect of the Child Citizenship Act of 2000 on the Affidavit of Support Requirement
  - D. Definition of "Domicile"
  - E. Sponsors Under the Age of 18
  - F. Joint Sponsors
  - G. Effect of the Visa Petitioner's Death
  - H. Other Sponsorship Requirements
  - I. Orphan Cases
  - J. Miscellaneous Comments
  - K. Children Who Immigrate Under Section 211(a) of the Act
  - L. Role of the Immigration Judges
  - M. Additional Changes to Department of Justice Rules
- III. Regulatory Analysis
  - A. Regulatory Flexibility Act
  - B. Unfunded Mandates Reform Act
  - C. Administrative Procedure Act
  - D. Assessment of Regulatory Impact on the Family
  - E. Paperwork Reduction Act
  - F. Executive Order 12866
  - G. Executive Order 13132
  - H. Executive Order 12988 Civil Justice Reform

**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.

## II. Description of and Response to Comments

The comment period ended on February 17, 1998. The Service received 117 comments that were submitted during the comment period. USCIS and DOJ have considered these comments in formulating the final rules.

The following is a discussion of the comments and USCIS's responses.

### A. Employment Sponsored Immigrants

#### Definition of "Significant Ownership Interest"

Sections 212(a)(4)(D) and 213A(f)(4) of the Act and 8 CFR 213a.2(b)(2) require the submission of Form I-864 in the case of an employment-based immigrant if a relative of the immigrant either filed the visa petition or has a "significant ownership interest" in the entity that did so. The interim regulation, at 8 CFR 213a.1, defined "significant ownership interest" as an ownership interest of five percent or more in a for-profit entity. Nine commenters (with 51 signers) believe that this five percent threshold is too low. One commenter, for example, argued that a five percent interest cannot be considered "significant" because "no ability to control or even influence [the entity] can result from such a low level of ownership." These commenters believe that an affidavit of support should not be required unless the relative owns at least 50 percent of the petitioning entity. They based this suggestion on the Department of State's determination in the Foreign Affairs Manual that a treaty investor must own at least 50 percent of the entity in order to meet the "substantial investment"

requirement for treaty investor visas. See Foreign Affairs Manual, Volume 9, Sec. 41.51, note 3.1 to 22 CFR 41.51.

The final rule retains the five percent threshold adopted in the interim rule. In accordance with the authorities cited in the supplemental information to the interim rule, at 62 FR 54347, USCIS believes that the term "significant ownership interest" had a well-settled meaning in Federal statutes and regulations when Congress included the term in sections 212(a)(4)(D) and 213A(f)(4) of the Act. The commenters' observation that these definitions are in "unrelated" statutes is not persuasive, since it is the meaning of the term itself that is at issue. In the absence of the enactment of a different definition of "significant ownership interest," there is no clear basis for adopting a different definition for section 213A of the Act.

#### Citizenship or Resident Alien Status of the Relative-Employer

Three commenters asked whether the affidavit of support requirement will apply to employment-based immigrants if the relative with the significant ownership interest is not a United States citizen or resident alien. For employment-based immigrants, the purpose of the affidavit of support is to ensure that a relative who could file a family-based visa petition will not use employment as a means to avoid the affidavit of support requirement that would apply if the relative were to file an alien relative visa petition. Relatives who are not U.S. citizens or resident aliens are ineligible to file alien relative visa petitions. For this reason, 8 CFR 213a.1 defines "relative," for purposes of the affidavit of support requirement, to include only those family members who can file alien relative visa petitions. The final rule clarifies that a relative must be either a U.S. citizen or a resident alien in order for the affidavit of support requirement to apply to an employment-based immigrant.

### B. Effect of an Intending Immigrant's Work History

Under section 213A(a)(3)(A) of the Act, all of a sponsor's obligations under the affidavit of support end once the intending immigrant has worked, or can be credited with, 40 qualifying quarters of coverage as defined under title II of the Social Security Act, 42 U.S.C. 401 *et seq.* One comment (with 21 signatures) suggested that the affidavit of support requirement should not apply at all if, when the intending immigrant seeks an immigrant visa or adjustment of status, the intending immigrant can already meet this requirement. This comment is well-taken. If the intending immigrant

can establish, on the basis of the records of the Social Security Administration, that he or she already has, or can be credited with, the necessary quarters of coverage, requiring the Form I-864 would serve no real purpose—the sponsor's obligations would terminate as soon as they arose. The final rule therefore adopts this suggestion.

### C. Effect of the Child Citizenship Act of 2000 on the Affidavit of Support Requirement

On October 30, 2000, President Clinton signed into law the Child Citizenship Act of 2000, Public Law 106-395, 114 Stat. 1631. Section 101 of Public Law 106-395 amended section 320 of the Act, effective February 27, 2001. Under this amendment, the alien child of a citizen becomes a citizen automatically under section 320 of the Act if, before the child's 18th birthday, the child is lawfully admitted for permanent residence while in the legal and physical custody of a citizen parent and while residing with the citizen parent in the United States. It is likely that most alien children of citizens will acquire citizenship at the same moment as their admission for permanent residence.

Because the requirements under the affidavit of support end when the sponsored immigrant becomes a citizen, USCIS concludes that imposing the affidavit of support requirement in these cases would be needless. Therefore, the final rule provides that no Form I-864 is required if the alien establishes that he or she will acquire citizenship automatically under section 320, as amended, upon his or her admission or adjustment of status. Note, however, that this final rule excuses the immigrant children of citizens from the requirement of filing a Form I-864 only. In a given case, it may still be that, in light of the general factors specified in section 212(a)(4)(B) of the Act—the alien's age, health, family status, assets, resources and financial status, education and skills—an immigrant child of a citizen would be inadmissible under section 212(a)(4)(A) of the Act as an alien likely to become a public charge. DHS does not consider it likely for this issue to arise in many cases, however. Under the amended section 320, most adopted children will acquire citizenship upon their admission to the United States or soon thereafter. Even a child with a serious medical condition, therefore, would most likely be a citizen before the child would become dependent on public assistance as a result of the condition.

The Child Citizenship Act applies to adopted children and alien orphans, as

well as to birth children. Note, however, that amended section 320 of the Act requires the child to be in the legal and physical custody of a citizen parent in order for the child to acquire citizenship upon admission as a permanent resident. If the citizen parent, residing in the United States, adopts an alien orphan abroad, and both parents saw the child before or during the adoption, then the legal parent-child relationship will already exist for immigration purposes when the alien orphan is admitted to the United States as a permanent resident. If all the other requirements of section 320 of the Act are met, the alien orphan will become a citizen at admission. If, however, the alien orphan is to be adopted in the United States only after admission, then the alien orphan will not become a citizen until the adoption is finalized. The citizen parent will therefore have to sign a Form I-864. A Form I-864 will also be required of the citizen parent when there is a completed foreign adoption, but one or both of the parents did not see the child before or during the adoption, unless the citizen parent can establish that, under the law of the State of the child's proposed residence, the foreign adoption will be entitled to recognition without the need for any formal administrative or judicial proceeding in that State.

The petitioning citizen parent must still submit a sufficient Form I-864 if the child immigrates after the child's 18th birthday, and also if the child immigrates before the child's 18th birthday, but the child is no longer a "child" as defined in section 101(b)(1) of the Act because the child is married.

#### *D. Definition of "Domicile"*

Eight comments questioned the definition of "domicile." Several commenters objected that, because of the way the interim rule defined "domicile," it would preclude citizens and resident aliens who are domiciled abroad from filing affidavits of support. It is true that those who are not domiciled in the United States may not file affidavits of support until they establish domiciles in the United States. This result is clearly what Congress intended in imposing the domicile requirement. An agreement to submit to the jurisdiction of a court in the United States, suggested by three comments, cannot substitute for this clear statutory requirement.

It appears that the commenters may have misunderstood the scope of the definition. In particular, in 1997 the Service did not intend, and USCIS does not now intend, the reference to sections 316(b), 317, and 319(b) of the

Act to exhaust the situations in which a person sojourning abroad may be said to retain a domicile in the United States. The final rule revises the definition to tie "domicile" to the sponsor's principal residence. The final rule also clarifies that a person residing temporarily abroad may file an affidavit of support if he or she can show, by a preponderance of the evidence, that he or she still has a domicile in the United States. To avoid confusion, the final rule makes this clarification in a new 8 CFR 213a.2(c)(1)(ii), rather than in the definition itself.

The final rule does provide in section 213a.2(c)(1)(ii) a single exception, under which a sponsor who is not domiciled in the United States (i.e., cannot show his or her residence abroad has been only temporary) may submit a Form I-864. The sponsor may do so only if the sponsor establishes, by a preponderance of the evidence, that the sponsor will have established his or her domicile in the United States no later than the date of the intending immigrant's admission or adjustment of status. The intending immigrant will, however, be inadmissible as an alien likely to become a public charge if the sponsor has not actually become domiciled in the United States by the date of the decision on the intending immigrant's application for admission or adjustment of status. Thus, the sponsor must arrive in the United States before, or at the same time as, the intending immigrant, and the sponsor must intend to establish his or her domicile in the United States.

#### *E. Sponsors Under the Age of 18*

Four commenters objected to the requirement that the sponsor must be at least 18 years old. They noted that this requirement will mean that a citizen or resident alien spouse who does not meet the age requirement cannot file an affidavit of support on behalf of the spouse seeking to immigrate. Similarly, a parent who is under 18 years old could not do so for his or her alien children. Congress set the age limit in section 213A(f)(1)(B) of the Act. USCIS cannot change the age limit in the regulations unless Congress amends section 213A of the Act. If the sponsor or joint sponsor was not 18 when he or she signed a Form I-864, the signature will have no legal effect under section 213A of the Act. Rather than requiring rejection of the Form I-864, however, the final rule provides that, to cure the improper filing, the sponsor or joint sponsor must sign it again on or after his or her 18th birthday before there can be a decision on the intending immigrant's application for an immigrant visa or adjustment of status.

#### *F. Joint Sponsors*

Four commenters argued that the joint sponsorship provision is too restrictive to provide a practical alternative. One of these commenters, in particular, suggested that the sponsor and joint sponsor should be able to "pool" their income, that is, that the joint sponsor should only be required to make up the difference between the sponsor's income and the income threshold. However, sections 213A(f)(2) and (5) of the Act permit a joint sponsor only in one specified situation: when the sponsor's income is not sufficient. The joint sponsor, according to section 213A(f)(5) of the Act, must be able to meet the income threshold. For this reason, the final rule cannot, and does not, adopt the suggestion that, like the household members, the sponsor and joint sponsor should be able to "pool" their income.

One comment suggested that a joint sponsor should be allowed if the visa petitioner is under 18. Sections 213A(f)(2) and (5) of the Act provide the only statutory basis for joint sponsors, and allow for a joint sponsor only if the sponsor's income is not sufficient. There is no similar provision for cases involving sponsors who are not at least 18, or who are not domiciled in the United States.

One of the eight commenters on the domicile issue discussed earlier suggested that the regulation should permit a joint sponsor if the visa petitioner cannot meet the domicile requirement. But sections 213A(f)(2) and (5) of the Act provide the only statutory basis for joint sponsors, and allow for a joint sponsor only if the principal sponsor's income is not sufficient. If the person who is required to be the sponsor is not domiciled in the United States, and, as noted earlier in the discussion of domicile, does not intend to establish a domicile in the United States, then there is no one who has standing to sign an affidavit of support on behalf of the intending immigrant.

The final rule also makes clear that an intending immigrant may not have more than one joint sponsor, in addition to the principal sponsor. This clarification is consistent with the statement of managers accompanying IIRIRA with respect to section 213A, which clearly indicates that the managers did not consider it appropriate to permit a second joint sponsor if the joint sponsor's income was not sufficient. H. Rep. No. 104-828 at 242 (1996). It is not necessary, however, for all the derivative beneficiaries of a visa petition to have the same joint sponsor as the

principal beneficiary. For example, suppose the principal beneficiary has a wife and four children who will accompany the principal beneficiary to the United States. It may be the case that a willing joint sponsor would have sufficient income to file an affidavit of support for the husband and wife and only one of the children. The final rule would permit the joint sponsor to accept responsibility only for those three aliens, and would allow a second joint sponsor to file an affidavit of support for the other three children. Each joint sponsor would then be responsible only for those aliens named in that joint sponsor's own Form I-864. The principal intending immigrant and the accompanying spouse and children, as a group, however, may not have more than two joint sponsors.

#### G. Effect of the Visa Petitioner's Death

Seven commenters suggested that a joint sponsor should be permitted if the visa petitioner dies before the visa petition is approved, and the beneficiary has obtained "relief from revocation" under 8 CFR 205.1(a)(3)(i)(C). There is no authority to approve a visa petition after the petitioner dies. See *Abboud v. INS*, 140 F.3d 843 (9th Cir. 1998); *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993); *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970). If the petitioner dies before approval of the visa petition, there is no basis for approving the visa petition.

The legal situation is different if the visa petitioner dies after approval of the visa petition. Section 205 of the Act authorizes revocation of approval of a visa petition for "good and sufficient cause." The related regulation, 8 CFR 205.1(a)(3)(i)(C), provides that the petitioner's death automatically revokes approval of a family-based immigrant petition. This same regulation, however, allows the approval to remain in force if USCIS, in the exercise of discretion, "determines that for humanitarian reasons revocation would be inappropriate." 8 CFR 205.1(a)(3)(i)(C).

Reinstatement of approval of the visa petition does not waive the affidavit of support requirements under section 213A of the Act. However, on March 13, 2002, the Family Sponsor Immigration Act, Public Law 107-150, 116 Stat. 74, was enacted. Public Law 107-150 amended section 213A(f)(5) of the Act to permit another relative to sign the affidavit of support if the petitioner dies after the visa petition is approved, where it is determined that revoking the approval would not be appropriate. This final rule incorporates the provisions of section 213A(f)(5)(B), as amended by Public Law 107-150. A substitute sponsor must be either a citizen or

national, or else an alien lawfully admitted for permanent residence. The substitute sponsor must also be at least 18 years of age, and must have a domicile in the United States. If USCIS allows the approval of the visa petition to stand, then the sponsored alien's spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or a legal guardian may sign the affidavit of support.

The final rule also adopts a special rule for cases in which the alien beneficiary was, before the petitioner's death, the spouse of a citizen. Under section 201(b)(2)(A)(i) of the Act, if an alien was married to a citizen for at least 2 years at the time of the citizen's death, the alien may file a petition on his or her own behalf, so long as the alien does so within 2 years of the citizen's death, and has not remarried. Section 212(a)(4)(C)(i)(I) of the Act, in turn, relieves that alien of the affidavit of support requirement, once USCIS approves the new petition. The final rule provides that it will not be necessary for the beneficiary to file a new petition (Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant) as the widow(er) of a citizen. Instead, the final rule provides for automatic conversion of the citizen's spousal Form I-130, Petition for Alien Relative, to a widow(er)'s petition upon the citizen's death if, on that date, the widow(er) meets the requirements of section 201(b)(2)(A)(I) of the Act as it relates to widow(er)'s petitions. This automatic conversion will apply whether the citizen spouse dies before or after approval of the Form I-130. Since the alien spouse will then immigrate as the widow(er) of a citizen, it will not be necessary to submit a Form I-864 from a substitute sponsor.

The final rule retains the provision of the interim rule that permits a joint sponsor if the visa petitioner dies after the principal beneficiary has immigrated, but before a family member entitled to "follow to join" the principal beneficiary immigrates. ("Following to join" permits spouses and children of an alien to obtain the status nonimmigrant visa or immigrant visa and priority date of the principal alien.) The final rule, however, conforms the provision to the requirements of the Family Sponsor Immigration Act. That is to say, the substitute sponsor must be a citizen, national, or permanent resident alien, at least 18 years of age, and related to the new intending immigrant in at least one of the ways described in section 213A(f)(5)(B) of the

Act, as amended by Public Law 107-150.

#### H. Other Sponsorship Requirements

Section 213A(f)(1)(D) of the Act provides that the sponsor must be the person "petitioning for the admission of the alien under section 204" of the Act. The interim rule, in 8 CFR 213a.2(b)(1), made clear that the sponsor must be the visa petitioner whose petition is the actual basis for the intending immigrant's eligibility to apply for the immigrant visa or adjustment of status. One commenter noted that an alien may be the beneficiary of more than one approved visa petition, filed by several relatives. This commenter believes that any one of these petitioners should be able to be the sponsor. For example, if the intending immigrant applies for a visa as an immediate relative, on the basis of his wife's visa petition, but his mother also filed a third family-based preference petition, then his mother, instead of his wife, should be able to be the sponsor.

This comment cannot be adopted. The reference in section 213A(f)(1)(D) of the Act to section 204 of the Act can most reasonably be taken to mean that Congress anticipated that the sponsor would be the same person whose visa petition has made the intending immigrant's application for an immigrant visa or for adjustment of status currently possible. If the mother in this example is going to be the sponsor, then the alien will have to wait until the priority date for her petition is reached. The mother may, of course, choose to be a joint sponsor if the visa petitioner/sponsor cannot meet the income threshold.

#### Proof of Sponsor's Social Security Number, Citizenship, and Residence

One commenter suggested that every sponsor should have to prove his or her citizenship, residence, and Social Security number. It is not necessary to incorporate this suggestion into the final rule. USCIS already verifies the citizenship or resident alien status of those who file alien relative visa petitions. Moreover, the general authority to gather evidence concerning an alien's eligibility to enter the United States, granted under section 287(b) of the Act, is a sufficient basis for USCIS to require additional evidence concerning these issues. Such evidence may include verification of a sponsor's Social Security number, especially when there is a reasonable basis to question the sponsor's identity or eligibility to sign the Form I-864. A joint sponsor, however, will have to

prove his or her eligibility to be a joint sponsor.

#### Nonimmigrant Fiancé(e)s

Another commenter asked for clarification that the nonimmigrant fiancé(e) of a citizen does not need a Form I-864 when the fiancé(e) comes to the United States as a K-1 nonimmigrant fiancé(e) under section 101(a)(15)(K) of the Act to marry the citizen. This is correct. A K-1 nonimmigrant fiancé(e), however, is admitted for only 90 days. The lawful status of the K-1 nonimmigrant fiancé(e), and any accompanying child admitted as a K-2 nonimmigrant, ends unless, within this 90-day period, the K-1 nonimmigrant fiancé(e) marries the citizen who filed the K-1 nonimmigrant visa petition. After the marriage, the K-1 nonimmigrant fiancé(e) and any accompanying children admitted as K-2 nonimmigrants must then apply for adjustment to permanent resident status. Sections 201(b)(2)(A)(i) and 245(d) of the Act make it clear that, when an alien who has been admitted as a K-1 nonimmigrant fiancé(e), and any accompanying child admitted as a K-2 nonimmigrant, applies for adjustment of status, he or she does so as an immediate relative. Since the K nonimmigrant adjusts as an immediate relative, sections 212(a)(4) and 213A make the nonimmigrant inadmissible unless the citizen spouse files a Form I-864 for both the K-1 nonimmigrant fiancé(e) and any accompanying children admitted as K-2 nonimmigrants.

This commenter also believed that Forms I-864 should be required for other nonimmigrants, such as students and the family members of students and nonimmigrants in work-related classifications. Section 213A of the Act, however, clearly applies only to certain immigrants. There is no basis in section 213A of the Act for adopting this comment.

#### Continued Use of the Form I-134, Affidavit of Support

The interim rule clarified in 8 CFR 213a.5 that the regulations relating to the use of Forms I-864, I-864A, and I-865 do not apply to other situations where immigration or consular officers have permitted the use of Form I-134. The Form I-134 is the long-used affidavit of support that, as several State courts have held, does not impose an obligation that could be enforced against the sponsor by lawsuit. *San Diego County v. Vilorio*, 276 Cal. App. 2d 350, 80 Cal. Rptr 869 (Cal. App. 1969); *Michigan ex rel. Attorney General v. Binder*, 356 Mich. 73, 96 N.W. 2d 140

(Mich. 1959); *California Dept. Mental Hygiene v. Renel*, 10 Misc.2d 402, 173 N.Y.S. 2d 231 (N.Y. App. Div. 1958). Seven commenters asked for clarification of the situations when Form I-134 may be used. The discretion concerning use of Form I-134 has long been quite broad. The sole purpose of 8 CFR 213a.5 is to retain that broad discretion. For this reason, the final rule makes no change to 8 CFR 213a.5.

#### Definitions of "Household Size" and "Household Income"

Numerous comments were received concerning the definitions of "household size" and "household income" and the use of the Form I-864A.

In general, these commenters believed that "household size" was defined too broadly, since all related people at the same residence would be considered in the household, even if they were, in fact, separate economic "households." These comments are well-founded. The final rule, therefore, provides for flexibility in the definition of "household size."

In all cases, the sponsor must include in calculating the "household size" the sponsor, his wife or her husband, the sponsor's unmarried children under the age of 21 (other than a step-child who meets the requirements of section 101(b)(1)(B) of the Act but who is not part of the sponsor's household, is not claimed as a dependent by the sponsor for tax purposes, and is not seeking to immigrate based on the step-parent/step-child relationship), and any other person—whether related to the sponsor or not—claimed as a dependent on the sponsor's income tax returns. The sponsor must include his or her spouse and all persons claimed as dependents for tax purposes, even if these persons do not actually have the same principal residence as the sponsor. The sponsor may exclude any unmarried children under 21 if these children have reached majority under the law of the place of domicile and the sponsor does not claim them as dependents on the sponsor's income tax returns.

If, in fact, the household consists of a more extended family, the sponsor may elect to include other relatives in determining the "household size." Under this alternative, the sponsor may then include in the calculation of household size any relative of the sponsor who has the same principal residence as the sponsor. In determining the household size, "relative" has the same meaning as for the affidavit of support regulation as a whole—that is, in addition to the spouse, unmarried children under 21, and any other

persons legally claimed as dependents, the sponsor may include his or her father, mother, adult son, adult daughter, brother, or sister. The final rule removes the interim rule's requirement that the household member must have resided in the sponsor's household for at least six months in order to sign a Form I-864A. The final rule also clarifies, as requested by three commenters, that no person should be counted more than once in determining the size of the household.

The definition of "household income" is revised to correspond to the revised definition of "household size." In determining the "household income" the sponsor may include the income of any other persons included in calculating the "household size," but these other persons, including the sponsor's spouse or children (who must be at least 18 years old), must still sign Form I-864A in order for the sponsor to use this option. The final rule retains the Form I-864A requirement to ensure that the family member's promise of support is enforceable. As with the sponsor's spouse and dependents, the income of these other relatives in the residence may be "pooled" to determine the household income. In response to one comment, the final rule clarifies that a person included in calculating "household income" must be at least 18 years old to sign a Form I-864A.

#### Intending Immigrant as Part of the Sponsor's Household

Two commenters argued that the intending immigrant and his or her family should not be considered in determining the sponsor's "household size" for purposes of the affidavit of support. Section 213A(f)(6)(A)(iii) of the Act clearly requires the sponsor's income to meet the income threshold "for a family unit of a size equal to the number of members of the sponsor's household \* \* \* plus the total number of \* \* \* aliens sponsored by that sponsor." Consequently, the sponsor must continue to include the intending immigrants in calculating the "household size," and must also include any other immigrants sponsored under any other Form I-864 if the sponsor's obligation is still in effect.

#### Sponsor's Reliance on the Intending Immigrant's Income

One commenter suggested that the intending immigrant's own income should never be considered in determining the household income, and that section 213A(f)(6)(A)(ii) of the Act permits consideration of the intending immigrant's assets, but not his or her income. The commenter also observed

that “most” intending immigrants will be giving up their jobs abroad, and so will no longer have that income. Many immigrants, however, acquire permanent residence through adjustment of status after working lawfully in the United States. Some intending immigrants work in the United States as nonimmigrants, and then go abroad and return with immigrant visas. Other intending immigrants may obtain transfers, so that they work in the United States for the same employer as abroad, or may have investments or other lawful sources of income that will continue to be available. The intending immigrant, moreover, is considered in calculating the sponsor’s household size, and it is the income of the household that determines whether the sponsor can satisfy the income threshold.

The final rule, therefore, clarifies that the sponsor may rely on the intending immigrant’s income if the intending immigrant is either the sponsor’s spouse or has the same principal residence as the sponsor and can show by a preponderance of the evidence that the intending immigrant’s income will continue, after acquisition of permanent residence, from the same source (such as lawful employment with the same employer or some other lawful source). The prospect or offer of employment in the United States that has not yet actually begun will not be sufficient to meet this requirement.

#### Who Must Sign the Form I-864

On a similar theme, one commenter asked whether the intending immigrant can sign the Form I-864 if the intending immigrant’s own resources will be the chief basis for the sufficiency of the Form I-864. The commenter’s example is a 22-year-old student, of meager resources, who has filed a Form I-130 for her father, who is independently wealthy.

Section 213A(f)(6)(A)(ii) of the Act provides that the sponsor may rely on the intending immigrant’s assets. However, sections 212(a)(4)(C) and 213A(f)(1) of the Act make it clear that the daughter, not the father, must sign and file the Form I-864, although it may prove that it is the father’s resources, not the daughter’s, that make meeting the “significant assets” provision possible. As noted, she may rely on her father’s income, as distinct from his assets, only if her father has the same principal residence as she does and can show by a preponderance of the evidence that his income will continue from the same source, even after acquisition of permanent residence.

#### Documenting the Sponsor’s Current Income

Eighteen commenters pointed out that Form I-864 does not include a place for the sponsor to indicate his or her current income. This oversight was corrected in the September 15, 2003, edition of Form I-864. The final rule now makes it clear that it is the sponsor’s income in the year in which the intending immigrant applies for an immigrant visa or adjustment of status that is to bear the greatest evidentiary weight in determining whether the affidavit of support is sufficient. The tax forms for past years serve as an indication of the sponsor’s ability to maintain that income over time.

These 18 comments implicitly suggested another question: For what year must the sponsor’s income meet the requirements of section 213A? This question will arise regularly, since it is often the case that there will be a lapse of time between the filing of the Form I-864 and the decision on the immigrant visa or adjustment application. The final rule clarifies that, as a general principle, the sufficiency of the Form I-864 will be determined based on the household income for the year in which the intending immigrant filed the immigrant visa or adjustment application. There is one exception, however. If more than a year has elapsed since the submission of the Form I-864, the final rule gives the Department of State officer, immigration officer, or immigration judge the discretion to request more current information if the Department of State officer, immigration officer, or immigration judge concludes that this additional evidence is necessary to the proper adjudication of the case. In any case in which the intending immigrant is requested to submit additional evidence, the additional evidence must relate to the current year, not to the year of the filing of the immigrant visa or adjustment application. The sufficiency of the Form I-864 will then be adjudicated based on the additional evidence.

DHS does not intend that a one-year delay between the filing and adjudication of the immigrant visa or adjustment application will routinely lead to a request for additional evidence. If the sponsor has a stable employment and income history, it may in many cases be reasonable to infer that this history has continued, so that additional evidence would not become necessary simply through the passage of time. It is necessary to provide authority to request additional evidence, however, for the sake of those cases in which, on the basis of the evidence of record, a

reasonable adjudicator could find the sponsor’s ability to maintain a sufficient income is reasonably open to question.

#### Changes in the Poverty Guidelines

Eight commenters suggested that a sponsor should not have to provide a new Form I-864 if the Poverty Guidelines change while the case is awaiting decision. It will not be necessary to file a new Form I-864 in this case. The final rule also clarifies that the sufficiency of the affidavit of support will be determined in accordance with the Poverty Guidelines in effect when the intending immigrant files the application for an immigrant visa or adjustment of status. So that the record will include the correct version of the Poverty Guidelines, the final rule provides that the intending immigrant is to file a copy of the current edition of Form I-864P, Poverty Guidelines, with his or her application. USCIS updates the Form I-864P each year to reflect the annual adjustment in the Poverty Guidelines.

There is one exception to this general rule: If, in the exercise of discretion, the Department of State officer, immigration officer, or immigration judge requests additional evidence because more than one year has elapsed since the filing of the application, then the sufficiency of the Form I-864 will be determined based on the Poverty Guidelines in effect when the request for evidence was made.

#### “Discretion” To Discount a Form I-864 Despite Sufficient Current Income

The interim rule, at 8 CFR 213a.2(c)(2)(v), provided that a Department of State officer, immigration officer, or immigration judge may find an affidavit of support to be insufficient, even if the sponsor’s income meets the income threshold, if the officer finds that it is unlikely that the sponsor will be able to maintain that income. Twenty-one commenters argued that this element of the interim rule gives the deciding officer too much “discretion.” One of these comments, moreover, maintained that, if the officer can reject marginally sufficient Forms I-864, the officer should also be able to accept marginally insufficient Forms I-864. The provision in the interim rule was not “discretionary.” It is not enough that the sponsor has sufficient income. Section 213A(f)(1)(E) of the Act clearly specifies that the sponsor must demonstrate that he or she can maintain that income. The final rule does specify, however, that, if the sponsor satisfies all other requirements of section 213A of the Act, a sufficient income will ordinarily make the affidavit of support

sufficient, unless, on the basis of the specific facts of a given case, the deciding officer finds that the sponsor has not demonstrated his or her ability to maintain that income over time.

The sponsor's employment history could be one specific fact that could warrant such a finding. Suppose, for example, that the sponsor recently started a new job after a long period of unemployment. If the sponsor has a reasonable prospect that the employment will continue, then it may well be that the affidavit of support will be sufficient. If, however, the new position is, by its terms, only temporary or seasonal, it would be reasonable to hold that the income is not sufficient to show that the sponsor can reasonably be expected to be able to maintain his or her household income at the income threshold.

Another situation may involve one person who has filed visa petitions for several relatives—two brothers and a sister, for example at—the same time, so that each beneficiary's priority date becomes current at about the same time. The relatives may then apply for immigrant visas or for adjustment of status at about the same time. Strictly speaking, the legal support obligation would not be in effect when these siblings (and their accompanying spouses and children) apply for visas, since none of them have been admitted as permanent residents yet. Thus, the second brother and the sister, for example, would not be included in calculating the "household size" for the first brother's affidavit of support. Yet the fact that the same person must sign an affidavit of support for several people would surely be relevant in determining whether the sponsor can meet the support obligation for all of those aliens. The Department of State officer, immigration officer, or immigration judge may, therefore, properly consider these other affidavits of support (although not yet in effect) in determining whether the sponsor can meet the requirements of section 213A with respect to the alien(s) whose case(s) are under review. It may prove that only one or two of the intending immigrants (and their accompanying family members) will be able to immigrate at that time, unless someone is willing to be a joint sponsor for those intending immigrants who, if included, would put the household size beyond the size for which the sponsor's income is sufficient.

On a related issue, the final rule clarifies that a sufficient affidavit of support will not overcome the public charge ground of inadmissibility in every possible case. In most cases, the

affidavit of support will carry the greatest weight. In a particular case, however, there may be specific facts about the intending immigrant's situation, under the factors specified in section 212(a)(4)(B) of the Act—the alien's age, health, family status, assets, resources and financial status, education and skills—that warrant a finding that the intending immigrant remains inadmissible on public charge grounds, even if the affidavit of support meets the requirements of section 213A of the Act.

#### Effect of the Sponsor's Own Receipt of Means-Tested Public Benefits

Several commenters objected to the requirement that the sponsor must disclose whether the sponsor or any household members have received means-tested public benefits. The argument is that section 213A of the Act does not authorize this requirement. USCIS does not agree that section 213A of the Act does not permit USCIS to ask about past receipt of means-tested public benefits. In most cases, however, information about this issue will not add much evidence of probative value. As a matter of policy, therefore, the sponsor will not be asked to disclose his or her receipt of means-tested public benefits. The Service already removed this question from the November 5, 2001, edition of the Form I-864. If a sponsor uses an older edition of the Form I-864, the sponsor may leave that question unanswered. However, USCIS notes that the sponsor may not include any means-tested benefits received in calculating the household income. The sponsor may, of course, rely on retirement benefits, unemployment compensation, workman's compensation, or other benefits that the sponsor has received, that must be included as taxable income. The duration of the sponsor's eligibility for these benefits may be relevant in determining the sponsor's ability to maintain his or her income over time.

#### Income Tax Returns

Section 213A(f)(6)(A)(i) of the Act requires the sponsor to provide certified copies of his or her individual income tax returns for the last three years before the sponsor signed the Form I-864. One commenter suggested that the final rule should make clear that the sponsor must provide the complete return as actually filed, including all Internal Revenue Service Forms W-2 (if the sponsor relies on income from employment), Forms 1099 (if the sponsor relies on income from sources documented on Forms 1099 in meeting the income threshold), or other documentary evidence of

income, and not just the Forms 1040, 1040A or 1040EZ. The final rule makes this clarification.

Section 213A(f)(6)(B) of the Act gives discretion to alter the affidavit of support requirements so that a sponsor need only file a copy of the tax return from the most recent tax year, rather than the returns for the three most recent tax years. This final rule adopts this alternative. That is, once this final rule enters into force, a sponsor will only be required to submit one Federal tax return, for the most recent tax year. However, the sponsor may, at his or her option, submit the sponsor's or household member's Federal income tax returns for the three most recent years if the sponsor believes these additional tax returns may help to establish the sponsor's ability to maintain his or her household income at the applicable threshold set forth in Form I-864P, Poverty Guidelines.

#### Use of IRS Transcripts Instead of Copies of the Required Tax Returns

Another commenter asked whether the sponsor may submit IRS-generated transcripts of the returns. Under current IRS policy, IRS will provide transcripts, free of charge, if the sponsor files IRS Form 4506T. There is, by contrast, a fee for filing an IRS Form 4506, rather than the free IRS Form 4506T, if one wants to obtain an actual photocopy of the filed return. It is important to note that the interim rule did not require the sponsor to obtain photocopies of the sponsor's own returns from the IRS. If, as the IRS recommends, the sponsor has kept photocopies or duplicate originals of the sponsor's returns in the sponsor's own files, the sponsor may submit copies of his or her own file copies. Section 213A requires the submission of certified copies, but the interim rule and the Form I-864 itself make it clear that, by signing the Form I-864, the sponsor certifies under penalty of perjury that the copies are true copies. The final rule does give the sponsor, substitute sponsor, joint sponsor, household member, or intending immigrant the option of submitting either photocopies or IRS-generated transcripts of the required tax returns. Along with the transcripts or photocopies, the sponsor, joint sponsor, or household member must submit copies of all Forms W-2, Forms 1099, and schedules, as specified in the rule.

#### No Legal Duty To File a Tax Return

Two commenters addressed the situation of a sponsor who had no legal duty to file a tax return for a particular year. The sponsor would bear the burden of showing the basis for his or

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



impose any obligations on the sponsor, joint sponsor, or household member. A sponsor may file a fully sufficient Form I-864, but the intending immigrant may be held to be inadmissible on some other basis. In another case, the intending immigrants included in a Form I-864 or Form I-864A may not all acquire permanent residence on the same day. The final rule clarifies that, for the obligations to arise, the intending immigrant must actually acquire permanent resident status on the basis of the application supported by the Form I-864 or Form I-864A. Additionally, a potential joint sponsor who signed a Form I-864 that met all the requirements of the affidavit of support regulation would be bound by the support obligations only if the immigration judge, immigration officer, or consular officer found that the principal sponsor did not meet the income threshold, so that the joint sponsor's Form I-864 was actually necessary to the grant of permanent residence to the intending immigrant.

In response to nine commenters, the final rule clarifies that a household member's obligations under Form I-864A terminate under the same circumstances as the sponsor's obligations under Form I-864 terminate. One commenter asked whether a household member's obligation under Form I-864A terminates when he or she leaves the household. It does not. One of the commenters suggested that divorce should terminate a support obligation. Another commenter suggested that divorce should be irrelevant to the support obligation. Finally, one commenter maintained that the support obligation should terminate five years after the sponsored immigrants become resident aliens, "even if they do not become citizens or work."

Section 213A of the Act specifies the two circumstances that end the support obligation: The sponsored immigrant's (1) naturalization or (2) having acquired 40 quarters of coverage under the Social Security Act. The interim rule added two more: (1) The death of the sponsor or sponsored immigrant or (2) the sponsored immigrant's abandonment of status and permanent departure from the United States. These two additional grounds for termination exist as a matter of logical necessity. Section 213A of the Act does not provide any basis to say that divorce does, or does not, affect a support obligation under an affidavit of support. If the sponsored immigrant is an adult, he or she probably can, in a divorce settlement, surrender his or her right to sue the sponsor to enforce an affidavit of support. The sponsored

immigrant and the sponsor (or joint sponsor) may not, however, alter the sponsor's obligations to DHS and to benefit-granting agencies.

This final rule adds two additional situations that will terminate the obligations that result from the signing of a Form I-864 or I-864A. First, as noted, the interim rule terminated these obligations if the sponsored immigrant ceases to be an alien lawfully admitted for permanent residence and leaves the United States. It is not always the case, however, that an alien who abandons permanent residence does so formally, such as by filing a USCIS Form I-407 when departing the United States. In many cases, the issue of abandonment is determined only in a later removal proceeding. The final rule makes clear that a formal adjudication in a removal proceeding that an alien has abandoned permanent resident status will also terminate any remaining obligations under any Form I-864 or I-864A submitted when the person became a permanent resident.

Second, some aliens who have already been admitted as permanent residents but have become subject to removal apply for a new grant of adjustment of status as a means of relief from removal. If an alien in this situation seeks this new adjustment as an immediate relative or as a family-based immigrant (or as an employment-based immigrant who will work for a relative or a relative's firm), the alien may need to submit a new Form I-864 or I-864A with the new adjustment application. The grant of adjustment will terminate the support obligations resulting from any earlier Forms I-864 or I-864A, and those obligations will then rest on whomever signed the Forms I-864 or I-864A in support of the new adjustment application.

Thirteen commenters believed that USCIS should notify sponsors when the sponsorship obligations have terminated. Adopting this suggestion is not feasible. Since the sponsor is a relative, it is likely that the sponsor will know, or can inquire of the sponsored immigrant, whether any fact that terminates the obligation has occurred. The only bases for termination of which USCIS is likely to be aware are the sponsored immigrant's naturalization or the sponsored immigrant's formal abandonment of permanent residence or formal removal from the United States. The termination of the obligation would be an affirmative defense to any deeming of the sponsor's income to the sponsored immigrant, request for reimbursement, or notice of intent to fine for failure to file Form I-865 to report a change of address.

#### Reporting a Change of Address

One commenter suggested that Form I-865, Sponsor's Notice of Change of Address, is virtually worthless, since the sponsor need not report the sponsored immigrant's name, address, or other identifying information. Form I-865 need not include information about the sponsored immigrant, because the USCIS database automatically links a Form I-865 to every Form I-864 that the sponsor may have filed, based on the sponsor's Social Security number.

The commenter also suggested that USCIS should send a confirmation that it has received a Form I-865. USCIS will consider this suggestion as USCIS expands its automated capabilities. Until this expansion occurs, a sponsor or joint sponsor may protect his or her ability to verify that he or she has complied with the requirement to file Form I-865 by submitting the properly completed Form I-865 by mail (using the U.S. Postal Service's Express Mail, priority mail, or certified mail service) or by shipping it through a commercial delivery service, and keeping the proof of mailing or shipment as well as the return receipt or other confirmation of delivery for his or her files.

Accordingly, the final rule provides that USCIS will accept the United States Postal Service certificate of mailing and a return receipt or delivery confirmation as proof that the sponsor or joint sponsor filed the Form I-865 with the office whose address appears on the certificate of mailing and return receipt. If the sponsor uses a commercial delivery service, USCIS will accept the delivery service's shipping label and proof of delivery of the properly completed Form I-865 to the appropriate USCIS office.

#### I. Orphan Cases

Sixty-two commenters objected to the requirement that U.S. citizens who adopt alien orphan children, as defined in section 101(b)(1)(F) of the Act, must file affidavits of support on behalf of these children. Fifty of the 62 comments on this issue were substantially identical letters. The other 12, while not identical, raised issues included in the 50 identical letters.

It is likely that many, and perhaps most, alien orphans will be exempt from the affidavit of support requirement under the provision of this final rule that relieves an alien of the need to have an affidavit of support if the alien already has, or can be credited with, 40 quarters of coverage under the Social Security Act. An alien child is entitled to be credited with all the quarters of coverage earned by each of his or her

parents before the child's 18th birthday. To qualify as an alien orphan, the alien must not have reached his or her 16th birthday before the adopting parent(s) filed the visa petition. Thus, the orphan can be credited with each of his or her parents' quarters of coverage. The parents, in turn, need not have worked full-time in order to obtain quarters of coverage. In 1998, for example, a person earned four quarters of coverage if he or she made at least \$2,800.00 in covered earnings during that year (62 FR 58762). It is likely that many, if not most, citizens adopting orphans will already have sufficient quarters of coverage to make the filing of an affidavit of support unnecessary. If the parents' Social Security Administration records show that, between them, they already have 40 quarters of coverage, then they will not need to file a Form I-864 for the alien orphan.

As already noted in this Supplementary Information, moreover, this final rule relieves the child of a citizen of the affidavit of support requirement, if the child will, upon admission, acquire citizenship under section 320 of the Act. No affidavit of support will be necessary, therefore, if the adoption of an alien orphan is already final when the alien orphan seeks admission or adjustment of status and, since both parents saw the child before or during the adoption proceeding, the alien orphan will become a citizen under section 320 of the Act, as amended, upon his or her admission or adjustment of status.

The long-term impact of the affidavit of support requirement is also likely to be small in orphan cases for another reason. Section 213A(a)(2) of the Act terminates the sponsor's obligations under the affidavit of support when the sponsored immigrant naturalizes. Assuming the child meets all other requirements of section 320 of the Act, as amended, that provision will make the alien orphan who is not adopted abroad a citizen as soon as the citizen parent finalizes the alien orphan's adoption in the United States. Unlike the sponsors of adults, therefore, the citizen sponsors of immigrant children have considerable control over how long the affidavit of support obligations will continue.

For the sake of those adopting parents who intend to adopt an alien orphan after bringing the child to the United States, but who cannot meet the quarters of coverage exception, USCIS will address the orphan-related comments. The comments and the responses are set out as follows.

*Comment:* Requiring affidavits of support on behalf of alien orphan

children is duplicative, since the adopting parents must already provide information concerning their financial status when they file the orphan visa petition.

*Response:* The Form I-864 does not simply duplicate the visa petition process. It has long been settled that whether the intended beneficiary is actually admissible to the United States is not at issue in the visa petition process. *See Matter of O*, 8 I. & N. Dec. 295 (BIA 1959). The only issues in the visa petition proceeding are whether the alien child qualifies as an orphan and whether the petitioner qualifies as a prospective adoptive parent. Whether the orphan is actually admissible can be decided only when that issue is adjudicated in connection with an application for an immigrant visa, for admission as an immigrant, or for adjustment of status. Section 212(a)(4)(C) of the Act specifically requires an affidavit of support for all aliens who immigrate as the immediate relatives of U.S. citizens. Like all unmarried minor children of citizens, orphans immigrate as immediate relatives. Thus, section 213A of the Act clearly requires affidavits of support in these cases. Moreover, the Form I-864 also provides the basis for deeming the sponsor's income to the sponsored immigrant, for purposes of determining the sponsored immigrant's eligibility for means-tested public benefits, and makes the sponsor responsible for reimbursing agencies for the costs of means-tested public benefits.

*Comment:* Requiring an affidavit of support at the immigrant visa stage introduces uncertainty, since the adopting parents will not be able to know whether the children are admissible. The regulation should provide for "pre-approval" of the Form I-864, for example, when the parents file Form I-600, Petition to Classify Orphan as an Immediate Relative or I-600A, Petition for Advance Processing of Orphan Petition.

*Response:* This uncertainty exists in all immigrant visa cases, since approval of a visa petition never guarantees that the intended beneficiary will be found to be admissible when he or she applies for an immigrant visa, for admission, or for adjustment of status. USCIS cannot "pre-approve" the Form I-864, since only the officer who has jurisdiction over the application for an immigrant visa, for admission as an immigrant, or for adjustment of status has authority to determine whether an alien is admissible. The parents will, however, know their own financial situation, including whether they have, between them, at least 40 qualifying quarters of

coverage under the Social Security Act. They will also know the requirements they must meet to satisfy section 213A of the Act. Their knowledge of the facts of their situation and of the legal requirements will enable them to make a reasonable prediction about their ability to satisfy the requirements of the law.

*Comment:* Parents should not be required to file an affidavit of support on behalf of their children because they are already responsible for the support of their children and therefore the Form I-864 just duplicates the already-existing support obligation.

*Response:* The affidavit of support requirement goes beyond the general obligation to support one's children, by providing, in accordance with the clear statutory mandate, that a benefit-granting agency may deem the sponsor's income to be the sponsored immigrant's income, and that the sponsor must reimburse agencies for the costs of any means-tested public benefits that may be accorded to the sponsored immigrant.

*Comment:* Requiring production of tax returns and other financial information is overly intrusive, especially since the regulation permits USCIS to make this information available to agencies that may provide means-tested public benefits.

*Response:* Section 213A(f)(6) of the Act specifically requires the sponsor to produce his or her tax returns. Section 213A(a)(3)(C) of the Act requires USCIS to make the sponsor's name, address, and Social Security number available to public assistance agencies through the system for alien verification of eligibility. USCIS will provide these documents to other agencies only in relation to a deeming action or an action to enforce the sponsor's support obligation. USCIS will not make the documents, or the information in them, routinely available to other agencies.

*Comment:* Requiring the adopting parents to provide notice of any change of address violates their rights as citizens.

*Response:* Section 213A(d) of the Act clearly requires the sponsor to provide notice of a change of address, so long as the affidavit of support obligation remains in force. This requirement will not apply to those who, because they have already accrued 40 qualifying quarters of coverage, need not submit an affidavit of support. Also, the requirement to notify USCIS of a change of address ends when the child is naturalized.

*Comment:* Either of the adopting parents, and not just the one who signed the visa petition, should be able to be

the orphan's sponsor. It may be that the parent who signed the petition is not the parent who has the income sufficient to meet the income requirements.

*Response:* The sponsor must be the person who is actually the visa petitioner. As long as one parent who is actually the visa petitioner signs the Form I-864 and the other signs a Form I-864A, both spouses' incomes may be considered in determining the household income.

*Comment:* Requiring the adopting parent to complete part 3 of Form I-864 is not consistent with the rules governing the use of Form I-600A, the application for advance processing of an orphan petition. When a prospective adoptive parent files Form I-600A, it is not necessary to identify the prospective immigrant.

*Response:* A prospective adoptive parent uses Form I-600A if he or she wants to begin the processing before he or she has identified the particular child to be adopted. The parent must also file Form I-600, the petition to classify an orphan as an immediate relative, once the child has been identified. Since the parent files Form I-864 when the child actually applies for an immigrant visa, the child's identity will be known, enabling the sponsor to include this information in part 3 of Form I-864.

*Comment:* Requiring proof of employment or self-employment is unfair to adopting parents who may have taken time off from work in order to prepare for adopting the child.

*Response:* Temporary absence from the work force will not require rejection of the affidavit of support, so long as the sponsor can show that either the household income or the sponsor's assets meet the requirements of the regulation. As with all sponsors, there is no requirement that the sponsor be employed in order to qualify as a sponsor. What section 213A of the Act requires is that the sponsor's income, whether from employment, investments, or some other lawful source, must meet the income threshold established by section 213A of the Act, or else that the sponsor can meet the alternative "significant assets" provision.

*Comment:* Requiring affidavits of support for alien orphans discriminates against these children and their parents, since parents of biological children do not have to comply with the requirements.

*Response:* A biological parent must meet the requirements of section 213A of the Act if the biological child is an alien who will immigrate on the basis of the biological parent's visa petition and will not acquire citizenship at admission under section 320 of the Act,

as amended, just as a prospective adoptive parent must meet these requirements if the adopted child is going to immigrate based on the prospective adoptive parent's visa petition, but will not acquire citizenship at admission under section 320 of the Act, as amended. The same rule applies to a child born in or out of wedlock, to a stepchild, and to an adopted child that does not qualify as an orphan. In each case, the citizen parent must file Form I-864, unless the child has, or can be credited with, 40 qualifying quarters of coverage under the Social Security Act, or unless the child will, at admission, acquire citizenship under section 320 of the Act, as amended.

*Comment:* Adopting parents should not have to disclose their past receipt of means-tested public benefits.

*Response:* As already noted, a sponsor will no longer be required to provide this information.

#### Definition of "Means-Tested Benefits"

Six commenters addressed the definition of "means-tested public benefits." The interim rule specified that, in order to qualify a program as a means-tested public benefit program, for purposes of the deeming and reimbursement requirements, the agency that administers the program should publicize the agency's determination that the program is a means-tested public benefit program. One commenter argued that the definition of means-tested public benefit is too narrow. The commenter suggested that the regulation should incorporate the definition included in an earlier, unenacted, version of what became section 213A of the Act. As the commenter pointed out, however, this definition was deleted from the bill under the so-called "Byrd rule," 2 U.S.C. 644. This commenter argued that the striking of the definition should not be considered an expression of the actual congressional intent in enacting the final bill, but only as a preliminary parliamentary move. The fact remains that Congress did not enact the definition that this commenter prefers.

Other commenters believed that the rule or the Form I-864 should specify exactly which programs qualify as means-tested public benefits. This alternative would require a revision of the regulation and of the Form I-864 each time a new means-tested public benefit was created or an existing one abolished. The final rule strengthens the requirement of the interim rule at 8 CFR 213a.4(b) that a benefit agency make public its determination that a program qualifies as a means-tested public benefit if the agency wants to deem a

sponsor's income to a sponsored immigrant and to seek reimbursement from a sponsor. The Federal agency's publication in the **Federal Register** of the agency's determination that a program is a means-tested public benefit is sufficient to give all persons notice of the determination. 44 U.S.C. 1507. Several states have their own corresponding systems for publishing relevant regulatory and administrative determinations. So long as a Federal agency gives notice in the **Federal Register**, or a State agency gives notice in whatever manner is provided for under State law, therefore, any sponsor can by reasonable effort learn which programs are "means-tested public benefit" programs.

A related comment is that a sponsor should be responsible only for those programs that have been designated as "means-tested public benefit" programs as of the date the sponsor signs the Form I-864. Again, because "means-tested public benefit" was defined in the interim rule, a sponsor cannot reasonably claim not to know which programs are enforceable against him or her. However, USCIS agrees that as the interim rule encouraged governments to report which specific programs were means-tested, some notice by publication of benefit programs is appropriate. This final rule provides that any government providing a means-tested public benefit must publish that it is a means-tested public benefit prior to the date the benefit was first provided to the immigrant, for that government to be eligible to be reimbursed by the sponsor who sponsored that immigrant.

#### Enforcement of the Affidavit of Support

Numerous commenters suggested that the regulation should more precisely define the scope of the sponsor's liability. For example, must the sponsor provide money to the sponsored immigrant, or may the support be provided in kind? Does the sponsored immigrant have a duty to support himself or herself, which the sponsor can raise as an affirmative defense to a suit by the sponsored immigrant? Is the sponsor's liability to a benefit granting agency limited to the difference between the sponsored immigrant's income and the 125 percent income threshold? Or is the scope of liability, at least potentially, unlimited? If the sponsor was supporting the sponsored immigrant at the proper level, or the sponsored immigrant was otherwise ineligible for assistance, but the agency mistakenly provided assistance, is the sponsor liable? Like the interim rule, this final rule does not address these issues. It is for the proper court to

adjudicate any suit that may be brought to enforce an affidavit of support.

One commenter asked how the liability is to be apportioned among the sponsor, a joint sponsor, and any signers of Form I-864A. Under section 213A of the Act, the sponsor and joint sponsor are jointly and severally liable. Under the regulation, a person who signs a Form I-864A also agrees to be held jointly and severally liable with the sponsor. The general principles that govern joint and several liability will apply in these cases. This means that the sponsor and the joint sponsor are equally responsible under the law for the sponsored immigrant's support. If the sponsored immigrant receives a means-tested benefit, the agency may seek reimbursement, and if necessary, may sue only the sponsor, only the joint sponsor, or both the sponsor and the joint sponsor.

Another commenter believed it contrary to the intent of Congress to permit the sponsored immigrant to sue to enforce the support obligation. Section 213A(a)(1)(B) of the Act expressly says the sponsored immigrant must be able to seek to enforce the affidavit of support. Congress clearly intended to permit the sponsored immigrant to sue to enforce the support obligation, if necessary.

One commenter criticized the rule because section 213A of the Act requires the sponsor to provide the sponsored immigrant with enough support to keep the sponsored immigrant's income at "no less than" 125 percent of the Poverty Guidelines, but the rule speaks of "at or above" 125 percent. The regulation does not use the expression "at or above." In any event, USCIS is at a loss to understand the difference. To avoid liability, the sponsor must maintain the sponsored immigrant at 125 percent. If the sponsor chooses to do more, the sponsor may do so. But neither section 213A of the Act nor the rule requires a sponsor to do so.

One comment asked whether a State agency must comply with the requirement to request reimbursement, if the agency has no intention to sue. Section 213A(b) of the Act makes the request for reimbursement a prerequisite to suit, but does not require the agency to sue. For this reason, section 213A(b) of the Act would not require any agency to make a request for reimbursement, if that agency has no intention to sue. This observation, of course, pertains only to section 213A of the Act, and has no bearing on whether the agency may have a legal obligation, apart from section 213A of the Act, to seek reimbursement or to bring suit.

This commenter also asked about how the deeming requirement and the reimbursement requirement relate to each other. This question relates, in part, to the eligibility requirements for a specific benefit program. The basic assumption is that, if the sponsor's income is sufficiently high, then deeming the sponsor's income to the sponsored immigrant will make the sponsored immigrant ineligible for the program. No benefits would then be paid, and no reimbursement obligation would arise. Similarly, the purpose of the "indigence exception" in section 421(e) of Public Law 104-193 that this commenter addresses is to prevent the sponsored immigrant from falling into total distress if the sponsor defaults on his or her obligation. The agency may then provide assistance, assuming the sponsored immigrant is otherwise eligible, and collect the cost of the benefits from the sponsor.

This commenter also objected to the reference in 8 CFR 213a.2 to another section of title 8 for the definition of "personal service." The complete text of the Code of Federal Regulations is readily available to the public from the Government Printing Office, in public libraries, computer-assisted research services, and on the USCIS Internet Web site at <http://www.uscis.gov>. To define a term that has already been defined is not necessary. In response to a different comment, however, the final rule does clarify that personal service of a request for reimbursement under section 213A(b) of the Act and 8 CFR 213.4(a) need not be made by a Federal Government officer or employee.

This commenter believed that USCIS should be the sponsor's agent for purposes of service on the sponsor of a request for reimbursement or of a summons and complaint. Section 213A of the Act provides no basis for the adoption of this suggestion. USCIS will provide the sponsor's last known address to an agency entitled to that information. It then falls to the agency to accomplish service of process.

This commenter also argued that the agency should be able to include anticipated future benefits in the request for reimbursement. There is no duty to reimburse until the agency actually provides some benefit. If additional benefits are paid, nothing in section 213A of the Act or regulation precludes a subsequent request for reimbursement.

#### *J. Miscellaneous Comments*

In addition, the Service received seven broad general comments in favor of the interim rule, and 19 broad general comments against the interim rule. These comments also addressed specific

issues, and so the response to these comments as they relate to those issues have been included in the discussion of those issues. Three of the negative comments, however, warrant a separate response.

First, 14 of the negative comments expressed concern that the interim rule would undercut the principle of family unification by making it more difficult for citizens and resident aliens to bring their family members to the United States. This result may follow from the strengthening of the public charge inadmissibility ground. The general principle of family unification, however, always operates in light of the specific requirements of the immigration laws. Family unification cannot provide a basis for admitting an alien who is unable to overcome a ground of inadmissibility for which the law does not provide a waiver.

Another commenter argued that the new affidavit of support requirement was not intended to impose financial obligations on U.S. citizens and permanent resident sponsors. But section 213A of the Act clearly does impose financial obligations on sponsors. Section 213A(b)(2) of the Act permits assistance agencies to sue the sponsor for reimbursement of means-tested public benefits. Section 213A(a)(1)(B) of the Act permits the sponsored immigrant to sue as well.

Another commenter argued that the regulation should adopt a different interpretation of the support requirements because people from different cultures often support family members on far less money than United States citizens are generally accustomed to. Section 213A of the Act, however, clearly specifies that the household income must meet a specified threshold. There is no administrative authority to disregard the income requirements that Congress has enacted.

Two commenters argued that it is "unfair" that the new affidavit of support requirement applies to aliens who immigrate on the basis of visa petitions filed and approved before the new requirement entered into force. One of the commenters suggested that the commenter's son would have married someone else, if he had known he would have to sign an enforceable Form I-864. It is beyond question that Congress may enact new immigration provisions and make them apply to cases that were already pending. *Matter of Alarcon*, 20 I. & N. Dec. 557, 562 (BIA 1992). Section 531(b) of IIRIRA clearly makes the new affidavit of support requirement apply to aliens who apply for admission (or, by extension,

adjustment of status) on or after the day the requirement entered into force.

The Supplementary Information that accompanied the interim rule indicated that the duties imposed on the sponsor arise from the sponsor's participation in a voluntary Federal program. One commenter objected to the characterization of the affidavit of support requirement as "voluntary," since completing Form I-864 is the only way to satisfy the requirements of section 213A of the Act. The only voluntary aspect, according to this comment, "is to sponsor an immigrant or not sponsor an immigrant." But that is precisely what makes it voluntary. The sponsor is under no legal obligation to file a visa petition, nor is the sponsor obligated to sign Form I-864. But if the sponsor chooses to facilitate the immigration of alien relatives, the sponsor must comply with the legal requirements for doing so.

This commenter also objected to the designation of consular officers as immigration officers, for purposes of the interim rule, and to the fact that consular officers should play any role at all in the process. The Form I-864, according to this comment, should be pre-approved by USCIS. Consular officers have for decades had authority under the Act and its predecessors to adjudicate applications for immigrant visas. In doing so, the consular officer must necessarily determine whether the applicant is inadmissible as likely to become a public charge. Also, the commenter appeared to misunderstand the reason for designating consular officers as immigration officers for the limited purpose of this rule. Under section 531(b) of IIRIRA, no affidavit of support is required if the alien had his or her interview with "an immigration officer" before the affidavit of support requirement entered into force. Without the designation to which this commenter objects, the new requirement would have applied to all aliens who had obtained visas before December 19, 1997, but who did not actually immigrate until after that date. USCIS considered it more prudent to "grandfather" this finite class of aliens, rather than impose on USCIS, the consuls, and the aliens the burden of having to reconsider the validity of the already-issued visas in light of the new requirements.

Finally, a commenter asked for clarification of what constitutes a "material misrepresentation" that would render the affidavit of support insufficient to overcome the public charge inadmissibility ground. According to the Supreme Court's decision in *Kungys v. United States*, 485

U.S. 759 (1988), a concealment or misrepresentation of fact is material if disclosure of the truth would have had a natural tendency to influence an official decision. The critical question is whether the sponsor has, and can maintain, a household income that is at least 125 percent of the Poverty Guidelines for a household of the same size. Certainly, misrepresentations or concealments about household size, income, or employment history would always be material. Whether other concealments or misrepresentations would be material would depend on the facts of particular cases.

#### *K. Children Who Immigrate Under Section 211(a) of the Act*

This final rule also adopts one additional revision that is not based on any comments. This revision concerns children admitted under section 211(a) of the Act. This provision waives the immigrant visa requirement for certain children who accompany their immigrant parent(s) to the United States, but who are born after issuance of the immigrant visa to the parent(s). These children are not counted against the numerical limits on immigration, nor is any separate visa petition filed for them. Thus, section 204 of the Act does not form the basis of their admission, and they are not properly classified as "immediate relatives," "family-based immigrants" or "employment-based immigrants." Since they do not belong to any of the classes specified in sections 212(a)(4)(C) or (D) and 213A of the Act, the final rule makes clear that there is no need in these cases for an affidavit of support that meets the requirements of section 213A of the Act. It will still be necessary for the child's parent or parents to establish that the child is not inadmissible on public charge grounds. Section 212(a)(4)(B) of the Act, and the case law that section 212(a)(4)(B) of the Act is drawn from, rather than section 213A of the Act, will govern this determination.

#### *L. Role of the Immigration Judges*

This jointly published final rule includes new provisions, in 8 CFR part 1240, relating to the authority of immigration judges, an issue that the interim rule did not address and about which the Service received no comments. The interim rule did not include immigration judges as officers with authority to adjudicate the sufficiency of a Form I-864. The Attorney General has concluded, however, that it is appropriate for immigration judges to have this authority. Immigration judges regularly adjudicate applications for adjustment

of status filed by aliens in removal proceedings, and in many of these cases, section 212(a)(4)(C) or (D) of the Act requires the applicant to submit an affidavit of support that complies with the requirements of section 213A of the Act in order to establish that the applicant is not likely to become a public charge. This rule amends 8 CFR part 1240 and expressly authorizes an immigration judge to review the affidavit of support in order properly to decide the adjustment application, when this issue arises in removal proceedings. The provisions of 8 CFR part 213a also now refer to the immigration judge when this reference is appropriate. The Attorney General, rather than the Secretary of Homeland Security, is promulgating the amendments to 8 CFR part 1240 since these amendments relate to the jurisdiction of immigration judges.

#### *M. Additional Changes to Department of Justice Rules*

As noted previously, the Secretary of Homeland Security has included in this final rule an amendment to 8 CFR 205.1 that implements the Family Sponsor Immigration Act, Public Law 107-150. The Department of Justice regulation at 8 CFR 1205.1 includes substantially the same provision as 8 CFR 205.1. Both 8 CFR 205.1(a)(3)(i)(C) and 8 CFR 1205.1(a)(3)(i)(C) refer to the "Attorney General" as having discretion to reinstate approval of a family-based immigrant visa petition, in a case in which the approval is revoked by the petitioner's death. Under section 451 of the Homeland Security Act, this discretion now rests with USCIS since, before enactment of the Homeland Security Act, the Board of Immigration Appeals did not have jurisdiction to adjudicate an appeal from a district or service center director's decision not to reinstate the approval. *Matter of Zaidan*, 19 I. & N. Dec. 297 (BIA 1985). Section 5304(c)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, amends section 205 of the Act to make clear that the Secretary of Homeland Security, not the Attorney General, now has authority to revoke approval of an immigrant visa petition. To avoid conflict between 8 CFR 205.1 and 8 CFR 1205.1, this final rule includes an amendment to 8 CFR 1205.1. As with the amendments to 8 CFR part 1240, the Attorney General is promulgating this conforming amendment.

The Secretary of Homeland Security hereby amends the regulations of the Department of Homeland Security to clarify the affidavit of support process under section 213A of the Immigration

and Nationality Act. The Secretary is exercising his authority under sections 103 and 213A of the Act (8 U.S.C. 1103, 1183a).

The Attorney General is amending part 1240 of the regulations of the Department of Justice to clarify the authority and procedures before immigration judges to adjudicate an affidavit of support under section 213A of the Immigration and Nationality Act. The Attorney General also is amending part 1205 of the regulations of the Department of Justice to conform the text of 8 CFR 1205.1(a)(3)(i)(C) to the text of 8 CFR 205.1(a)(3)(i)(C) as amended by the Secretary of Homeland Security. The Attorney General is exercising his authority under section 103(g) of the Act, and his authority under 28 U.S.C. 503, 509–510.

### III. Regulatory Analyses

#### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBRFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). DHS has reviewed this regulation in accordance with the Act and has determined, with respect to the amendments made by this final rule to 8 CFR parts 204, 205, 213a, and 299, and the Department of Justice has determined, with respect to the amendments made to 8 CFR parts 1205.1 and 1240, that it will not have a significant economic impact on a substantial number of small entities.

The factual basis for this determination is that this rule applies to individuals who file affidavits of support on behalf of immigrants, and the immigrants they sponsor. The impact is on these persons in their capacity as individuals, so that they are not, for purposes of the rule, within the definition of small entities established by 5 U.S.C. 601(6). In this regard, it is important to note that it is the immigrant's relative in that relative's individual capacity, and not the firm, that incurs the obligation to support an employment-based immigrant who is subject to the affidavit of support requirement.

#### B. Unfunded Mandates Reform Act

Since the duties imposed on the sponsor arise from the sponsor's participation in a voluntary Federal program, this rule is not a Federal

private sector mandate, as defined by 2 U.S.C. 658(7)(A)(ii). The rule implements statutory requirements placed on Federal, state, and local government agencies related to seeking reimbursement of benefits from a sponsor under an affidavit of support. Agencies must also provide certain reports to USCIS. Under 2 U.S.C. 1531, however, no Federal Intergovernmental Mandate Assessment is required because this rule "incorporate[s] requirements specifically set forth in law."

#### C. Administrative Procedure Act

Under 5 U.S.C. 553(d), a substantive rule generally may not enter into force until 30 days after publication in the **Federal Register**. A longer delay applies to a "major rule," as defined in the Congressional Review Act, 5 U.S.C. 804, as amended by SBRFA. This final rule, however, is not a "major rule," and so will enter into force on July 21, 2006. In accordance with the general rule that governs immigration cases, *Matter of Alarcon, supra*, this final rule will apply to any case decided on or after that date, even if the alien filed his or her application for an immigrant visa, for admission as an immigrant, or for adjustment of status, after December 19, 1997, but before July 21, 2006. The interim rule will continue to apply to any case adjudicated before July 21, 2006.

The Secretary of Homeland Security notes that the amendments made by this final rule to 8 CFR parts 204 and 205 were not included in the interim rule. No further notice and comment, however, is necessary with respect to these provisions. First, the addition of these provisions to the final rule is a direct result from, and a logical outgrowth of, the comments received concerning the impact of a visa petitioner's death on the alien beneficiary's case. Second, the Secretary of Homeland Security finds good cause that, under 5 U.S.C. 553(b)(3)(B), notice and comment on these issues is unnecessary because it is impracticable and not in the public interest to delay these provisions since they are not adverse to the interests of those affected by them. In fact, the provisions will benefit those affected by them, since, without these specific amendments, those affected by them would likely be unable to immigrate.

The Attorney General also finds that under 5 U.S.C. 553(b)(3)(B), notice and comment concerning the amendments to 8 CFR part 1240 is not necessary. These amendments are rules of agency practice and procedure. The amendments clarify the authority of an

immigration judge to adjudicate issues relating to affidavits of support that arise in cases that are already within the immigration judge's jurisdiction.

#### D. Assessment of Regulatory Impact on the Family

The immigration law facilitates reunification of families by according preferences to aliens who are close relatives of citizens and resident aliens. The affidavit of support requirement, imposed by the Act itself, may make some family members ineligible to immigrate because their sponsoring relative cannot satisfy the income requirements. This final rule should, however, make it somewhat easier to comply with the affidavit of support requirement, thus increasing the likelihood that aliens subject to the requirement will be able to immigrate. For this reason, DHS has determined, as provided by section 654 of the 1999 Treasury and General Government Appropriations Act, Public Law 105–277, Division A, section 101(h), 112 Stat. 2681, 2681–528, that the provisions of this final rule that amend 8 CFR parts 204, 205, 213a, and 299 will not have an adverse impact on the strength or stability of the family. For the same reasons, the Attorney General makes the same finding with respect to the amendments that this rule makes to 8 CFR part 1240.

#### E. Paperwork Reduction Act

The information collection requirements contained in this rule (Form I–864, Affidavit of Support Under Section 213A of the Act, Form I–864EZ, EZ Affidavit of Support, Form I–864A, Contract Between Sponsor and Household Member, Form I–864W, Intending Immigrant's I–864 Exemption and Form I–865, Sponsor's Notice of Change of Address), have been previously approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (PRA). The OMB control numbers for the Forms I–864, I–864A and I–865 are contained in 8 CFR 299.5, Display of control numbers. This final rule amends 8 CFR 299.5 to update the OMB control numbers for those Forms and to add the control numbers for the Forms I–864EZ and I–864W.

As already noted, this final rule also reflects the creation of two new Forms. First, USCIS established a new Form I–864EZ, EZ Affidavit of support under section 213A. A sponsor may use this Form I–864EZ, instead of Form I–864, if the sponsor meets all of these requirements: The sponsor is the Form I–130 visa petitioner (and there is no

need for a joint sponsor or a Form I-864A); the affidavit of support is filed on behalf of only one intending immigrant; the sponsor is seeking to qualify based on the sponsor's own income alone (not on the basis of assets); and all the sponsor's income is shown on IRS Forms W-2. Second, USCIS established a new Form I-864W, Intending Immigrant's I-864 Exemption. An intending immigrant submits the Form I-864W, instead of the Form I-864, to establish that the intending immigrant is not required to submit the Form I-864 because the intending immigrant (a) already has, or can be credited with, 40 quarters of coverage under the Social Security Act; (b) is the child of a U.S. citizen, and will acquire citizenship under section 320 of the Act if the application for admission as an immigrant or for adjustment of status is approved; or (c) is the widow(er) of a U.S. citizen or the battered spouse or child of a U.S. citizen or permanent resident alien. As noted, the final rule adds the OMB Control Number for these Forms to 8 CFR 299.5.

#### *F. Executive Order 12866*

Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735, October 4, 1993, requires a determination whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). This rule has been identified as significant under Executive Order 12866 and has been reviewed by OMB. This rule is not considered economically significant under section 3(f) of the Executive Order because it will have an annual effect on the economy of less than \$100 million. DHS notes that the former Immigration and Naturalization Service did consider the interim rule to be an economically significant regulatory action. The former Service did not receive any comments on this estimate. After further consideration of the policy impact, we have reexamined how to define the baseline. Since it is reasonable to assume that the world absent this final regulation will resemble the present, the baseline should reflect the future effect of current government programs and policies. In this case, DHS forecasts that revisions from the Interim Final rule, and current status quo, will have an annual impact far below the \$100 million threshold required for an economically significant regulation.

This final rule implements provisions of section 423 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, as amended by IIRIRA. Under

this legislation, any family-based immigrant, and in certain cases, an employment-based immigrant, is inadmissible as a likely public charge unless an eligible sponsor files a legally enforceable affidavit of support.

Public Law 104-193 also established new requirements limiting the ability of aliens—even those who are lawfully admitted for permanent residence—to obtain means-tested public benefits. The precise scope of these requirements, and of the statutory exceptions, is beyond the scope of this final rule since DHS does not administer the affected means-tested public benefit programs. DHS has concluded that these savings are more properly attributed to these other provisions of Public Law 104-193, as amended, rather than the affidavit of support requirements created by section 213A of the Act and implemented by the interim rule and this final rule. The implementation of section 213A of the Act is likely to have an impact on sponsors, sponsored aliens, and the Government, but DHS believes that the economic impact has not, since the interim rule entered into force, exceeded \$100 million in any given fiscal year, nor is the impact likely to exceed this threshold in the future.

#### Background

If a sponsored immigrant applies for designated Federal means-tested public benefits, the income and resources of the sponsor and the sponsor's spouse are "deemed" to be available to the sponsored immigrant in determining the sponsored immigrant's eligibility for the benefit. The underlying assumption of this deeming provision is that, since the sponsor has agreed in the Affidavit of Support to provide financial support for an immigrant, then that sponsor's income and resources should be taken into account when determining whether a sponsored immigrant is eligible for a designated means-tested benefit. In most cases, the counting of the sponsor's income and assets as the income and assets of the sponsored immigrant means that the sponsored immigrant is deemed to have income and assets at a level sufficient to make the sponsored immigrant ineligible for the benefit sought. Affidavits of support will be enforceable against sponsors by any agency providing designated Federal, state, or local means-tested benefits, with certain exceptions (notably emergency medical care, disaster relief, school lunches, foster care or adoption assistance for a child whose foster or adoptive parent is a citizen or a qualified alien, student loans, and Head Start benefits) until the sponsored

immigrants become U.S. citizens or can be credited with 40 quarters of work.

Since the enactment of the first general immigration statute on August 3, 1882, the law has required all prospective immigrants to the United States to demonstrate that they would not become public charges after admission. Section 212(a)(4) of the Immigration and Nationality Act (INA), as amended in 1996, provides that immigrants may be inadmissible until they provide such evidence. Prior to these new public charge provisions and the legally enforceable and mandatory affidavit of support requirements specified in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act and IIRIRA, there were no statutory provisions regarding the requirements or means by which prospective immigrants, whether adjusting status through the former Immigration and Naturalization Service in the United States or obtaining immigrant visas from Department of State consular officers overseas, could establish the availability of financial support in the United States.

Before implementation of the 1996 laws, prospective immigrants demonstrated to Consular and Immigration officers that they would not become public charges through several means, including the prospective immigrant's personal funds, savings, or assets; prearranged employment in the United States; a public charge bond; a non-binding affidavit of support from a relative or friend in the United States who had adequate income; or a combination of these methods. Although adequate income was not defined in statute or regulation, consular and immigration officers often used guidelines published in the Department of State Foreign Affairs manual to establish that prospective immigrants would not become public charges after entry. These guidelines suggested that, for an affidavit of support to be considered a favorable factor in establishing that the prospective immigrant would not become a public charge, the income of the person signing the affidavit of support should be equal to or greater than 100 percent of the applicable Federal poverty guideline. Although these non-binding affidavits of support were intended for use in assessing the financial support of family-based immigrants, they were occasionally filed on behalf of other categories of immigrants as well as other groups of aliens such as students and parolees. Three Federal programs—Aid to Families with Dependent Children (AFDC), Supplemental Security Income

(SSI), and Food Stamps—included the income of sponsors signing the affidavit of support for three years (or, under SSI, five years after 1992) following the immigrant's entry in considering the financial eligibility of sponsored immigrants for their benefit programs. Based on research conducted on immigrants admitted in FY 1994, about three-quarters of all family-based immigrants were sponsored using the discretionary affidavit of support.

#### Impact on Federal and State Benefit Agencies

The fiscal impact of this final rule is largely on Federal and State agencies administering designated means-tested public benefit programs, sponsors, and sponsored immigrants. These designated means-tested programs are required to implement sponsor deeming policies (discussed above) as part of determining the eligibility of a sponsored immigrant for such means-tested benefits. Sponsor deeming generally makes it more difficult for sponsored immigrants to become eligible for benefits since the sponsor's income and resources are counted as being available to the sponsored immigrant. This addition of a sponsor's income to a sponsored immigrant's income usually results in an income level that exceeds the level necessary for benefit eligibility. As part of this eligibility determination process, Federal and State agencies must determine whether a permanent resident applicant for means-tested public benefits has a sponsor under section 213A of the Act. To do so, agencies can ask the USCIS SAVE Program whether a permanent resident applicant has a sponsor under section 213A of the Act, and if so, to provide the name, last known address, and Social Security number of each sponsor. With this information, the agency can determine whether a permanent resident applicant is subject to sponsor deeming policies, and will potentially be able to notify the sponsor about the sponsored immigrant's application for benefits, as well as to request from a sponsor information on his or her current income and assets, as appropriate, to be used along with the immigrant's income and assets, as appropriate, to determine eligibility for means-tested public benefits. Such information is also necessary for an agency to seek reimbursement from sponsors for the amount of means-tested benefits that might be provided to sponsored immigrants.

#### Impact on Petitioner and Joint Sponsors

An alien who seeks admission as an immigrant under section 201(b)(2) or 203(a) of the Act, whether from abroad or by adjustment of status when already in the United States, is inadmissible unless the relative petitioning for the alien's admission has completed and signed a legally binding and enforceable affidavit of support on behalf of the intending immigrant and any accompanying family members. To be sufficient to allow the intending immigrant(s) to obtain lawful permanent resident status, the petitioner must demonstrate income that meets or exceeds 125 percent of the applicable poverty guideline for his or her household size, which includes the sponsored intending immigrant(s) as well as any other immigrants the petitioner previously sponsored and is still obliged to support. If the petitioner cannot meet this threshold, one or two joint sponsors who can meet the income requirements and who are willing to also submit legally binding affidavits of support may do so on behalf of these intending immigrants.

Before enactment of section 213A of the Act, most family-based immigrants obtained and submitted a non-binding affidavit of support. However, it was not universally the case that the affidavit of support was signed by the person who filed the visa petition. Now, under section 213A of the Act, each visa petitioner must sign a binding Form I-864, Affidavit of Support. Since only three-quarters of new immigrants were sponsored using the earlier non-binding affidavit of support and about one-quarter of these sponsors were persons other than the petitioner, there is an additional requirement for close to half of persons seeking the immigration of their relatives. There are additionally increased requirements for sponsors to qualify as well as new documentary provisions. Therefore, all sponsors have somewhat more responsibilities and many have an additional responsibility.

To complete the affidavit of support, a sponsor must complete Form I-864 and assemble the required supporting documentation. Supporting immigrants so that they will not become public charges may also impose costs on sponsors. These costs are difficult to quantify since in most cases the sponsored immigrants will become largely or entirely self-supporting. Under the sponsorship provisions of the law, however, a sponsor is required, as needed, to support each immigrant for whom they signed an affidavit of support at 125 percent of the poverty line until the sponsorship obligation

terminates, usually through the sponsored immigrant naturalizing or being credited with 40 qualifying quarters under Title II of the Social Security Act.

Sponsors who sign the new affidavits of support can be held responsible for reimbursement of any Federally-funded means-tested public benefits, and potentially some State-funded programs, paid to sponsored immigrants while the affidavit of support is in effect.

#### Impact on Sponsored Immigrants

Sponsored immigrants are affected by the new provisions to the extent that they must present the documents to the Federal interviewing official and serve as the intermediary between the sponsor and the government official for obtaining additional supporting documentation or an affidavit of support from an additional or different joint sponsor. Sponsored immigrants are also less likely to be eligible for any means-tested public benefits since the deeming provisions cover more benefit programs and last a longer period of time than under the earlier non-binding affidavit of support. Barring submission of a sufficient affidavit of support for each immigrating family member, intending immigrants may find that their immigration—or that of some of their family members—is delayed. New provisions in the final rule allow each family unit to have two separate joint sponsors, thus reducing situations in which family unification does not occur because of the inability to find a joint sponsor who is willing and able to support the entire family unit at level specified in the applicable poverty guidelines.

#### Impact on the Administering Agencies

The interim rule also noted that the affidavit of support requirements have imposed some administrative costs on the Federal Government agencies administering the affidavit of support. Since all petitioners must now submit affidavits of support and a sizeable portion of immigrants require one or two joint sponsors, Federal officials have considerably more documentation to review. Additionally, if needed, certain household members of a sponsor may enter into an agreement with the sponsor to provide income to help support the sponsored immigrant(s) through signing an I-864A and submitting supporting documentation. Deficiencies in submitting complete information have increased requests for additional information and additional review by Federal officials.

Federal costs also relate to the printing and distribution of the Form I-



864 and related forms. This cost has been reduced somewhat by the availability of the affidavit of support forms for downloading from the USCIS Web page. The administrative costs arise, more significantly, from the additional time it takes to adjudicate applications for immigrant visas or adjustment of status. Before the enactment of section 213A of the Act, consular and immigration officers determined whether each new immigrant was likely to become a public charge based on a variety of factors, including the alien's age, health, and job skills; proof of a job offer in the United States; by examining the non-binding affidavit of support or by the submission of other documentation, including demonstration of significant assets. The use of Form I-134 was only one option that was available. The Form I-864, by contrast, is required in almost all family-based cases. Because use of the Form I-864 is more widespread, and because the statutory requirements for an acceptable Form I-864 are exacting, reviewing an affidavit of support is considerably more time-consuming now than it was before enactment of section 213A of the Act.

Some of these costs may be offset by subsequent adjustments to fees for immigrant visa and adjustment of status applications, a cost borne primarily by new family-based immigrants to the United States. For example, section 232 of H.R. 3247, 106th Cong. (1st Sess. 1999), as enacted by section 1000(a)(7) of the Consolidated Appropriations Act, 2000, Public Law 106-113, permits consular officers to assess a fee for services designed to ensure that sponsors properly complete affidavits of support before they are forwarded to consular officers. Unlike the Department of State, DHS does not currently charge an additional filing fee when an adjustment of status case includes an affidavit of support. Thus, the costs that DHS incurs are not currently offset by application fees. The User Fee statute, 31 U.S.C. 9701, may warrant adjusting the USCIS fee schedule to include a fee to recover the costs associated with reviewing a Form I-864 in connection with an application for adjustment of status. The interim rule did not, however, include any provision relating to fees. Before adding a filing fee for the Form I-864 USCIS would, therefore, promulgate a separate rulemaking after a new notice and comment period. USCIS must also maintain automated sponsorship information on the sponsors of those immigrants who are sponsored and make this information

available to benefit-providing agencies upon request.

This regulation may also have an economic impact on State and local governments, either because they choose to deem sponsor income and resources for their own programs or because they choose to make their own locally or State-funded assistance programs available to permanent residents while they are not eligible for Federal means-tested programs. Savings to States from reduced use of Federally funded means-tested public benefits toward which States match funds may be offset by some increased use of locally and State-funded programs. In the absence of information about what actions States will choose to take, costs and savings to State and local governments are not estimated.

#### G. Executive Order 13132

DHS certifies that this regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In particular, this final rule does not in any way interfere with a State's ability to make its own policy choice about whether to attribute a sponsor's income and assets to a sponsored immigrant, for purposes of the sponsored immigrant's eligibility for State-funded benefits. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

In this respect it is important to note the decisions of the Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992). In these cases, the Court reaffirmed the fundamental constitutional principle that the "[f]ederal Government may neither issue directives requiring the States to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program." *Printz*, 521 U.S. at 918. Nothing in section 213A of the Act, nor in this rule, violates this principle.

Whether to have any State-funded means-tested benefits remains a matter for each State to determine in accordance with its own constitutional processes and policy priorities. It is also for each State to determine whether to deem a sponsor's income to the sponsored immigrant, in determining a sponsored immigrant's eligibility for any State-funded means-tested benefits

the state chooses to adopt. It also is for each State to determine whether to seek reimbursement from the sponsor for any State-funded means-tested benefits an alien may improperly receive. No State is required to take any action, other than to give public notice of any decision the State makes concerning these matters.

Section 213A of the Act does require a State agency that does want to obtain reimbursement to request it before filing suit. But since the State agency's right to seek reimbursement from the sponsor, on the basis of an affidavit of support, exists solely as a matter of Federal law, the requirement to request reimbursement is not a matter of compelling the State to administer a federal program. Rather, the requirement is simply a condition precedent to the State's exercise of a right that would not exist in the absence of section 213A of the Act. The States do have certain reporting requirements under section 213A of the Act, section 421 of Public Law 104-193, and this rule. But the *Printz* Court expressly refrained from holding that requiring States to provide information to the Federal Government violates the principle of the *Printz* decision. 521 U.S. at 918.

#### H. Executive Order 12988 Civil Justice Reform

This final rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

#### List of Subjects

##### 8 CFR Part 204

Administrative practice and procedures, Aliens, Employment, Immigration, Petitions.

##### 8 CFR Part 205

Administrative practice and procedures, Aliens, Immigration, Petitions.

##### 8 CFR Part 213a

Administrative practice and procedures, Aliens, Affidavits of support, Immigrants.

##### 8 CFR Part 299

Aliens, Forms, Immigration, Reporting and recordkeeping requirements.

##### 8 CFR Part 1205

Administrative practice and procedures, Aliens, Immigration, Petitions.

##### 8 CFR Part 1240

Administrative practice and procedure; Immigration.

**Department of Homeland Security****8 CFR CHAPTER I—AUTHORITY AND ISSUANCE**

■ Accordingly, for the reasons stated in the joint preamble, and pursuant to my authority as Secretary of Homeland Security, the interim rule adding 8 CFR part 213a and amending 8 CFR part 299 that was published at 62 FR 54346 on October 20, 1997, is adopted as a final rule with the following changes, and 8 CFR parts 204 and 205 are amended as follows:

**PART 204—IMMIGRANT PETITIONS**

■ 1. The authority citation for part 204 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255, 1641; 8 CFR part 2.

■ 2. Section 204.2 is amended by adding a new paragraph (i)(1)(iv) to read as follows:

**§ 204.2 Petitions for relatives, widows and widowers, and abused spouses and children.**

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(iv) A currently valid visa petition previously approved to classify the beneficiary as an immediate relative as the spouse of a United States citizen must be regarded, upon the death of the petitioner, as having been approved as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant for classification under paragraph (b) of this section, if, on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section. If the petitioner dies before the petition is approved, but, on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section, then the petition shall be adjudicated as if it had been filed as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant under paragraph (b) of this section.

\* \* \* \* \*

**PART 205—REVOCATION OF APPROVAL OF PETITIONS**

■ 3. The authority citation for part 205 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1155, 1182, and 1186a.

■ 4. Section 205.1 is amended by revising paragraph (a)(3)(i)(C) to read as follows:

**§ 205.1 Automatic revocation.**

(a) \* \* \*

(3) \* \* \*

(i) \* \* \*

(C) Upon the death of the petitioner, unless:

(1) The petition is deemed under 8 CFR 204.2(i)(1)(iv) to have been approved as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant under 8 CFR 204.2(b); or

(2) U.S. Citizenship and Immigration Services (USCIS) determines, as a matter of discretion exercised for humanitarian reasons in light of the facts of a particular case, that it is inappropriate to revoke the approval of the petition. USCIS may make this determination only if the principal beneficiary of the visa petition asks for reinstatement of the approval of the petition and establishes that a person related to the principal beneficiary in one of the ways described in section 213A(f)(5)(B) of the Act is willing and able to file an affidavit of support under 8 CFR part 213a as a substitute sponsor.

\* \* \* \* \*

**PART 213a—AFFIDAVITS OF SUPPORT ON BEHALF OF IMMIGRANTS**

■ 5. The authority citation for part 213a continues to read as follows:

**Authority:** 8 U.S.C. 1183a; 8 CFR part 2.

■ 6. Section 213a.1 is amended by:

■ a. Revising the definitions for “Domicile”, “Household income”, “Household size”, “Income”, “Sponsor” and “Sponsored immigrant” and by

■ b. Adding the definitions for “Joint sponsor” and “Substitute sponsor” in proper alphabetical sequence.

The revisions and addition read as follows:

**§ 213a.1 Definitions.**

\* \* \* \* \*

*Domicile* means the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of the Act, with the intention to maintain that residence for the foreseeable future.

\* \* \* \* \*

*Household income* means the income used to determine whether the sponsor meets the minimum income requirements under sections 213A(f)(1)(E), 213A(f)(3), or 213A(f)(5) of the Act. It includes the income of the sponsor, and of the sponsor's spouse and any other person included in determining the sponsor's household size, if the spouse or other person is at least 18 years old and has signed a U.S. Citizenship and Immigration Services (USCIS) Form I-864A, Affidavit of Support Contract Between Sponsor and Household Member, on behalf of the

sponsor and intending immigrants. The “household income” may not, however, include the income of an intending immigrant, unless the intending immigrant is either the sponsor's spouse or has the same principal residence as the sponsor and the preponderance of the evidence shows that the intending immigrant's income results from the intending immigrant's lawful employment in the United States or from some other lawful source that will continue to be available to the intending immigrant after he or she acquires permanent resident status. The prospect of employment in the United States that has not yet actually begun will not be sufficient to meet this requirement.

*Household size* means the number obtained by adding the number of persons specified in this definition. In calculating household size, no individual shall be counted more than once. If the intending immigrant's spouse or child is a citizen or already holds the status of an alien lawfully admitted for permanent residence, then the sponsor should not include that spouse or child in determining the total household size, unless the intending immigrant's spouse or child is a dependent of the sponsor.

(1) In all cases, the household size includes the sponsor, the sponsor's spouse and all of the sponsor's children, as defined in section 101(b)(1) of the Act (other than a stepchild who meets the requirements of section 101(b)(1)(B) of the Act, if the stepchild does not reside with the sponsor, is not claimed by the sponsor as a dependent for tax purposes, and is not seeking to immigrate based on the stepparent/stepchild relationship), unless these children have reached the age of majority under the law of the place of domicile and the sponsor did not claim them as dependents on the sponsor's Federal income tax return for the most recent tax year. The following persons must also be included in calculating the sponsor's household size: Any other persons (whether related to the sponsor or not) whom the sponsor has claimed as dependents on the sponsor's Federal income tax return for the most recent tax year, even if such persons do not have the same principal residence as the sponsor, plus the number of aliens the sponsor has sponsored under any other Forms I-864 for whom the sponsor's support obligation has not terminated, plus the number of aliens to be sponsored under the current Form I-864, even if such aliens do not or will not have the same principal residence as the sponsor. If a child, as defined in section 101(b)(1) of the Act, or spouse of the principal intending immigrant is

an alien who does not currently reside in the United States and who either is not seeking to immigrate at the same time as, or will not seek to immigrate within six months of the principal intending immigrant's immigration, the sponsor may exclude that child or spouse in calculating the sponsor's household size.

(2) If the sponsor chooses to do so, the sponsor may add to the number of persons specified in the first part of this definition the number of relatives (as defined in this section) of the sponsor who have the same principal residence as the sponsor and whose income will be relied on to meet the requirements of section 213A of the Act and this part.

\* \* \* \* \*

*Income* means an individual's total income (adjusted gross income for those who file IRS Form 1040EZ) for purposes of the individual's U.S. Federal income tax liability, including a joint income tax return (e.g., line 22 on the 2004 IRS Form 1040, line 15 on the 2004 IRS Form 1040A, or line 4 on the 2004 IRS Form 1040EZ or the corresponding line on any future revision of these IRS Forms). Only an individual's Federal income tax return—that is, neither a state or territorial income tax return nor an income tax return filed with a foreign government—shall be filed with an affidavit of support, unless the individual had no duty to file a Federal income tax return, and claims that his or her state, territorial or foreign taxable income is sufficient to establish the sufficiency of the affidavit of support.

\* \* \* \* \*

*Joint sponsor* means any individual who meets the requirements of section 213A(f)(1)(A), (B), (C), and (E) of the Act and 8 CFR 213a.2(c)(1)(i), and who, as permitted by section 213A(f)(5)(A) of the Act, is willing to submit a Form I-864 and accept joint and several liability with the sponsor or substitute sponsor, in any case in which the sponsor's or substitute sponsor's household income is not sufficient to satisfy the requirements of section 213A of the Act.

\* \* \* \* \*

*Sponsor* means an individual who is either required to execute or has executed a Form I-864 under this part.

*Sponsored immigrant* means any alien who was an intending immigrant, once that person has been lawfully admitted for permanent residence, so that the affidavit of support filed for that person under this part has entered into force.

*Substitute sponsor* means an individual who meets the requirements of section 213A(f)(1)(A), (B), (C), and (E) of the Act and 8 CFR 213a.2(c)(1)(i), who is related to the principal intending

immigrant in one of the ways described in section 213A(f)(5)(B) of the Act, and who is willing to sign a Form I-864 in place of the now-deceased person who filed the Form I-130 or Form I-129F that provides the basis for the intending immigrant's ability to seek permanent residence.

- 7. Section 213a.2 is amended by:
  - a. Revising paragraphs (a)(1) and (a)(2)(i)(A) and (C);
  - b. Removing the "or" at the end of paragraph (a)(2)(ii)(A);
  - c. Revising paragraph (a)(2)(ii)(B);
  - d. Adding new paragraphs (a)(2)(ii)(C), (D), and (E);
  - e. Revising paragraphs (b)(1) and (b)(2);
  - f. Revising paragraphs (c), (e), and (f); and by
  - g. Adding paragraph (g).

The revisions and additions read as follows:

**§ 213a.2 Use of affidavit of support.**

(a) *General.* (1)(i)(A) In any case specified in paragraph (a)(2) of this section, an intending immigrant is inadmissible as an alien likely to become a public charge, unless the qualified sponsor specified in paragraph (b) of this section or a substitute sponsor and, if necessary, a joint sponsor, has executed on behalf of the intending immigrant a Form I-864, Affidavit of Support Under Section 213A of the Act, in accordance with section 213A of the Act, this section, and the instructions on Form I-864. The sponsor may use the Form I-864EZ, EZ Affidavit of Support Under Section 213A of the Act, rather than the Form I-864, if the sponsor meets the eligibility requirements on the instructions for the Form I-864EZ. Each reference in this section to Form I-864 is deemed to be a reference to Form I-864EZ for any case in which the sponsor is eligible to use the Form I-864EZ.

(B) If the intending immigrant claims that, under paragraph (a)(2)(ii)(A), (C), or (E) of this section, the intending immigrant is exempt from the requirement to file a Form I-864, the intending immigrant must include with his or her application for an immigrant visa or adjustment of status a properly completed Form I-864W, Intending Immigrant's I-864 Exemption.

(ii) An affidavit of support is executed when a sponsor signs a Form I-864 and that Form I-864 is submitted, together with the current edition of Form I-864P and the initial evidence required by this section, in accordance with this paragraph. The current edition Form I-864P is available on the Internet at <http://www.uscis.gov/graphics/formsfee/forms>. Those without Internet

access may call (800) 870-3676 to obtain the Form I-864P.

(A) If the intending immigrant is applying for an immigrant visa, the intending immigrant must submit the Form I-864 (and any Forms I-864A) to the Department of State officer with jurisdiction over the intending immigrant's application for an immigrant visa, in accordance with instructions from the Department of State officer or the National Visa Center;

(B) If the intending immigrant is applying for adjustment of status, the intending immigrant must submit the Form I-864 (and any Forms I-864A) with the application for adjustment of status.

(iii) There must be a separate Form I-864 (and any Form(s) I-864A), with original signatures, for each principal visa petition beneficiary.

(iv) Each immigrant who will accompany the principal intending immigrant must be included on Form I-864 (and any Forms I-864A). See paragraph (f) of this section for further information concerning immigrants who intend to accompany or follow the principal intending immigrant to the United States.

(v)(A) Except as provided for under paragraph (a)(1)(v)(B) of this section, the Department of State officer, immigration officer, or immigration judge shall determine the sufficiency of a Form I-864 or I-864A based on the sponsor's, substitute sponsor's, or joint sponsor's reasonably expected household income in the year in which the intending immigrant filed the application for an immigrant visa or for adjustment of status, and based on the evidence submitted with the Form I-864 or Form I-864A and the Poverty Guidelines in effect when the intending immigrant filed the application for an immigrant visa or adjustment of status.

(B) If more than one year passes between the filing of the Form I-864 or Form I-864A and the hearing, interview, or examination of the intending immigrant concerning the intending immigrant's application for an immigrant visa or adjustment of status, and the Department of State officer, immigration officer or immigration judge determines, in the exercise of discretion, that the particular facts of the case make the submission of additional evidence necessary to the proper adjudication of the case, then the Department of State officer, immigration officer or immigration judge may direct the intending immigrant to submit additional evidence. A Department of State officer or immigration officer shall make the request in writing, and provide the intending immigrant not

less than 30 days to submit the additional evidence. An immigration judge may direct the intending immigrant to submit additional evidence and also set the deadline for submission of the initial evidence in any manner permitted under subpart C of 8 CFR part 1003 and any local rules of the Immigration Court. If additional evidence is required under this paragraph, an intending immigrant must submit additional evidence (including copies or transcripts of any income tax returns for the most recent tax year) concerning the income or employment of the sponsor, substitute sponsor, joint sponsor, or household member in the year in which the Department of State officer, immigration officer, or immigration judge makes the request for additional evidence. In this case, the sufficiency of the Form I-864 and any Form I-864A will be determined based on the sponsor's, substitute sponsor's, or joint sponsor's reasonably expected household income in the year the Department of State officer, immigration officer or immigration judge makes the request for additional evidence, and based on the evidence submitted in response to the request for additional evidence and on the Poverty Guidelines in effect when the request for evidence was issued.

(2)(i) \* \* \*

(A) An immediate relative under section 201(b)(2)(A)(i) of the Act, including orphans and any alien admitted as a K nonimmigrant when the alien seeks adjustment of status;

\* \* \* \* \*

(C) An employment-based immigrant under section 203(b) of the Act, if a relative (as defined in 8 CFR 213a.1) of the intending immigrant is a citizen or an alien lawfully admitted for permanent residence who either filed the employment-based immigrant petition or has a significant ownership interest in the entity that filed the immigrant visa petition on behalf of the intending immigrant. An affidavit of support under this section is not required, however, if the relative is a brother or sister of the intending immigrant, unless the brother or sister is a citizen.

(ii) \* \* \*

(B) Seeks admission as an immigrant on or after December 19, 1997, in a category specified in paragraph (a)(2)(i) of this section with an immigrant visa issued on the basis of an immigrant visa application filed with the Department of State officer before December 19, 1997;

(C) Establishes, on the basis of the alien's own Social Security Administration record or those of his or

her spouse or parent(s), that he or she has already worked, or under section 213A(a)(3)(B) of the Act, can already be credited with, 40 qualifying quarters of coverage as defined under title II of the Social Security Act, 42 U.S.C. 401, *et seq.*

(D) Is a child admitted under section 211(a) of the Act and 8 CFR 211.1(b)(1); or

(E) Is the child of a citizen, if the child is not likely to become a public charge (other than because of the provision of section 212(a)(4)(C) of the Act), and the child's lawful admission for permanent residence will result automatically in the child's acquisition of citizenship under section 320 of the Act, as amended. This exception applies to an alien orphan if the citizen parent(s) has (or have) legally adopted the alien orphan before the alien orphan's acquisition of permanent residence, and if both adoptive parents personally saw and observed the alien orphan before or during the foreign adoption proceeding. An affidavit of support under this part is still required if the citizen parent(s) will adopt the alien orphan in the United States only after the alien orphan's acquisition of permanent residence. If the citizen parent(s) adopted the alien orphan abroad, but at least one of the adoptive parents did not see and observe the alien orphan before or during the foreign adoption proceeding, then an affidavit of support under this part is still required, unless the citizen parent establishes that, under the law of the State of the alien orphan's intended residence in the United States, the foreign adoption decree is entitled to recognition without the need for a formal administrative or judicial proceeding in the State of proposed residence.

(b) \* \* \*

(1) *For immediate relatives and family-based immigrants.* The person who filed the Form I-130 or Form I-600 immigrant visa petition (or the Form I-129F petition, for a K nonimmigrant seeking adjustment), the approval of which forms the basis of the intending immigrant's eligibility to apply for an immigrant visa or adjustment of status as an immediate relative or a family-based immigrant, must execute a Form I-864 on behalf of the intending immigrant. If the intending immigrant is the beneficiary of more than one approved immigrant visa petition, it is the person who filed the petition that is actually the basis for the intending immigrant's eligibility to apply for an immigrant visa or adjustment of status who must file the Form I-864.

(2) *For employment-based immigrants.* A relative of an intending

immigrant seeking an immigrant visa under section 203(b) of the Act must file a Form I-864 if the relative either filed the immigrant visa petition on behalf of the intending immigrant or owns a significant ownership interest in an entity that filed an immigrant visa petition on behalf of the intending immigrant, but only if the relative is a citizen or an alien lawfully admitted for permanent residence. If the intending immigrant is the beneficiary of more than one relative's employment-based immigrant visa petition, it is the relative who filed the petition that is actually the basis for the intending immigrant's eligibility to apply for an immigrant visa or adjustment of status who must file the Form I-864.

(c) *Sponsorship requirements.* (1)(i) *General.* A sponsor must be:

(A) At least 18 years of age;

(B) Domiciled in the United States or any territory or possession of the United States; and

(C)(1) A citizen or an alien lawfully admitted for permanent residence in the case described in paragraph (a)(2)(i) of this section; or

(2) A citizen or national or an alien lawfully admitted for permanent residence if the individual is a substitute sponsor or joint sponsor.

(ii) *Determination of domicile.* (A) If the sponsor is residing abroad, but only temporarily, the sponsor bears the burden of proving, by a preponderance of the evidence, that the sponsor's domicile (as that term is defined in 8 CFR 213a.1) remains in the United States, *provided*, that a permanent resident who is living abroad temporarily is considered to be domiciled in the United States if the permanent resident has applied for and obtained the preservation of residence benefit under section 316(b) or section 317 of the Act, *and provided further*, that a citizen who is living abroad temporarily is considered to be domiciled in the United States if the citizen's employment abroad meets the requirements of section 319(b)(1) of the Act.

(B) If the sponsor is not domiciled in the United States, the sponsor can still sign and submit a Form I-864 so long as the sponsor satisfies the Department of State officer, immigration officer, or immigration judge, by a preponderance of the evidence, that the sponsor will establish a domicile in the United States on or before the date of the principal intending immigrant's admission or adjustment of status. The intending immigrant will be inadmissible under section 212(a)(4) of the Act, and the immigration officer or immigration judge must deny the intending

immigrant's application for admission or adjustment of status, if the sponsor has not, in fact, established a domicile in the United States on or before the date of the decision on the principal intending immigrant's application for admission or adjustment of status. In the case of a sponsor who comes to the United States intending to establish his or her principal residence in the United States at the same time as the principal intending immigrant's arrival and application for admission at a port-of-entry, the sponsor shall be deemed to have established a domicile in the United States for purposes of this paragraph, unless the sponsor is also a permanent resident alien and the sponsor's own application for admission is denied and the sponsor leaves the United States under a removal order or as a result of the sponsor's withdrawal of the application for admission.

(2) *Demonstration of ability to support intending immigrants.* In order for the intending immigrant to overcome the public charge ground of inadmissibility, the sponsor must demonstrate the means to maintain the intending immigrant at an annual income of at least 125 percent of the Federal poverty line. If the sponsor is on active duty in the Armed Forces of the United States (other than active duty for training) and the intending immigrant is the sponsor's spouse or child, the sponsor's ability to maintain income must equal at least 100 percent of the Federal poverty line.

(i) *Proof of income.* (A) The sponsor must include with the Form I-864 either a photocopy or an Internal Revenue Service-issued transcript of his or her complete Federal income tax return for the most recent taxable year (counting from the date of the signing, rather than the filing, of the Form I-864). However, the sponsor may, at his or her option, submit tax returns for the three most recent years if the sponsor believes that these additional tax returns may help in establishing the sponsor's ability to maintain his or her income at the applicable threshold set forth in Form I-864P, Poverty Guidelines. Along with each transcript or photocopy, the sponsor must also submit as initial evidence copies of all schedules filed with each return and (if the sponsor submits a photocopy, rather than an IRS transcript of the tax return(s)) all Forms W-2 (if the sponsor relies on income from employment) and Forms 1099 (if the sponsor relies on income from sources documented on Forms 1099) in meeting the income threshold. The sponsor may also include as initial evidence: Letter(s) evidencing his or her current employment and income, paycheck stub(s) (showing earnings for

the most recent six months, financial statements, or other evidence of the sponsor's anticipated household income for the year in which the intending immigrant files the application for an immigrant visa or adjustment of status. By executing Form I-864, the sponsor certifies under penalty of perjury under United States law that the evidence of his or her current household income is true and correct and that each transcript or photocopy of each income tax return is a true and correct transcript or photocopy of the return that the sponsor filed with the Internal Revenue Service for that taxable year.

(B) If the sponsor had no legal duty to file a Federal income tax return for the most recent tax year, the sponsor must explain why he or she had no legal duty to file a Federal income tax return for that year. If the sponsor claims he or she had no legal duty to file for any reason other than the level of the sponsor's income for that year, the initial evidence submitted with the Form I-864 must also include any evidence of the amount and source of the income that the sponsor claims was exempt from taxation and a copy of the provisions of any statute, treaty, or regulation that supports the claim that he or she had no duty to file an income tax return with respect to that income. If the sponsor had no legal obligation to file a Federal income tax return, he or she may submit other evidence of annual income. The fact that a sponsor had no duty to file a Federal income tax return does not relieve the sponsor of the duty to file Form I-864.

(C)(1) The sponsor's ability to meet the income requirement will be determined based on the sponsor's household income. In establishing the household income, the sponsor may rely entirely on his or her personal income, if it is sufficient to meet the income requirement. The sponsor may also rely on the income of the sponsor's spouse and of any other person included in determining the sponsor's household size, if the spouse or other person is at least 18 years old and has completed and signed a Form I-864A. A person does not need to be a U.S. citizen, national, or alien lawfully admitted for permanent residence in order to sign a Form I-864A.

(2) Each individual who signs Form I-864A agrees, in consideration of the sponsor's signing of the Form I-864, to provide to the sponsor as much financial assistance as may be necessary to enable the sponsor to maintain the intending immigrants at the annual income level required by section 213A(a)(1)(A) of the Act, to be jointly and severally liable for any

reimbursement obligation that the sponsor may incur, and to submit to the personal jurisdiction of any court that has subject matter jurisdiction over a civil suit to enforce the contract or the affidavit of support. The sponsor, as a party to the contract, may bring suit to enforce the contract. The intending immigrants and any Federal, state, or local agency or private entity that provides a means-tested public benefit to an intending immigrant are third party beneficiaries of the contract between the sponsor and the other individual or individuals on whose income the sponsor relies and may bring an action to enforce the contract in the same manner as third party beneficiaries of other contracts.

(3) If there is no spouse or child immigrating with the intending immigrant, then there will be no need for the intending immigrant to sign a Form I-864A, even if the sponsor will rely on the continuing income of the intending immigrant to meet the income requirement. If, however, the sponsor seeks to rely on an intending immigrant's continuing income to establish the sponsor's ability to support the intending immigrant's spouse or children, then the intending immigrant whose income is to be relied on must sign the Form I-864A.

(4) If the sponsor relies on the income of any individual who has signed Form I-864A, the sponsor must also include with the Form I-864 and Form I-864A, with respect to the person who signed the Form I-864A, the initial evidence required under paragraph (c)(2)(i)(A) of this section. The household member's tax return(s) must be for the same tax year as the sponsor's tax return(s). An individual who signs Form I-864A certifies, under penalty of perjury, that the submitted transcript or photocopy of the tax return is a true and correct transcript or photocopy of the Federal income tax return filed with the Internal Revenue Service, and that the information concerning that person's employment and income is true and correct.

(5) If the person who signs the Form I-864A is not an intending immigrant, and is any person other than the sponsor's spouse or a claimed dependent of the sponsor, the sponsor must also attach proof that the person is a relative (as defined in 8 CFR 213a.1) of the sponsor and that the Form I-864A signer has the same principal residence as the sponsor. If an intending immigrant signs a Form I-864A, the sponsor must also provide proof that the sponsored immigrant has the same principal residence as the sponsor,

unless the sponsored immigrant is the sponsor's spouse.

(D) *Effect of failure to file income tax returns.* If a sponsor, substitute sponsor, joint sponsor, or household member did not file a Federal income tax return for the year for which a transcript or photocopy must be provided, the Form I-864 or Form I-864A will not be considered sufficient to satisfy the requirements of section 213A of the Act, even if the household income meets the requirements of section 213A of the Act, unless the sponsor, substitute sponsor, joint sponsor, or household member proves, by a preponderance of the evidence, that he or she had no duty to file. If the sponsor, substitute sponsor, joint sponsor or household member cannot prove that he or she had no duty to file, then the Form I-864 or Form I-864A will not be considered sufficient to satisfy the requirements of section 213A of the Act until the sponsor, substitute sponsor, joint sponsor, or household member proves that he or she has satisfied the obligation to file the tax return and provides a transcript or copy of the return.

(ii) *Determining the sufficiency of an affidavit of support.* The sufficiency of an affidavit of support shall be determined in accordance with this paragraph.

(A) *Income.* The sponsor must first calculate the total income attributable to the sponsor under paragraph (c)(2)(i)(C) of this section for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status.

(B) *Number of persons to be supported.* The sponsor must then determine his or her household size as defined in 8 CFR 213a.1.

(C) *Sufficiency of income.* Except as provided in this paragraph, or in paragraph (a)(1)(v)(B) of this section, the sponsor's affidavit of support shall be considered sufficient to satisfy the requirements of section 213A of the Act and this section if the reasonably expected household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status, calculated under paragraph (c)(2)(iii)(A) of this section, would equal at least 125 percent of the Federal poverty line for the sponsor's household size as defined in 8 CFR 213a.1, under the Poverty Guidelines in effect when the intending immigrant filed the application for an immigrant visa or for adjustment of status, except that the sponsor's income need only equal at least 100 percent of the Federal poverty line for the sponsor's household size, if the sponsor is on active duty (other than for training) in the Armed

Forces of the United States and the intending immigrant is the sponsor's spouse or child. The sponsor's household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status shall be given the greatest evidentiary weight; any tax return and other information relating to the sponsor's financial history will serve as evidence tending to show whether the sponsor is likely to be able to maintain his or her income in the future. If the projected household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status meets the applicable income threshold, the affidavit of support may be held to be insufficient on the basis of the household income but only if, on the basis of specific facts, including a material change in employment or income history of the sponsor, substitute sponsor, joint sponsor or household member, the number of aliens included in Forms I-864 that the sponsor has signed but that have not yet entered into force in accordance with paragraph (e) of this section, or other relevant facts, it is reasonable to infer that the sponsor will not be able to maintain his or her household income at a level sufficient to meet his or her support obligations.

(iii) *Inability to meet income requirement.* (A) If the sponsor is unable to meet the minimum income requirement in paragraph (c)(2)(iii) of this section, the intending immigrant is inadmissible under section 212(a)(4) of the Act unless:

(1) The sponsor, the intending immigrant or both, can meet the significant assets provision of paragraph (c)(2)(iv)(B) of this section; or

(2) A joint sponsor executes a separate Form I-864.

(B) *Significant assets.* The sponsor may submit evidence of the sponsor's ownership of significant assets, such as savings accounts, stocks, bonds, certificates of deposit, real estate, or other assets. An intending immigrant may submit evidence of the intending immigrant's assets as a part of the affidavit of support, even if the intending immigrant is not required to sign a Form I-864A. The assets of any person who has signed a Form I-864A may also be considered in determining whether the assets are sufficient to meet this requirement. To qualify as "significant assets" the combined cash value of all the assets (the total value of the assets less any offsetting liabilities) must exceed:

(1) If the intending immigrant is the spouse or child of a United States citizen (and the child has reached his or her 18th birthday), three times the difference between the sponsor's household income and the Federal poverty line for the sponsor's household size (including all immigrants sponsored in any affidavit of support in force or submitted under this section);

(2) If the intending immigrant is an alien orphan who will be adopted in the United States after the alien orphan acquires permanent residence (or in whose case the parents will need to seek a formal recognition of a foreign adoption under the law of the State of the intending immigrant's proposed residence because at least one of the parents did not see the child before or during the adoption), and who will, as a result of the adoption or formal recognition of the foreign adoption, acquire citizenship under section 320 of the Act, the difference between the sponsor's household income and the Federal poverty line for the sponsor's household size (including all immigrants sponsored in any affidavit of support in force or submitted under this section);

(3) In all other cases, five times the difference between the sponsor's household income and the Federal poverty line for the sponsor's household size (including all immigrants sponsored in any affidavit of support in force or submitted under this section).

(C) *Joint sponsor.* A joint sponsor must execute a separate Form I-864 on behalf of the intending immigrant(s) and be willing to accept joint and several liability with the sponsor or substitute sponsor. A joint sponsor must meet all the eligibility requirements under paragraph (c)(1) of this section, except that the joint sponsor does not have to have filed a visa petition on behalf of the intending immigrant. The joint sponsor must demonstrate his or her ability to support the intending immigrant in the manner specified in paragraph (c)(2) of this section. A joint sponsor's household income must meet or exceed the income requirement in paragraph (c)(2)(iii) of this section unless the joint sponsor can demonstrate significant assets as provided in paragraph (c)(2)(iv)(A) of this section. The joint sponsor's household income must equal at least 125% of the Poverty Guidelines for the joint sponsor's household size, unless the joint sponsor is on active duty in the Armed Forces and the intending immigrant is the joint sponsor's spouse or child, in which case the joint sponsor's household income is sufficient if it equals at least 100% of

the Poverty Guidelines for the joint sponsor's household size. An intending immigrant may not have more than one joint sponsor, but, if the joint sponsor's household income is not sufficient to meet the income requirement with respect to the principal intending immigrant, any spouse and all the children who, under section 203(d) of the Act, seek to accompany the principal intending immigrant, then the joint sponsor may specify on the Form I-864 that the Form I-864 is submitted only on behalf of the principal intending immigrant and those accompanying family members specifically listed on the Form I-864. The remaining accompanying family members will then be inadmissible under section 212(a)(4) of the Act unless a second joint sponsor submits a Form I-864 on behalf of all the remaining family members who seek to accompany the principal intending immigrant and who are not included in the first joint sponsor's Form I-864. There may not be more than two joint sponsors for the family group consisting of the principal intending immigrant and the accompanying spouse and children who will accompany the principal intending immigrant.

(D) *Substitute sponsor.* In a family-sponsored case, if the visa petitioner dies after approval of the visa petition, but the U.S. Citizenship and Immigration Services determines, under 8 CFR 205.1(a)(3)(i)(C), that for humanitarian reasons it would not be appropriate to revoke approval of the visa petition, then a substitute sponsor, as defined in 8 CFR 213a.1, may sign the Form I-864. The substitute sponsor must meet all the requirements of this section that would have applied to the visa petitioner, had the visa petitioner survived and been the sponsor. The substitute sponsor's household income must equal at least 125% of the Poverty Guidelines for the substitute sponsor's household size, unless the intending immigrant is the substitute sponsor's spouse or child and the substitute sponsor is on active duty in the Armed Forces (other than active duty for training), in which case the substitute sponsor's household income is sufficient if it equals at least 100% of the Poverty Guidelines for the substitute sponsor's household size. If the substitute sponsor's household income is not sufficient to meet the requirements of section 213A(a)(f)(1)(E) of the Act and paragraph (c)(2) of this section, the alien will be inadmissible unless a joint sponsor signs a Form I-864.

(iv) *Remaining inadmissibility on public charge grounds.* Notwithstanding

the filing of a sufficient affidavit of support under section 213A of the Act and this section, an alien may be found to be inadmissible under section 212(a)(4) of the Act if the alien's case includes evidence of specific facts that, when considered in light of section 212(a)(4)(B) of the Act, support a reasonable inference that the alien is likely at any time to become a public charge.

(v) *Verification of employment, income, and assets.* The Federal Government may pursue verification of any information provided on or with Form I-864, including information on employment, income, or assets, with the employer, financial or other institutions, the Internal Revenue Service, or the Social Security Administration. To facilitate this verification process, the sponsor, joint sponsor, substitute sponsor, or household member must sign and submit any necessary waiver form when directed to do so by the immigration officer, immigration judge, or Department of State officer who has jurisdiction to adjudicate the case to which the Form I-864 or I-864A relates. A sponsor's, substitute sponsor's, joint sponsor's, or household member's failure or refusal to sign any waiver needed to verify the information when directed to do so constitutes a withdrawal of the Form I-864 or I-864A, so that, in adjudicating the intending immigrant's application for an immigrant visa or adjustment of status, the Form I-864 or Form I-864A will be deemed not to have been filed.

(vi) *Effect of fraud or material concealment or misrepresentation.* A Form I-864 or Form I-864A is insufficient to satisfy the requirements of section 213A of the Act and this part, and the affidavit of support shall be found insufficient to establish that the intending immigrant is not likely to become a public charge, if the Department of State officer, immigration officer or immigration judge finds that Form I-864 or Form I-864A is forged, counterfeited, or otherwise falsely executed, or if the Form I-864 or Form I-864A conceals or misrepresents facts concerning household size, household income, employment history, or any other material fact. Any person who knowingly participated in the forgery, counterfeiting, or false production of a Form I-864 or Form I-864A, or in any concealment or misrepresentation of any material fact, may be subject to a civil penalty under section 274C of the Act, to criminal prosecution, or to both, to the extent permitted by law. If the person is an alien, the person may also

be subject to removal from the United States.

\* \* \* \* \*

(e) *Commencement and termination of support obligation.* (1) With respect to any intending immigrant, the support obligation and change of address obligation imposed on a sponsor, substitute sponsor, or joint sponsor under Form I-864, and any household member's support obligation under Form I-864A, all begin when the immigration officer or the immigration judge grants the intending immigrant's application for admission as an immigrant or for adjustment of status on the basis of an application for admission or adjustment that included the Form I-864 or Form I-864A. Any person completing and submitting a Form I-864 as a joint sponsor or a Form I-864A as a household member is not bound to any obligations under section 213A of the Act if, notwithstanding his or her signing of a Form I-864 or Form I-864A, the Department of State officer (in deciding an application for an immigrant visa) or the immigration officer or immigration judge (in deciding an application for admission or adjustment of status) includes in the decision a specific finding that the sponsor or substitute sponsor's own household income is sufficient to meet the income requirements under section 213A of the Act.

(2)(i) The support obligation and the change of address reporting requirement imposed on a sponsor, substitute sponsor and joint sponsor under Form I-864, and any household member's support obligation under Form I-864A, all terminate by operation of law when the sponsored immigrant:

(A) Becomes a citizen of the United States;

(B) Has worked, or can be credited with, 40 qualifying quarters of coverage under title II of the Social Security Act, 42 U.S.C. 401, *et seq.*, provided that the sponsored immigrant is not credited with any quarter beginning after December 31, 1996, during which the sponsored immigrant receives or received any Federal means-tested public benefit;

(C) Ceases to hold the status of an alien lawfully admitted for permanent residence and departs the United States (if the sponsored immigrant has not filed USCIS Form I-407, Abandonment of Lawful Permanent Resident Status, this provision will apply only if the sponsored immigrant is found in a removal proceeding to have abandoned that status while abroad);

(D) Obtains in a removal proceeding a new grant of adjustment of status as

relief from removal (in this case, if the sponsored immigrant is still subject to the affidavit of support requirement under this part, then any individual(s) who signed the Form I-864 or I-864A in relation to the new adjustment application will be subject to the obligations of this part, rather than those who signed a Form I-864 or I-864A in relation to an earlier grant of admission as an immigrant or of adjustment of status); or

(E) Dies.

(ii) The support obligation under Form I-864 also terminates if the sponsor, substitute sponsor or joint sponsor dies. A household member's obligation under Form I-864A terminates when the household member dies. The death of one person who had a support obligation under a Form I-864 or Form I-864A does not terminate the support obligation of any other sponsor, substitute sponsor, joint sponsor, or household member with respect to the same sponsored immigrant.

(3) The termination of the sponsor's, substitute sponsor's, or joint sponsor's obligations under Form I-864 or of a household member's obligations under Form I-864A does not relieve the sponsor, substitute sponsor, joint sponsor, or household member (or their respective estates) of any reimbursement obligation under section 213A(b) of the Act and this section that accrued before the support obligation terminated.

(f) *Withdrawal of Form I-864 or Form I-864A.* (1) In an immigrant visa case, once the sponsor, substitute sponsor, joint sponsor, household member, or intending immigrant has presented a signed Form I-864 or Form I-864A to a Department of State officer, the sponsor, substitute sponsor, joint sponsor, or household member may disavow his or her agreement to act as sponsor, substitute sponsor, joint sponsor, or household member if he or she does so in writing and submits the document to the Department of State officer before the actual issuance of an immigrant visa to the intending immigrant. Once the intending immigrant has obtained an immigrant visa, a sponsor, substitute sponsor, joint sponsor, or household member cannot disavow his or her agreement to act as a sponsor, joint sponsor, or household member unless the person or entity who filed the visa petition withdraws the visa petition in writing, as specified in 8 CFR 205.1(a)(3)(i)(A) or 8 CFR 205.1(a)(3)(iii)(C), and also notifies the Department of State officer who issued the visa of the withdrawal of the petition.

(2) In an adjustment of status case, once the sponsor, substitute sponsor,

joint sponsor, household member, or intending immigrant has presented a signed Form I-864 or Form I-864A to an immigration officer or immigration judge, the sponsor, substitute sponsor, joint sponsor, or household member may disavow his or her agreement to act as sponsor, substitute sponsor, joint sponsor, or household member only if he or she does so in writing and submits the document to the immigration officer or immigration judge before the decision on the adjustment application.

(g) *Aliens who accompany or follow-to-join a principal intending immigrant.*

(1) To avoid inadmissibility under section 212(a)(4) of the Act, an alien who applies for an immigrant visa, admission, or adjustment of status as an alien who is accompanying, as defined in 22 CFR 40.1, a principal intending immigrant must submit clear and true photocopies of the signed Form(s) I-864 (and any Form(s) I-864A) filed on behalf of the principal intending immigrant.

(2)(i) To avoid inadmissibility under section 212(a)(4) of the Act, an alien who applies for an immigrant visa, admission, or adjustment of status as an alien who is following-to-join a principal intending immigrant must submit new Forms I-864 and I-864A, together with all documents or other evidence necessary to prove that the new Forms I-864 and I-864A comply with the requirements of section 213A of the Act and 8 CFR part 213a.

(ii) When paragraph (g)(2)(i) of this section requires the filing of a new Form I-864 for an alien who seeks to follow-to-join a principal sponsored immigrant, the same sponsor who filed the visa petition and Form I-864 for the principal sponsored immigrant must file the new Form I-864 on behalf of the alien seeking to follow-to-join. If that person has died, then the alien seeking to follow-to-join is inadmissible unless a substitute sponsor, as defined by 8 CFR 213a.1, signs a new Form I-864 that meets the requirements of this section. Forms I-864A may be signed by persons other than the person or persons who signed Forms I-864A on behalf of the principal sponsored immigrant.

(iii) If a joint sponsor is needed in the case of an alien who seeks to follow-to-join a principal sponsored immigrant, and the principal sponsored immigrant also required a joint sponsor when the principal sponsored immigrant immigrated, that same person may, but is not required to be, the joint sponsor for the alien who seeks to follow-to-join the principal sponsored immigrant.

■ 8. Section 213a.3(a) is revised to read as follows:

### § 213a.3 Notice of change of address.

(a)(1) If the address of a sponsor (including a substitute sponsor or joint sponsor) changes for any reason while the sponsor's support obligation under the affidavit of support remains in effect with respect to any sponsored immigrant, the sponsor shall file Form I-865, Sponsor's Notice of Change of Address, with U.S. Citizenship and Immigration Services (USCIS) no later than 30 days after the change of address becomes effective. As evidence that the sponsor, substitute sponsor, or joint sponsor has complied with this requirement, USCIS will accept a photocopy of the properly completed Form I-865, together with proof of the Form's delivery to the proper service center (such as a post-marked United States Postal Service Express Mail or certified mail receipt, showing that the sponsor mailed the Form I-865 to the proper USCIS service center, together with the corresponding post-marked United States Postal Service return receipt card or other proof of delivery provided by the United States Postal Service, or, if the sponsor, substitute sponsor, or joint sponsor sent the Form I-865 by a commercial delivery service, a photocopy of the shipping label and signature proof of delivery).

(2) If the sponsor is an alien, filing Form I-865 does not relieve the sponsor of the requirement under 8 CFR 265.1 also to file a Form AR-11, Alien's Change of Address Card.

\* \* \* \* \*

■ 9. Section 213a.4 is amended by:

- a. Revising paragraph (a);
- b. Adding a heading to paragraph (b), and adding a sentence at the end of paragraph (b); and by
- c. Revising paragraph (c).

The revisions and additions read as follows:

### § 213a.4 Actions for reimbursement, public notice, and congressional reports.

(a) *Requests for reimbursement; commencement of civil action.* (1) *By agencies.* (i) If an agency that provides a means-tested public benefit to a sponsored immigrant wants to seek reimbursement from a sponsor, household member, or joint sponsor, the program official must arrange for service of a written request for reimbursement upon the sponsor, household member, or joint sponsor, by personal service, as defined by 8 CFR 103.5a(a)(2), except that the person making personal service need not be a Federal Government officer or employee.

(ii) The request for reimbursement must specify the date the sponsor, household member, or joint sponsor's



support obligation commenced (this is the date the sponsored immigrant became a permanent resident), the sponsored immigrant's name, alien registration number, address, and date of birth, as well as the types of means-tested public benefit(s) that the sponsored immigrant received, the dates the sponsored immigrant received the means-tested public benefit(s), and the total amount of the means-tested public benefit(s) received.

(iii) It is not necessary to make a separate request for each type of means-tested public benefit, nor for each separate payment. The agency may instead aggregate in a single request all benefit payments the agency has made as of the date of the request. A state or local government may make a single reimbursement request on behalf of all of the state or local government agencies that have provided means-tested public benefits.

(iv) So that the sponsor, household member, or joint sponsor may verify the accuracy of the request, the request for reimbursement must include an itemized statement supporting the claim for reimbursement. The request for reimbursement must also include a notification to the sponsor, household member, or joint sponsor that the sponsor, household member, or joint sponsor must, within 45 days of the date of service, respond to the request for reimbursement either by paying the reimbursement or by arranging to commence payments pursuant to a payment schedule that is agreeable to the program official.

(v) Prior to filing a lawsuit against a sponsor, household member, or joint sponsor to enforce the sponsor, household member, or joint sponsor's support obligation under section 213A(b)(2) of the Act, a Federal, state, or local governmental agency or a private entity must wait 45 days from the date it serves a written request for

reimbursement in accordance with this section.

(2) *By the sponsored immigrant.* Section 213A(b) of the Act does not require a sponsored immigrant to request the sponsor or joint sponsor to comply with the support obligation, before bringing an action to compel compliance.

(3) *Role of USCIS and DHS.* Upon the receipt of a duly issued subpoena, USCIS may provide a certified copy of a Form I-864 or Form I-864A that has been filed on behalf of a specific alien for use as evidence in a civil action to enforce the Form I-864 or Form I-864A, and may also disclose the last known address and social security number of the sponsor, substitute sponsor, or joint sponsor. Requesting information through the Systematic Alien Verification for Entitlement (SAVE) Program is sufficient, and a subpoena is not required, to obtain the sponsored immigrant's current immigration or citizenship status or the name, social security number and last known address of a sponsor, substitute sponsor, or joint sponsor.

(b) *Designation of means-tested public benefits.* \* \* \* A sponsor, joint sponsor, or household member is not liable to reimburse any agency for any benefit with respect to which a public notice of the determination that the benefit is a means-tested public benefit was not published until after the date the benefit was first provided to the immigrant.

(c) *Congressional reports.* (1) For purposes of section 213A(i)(3) of the Act, USCIS will consider a sponsor or joint sponsor to be in compliance with the financial obligations of section 213A of the Act unless a party that has obtained a final judgment enforcing the sponsor or joint sponsor's obligations under section 213A(a)(1)(A) or 213A(b) of the Act has provided a copy of the final judgment to the USCIS by mailing a certified copy to the address listed in

paragraph (c)(3) of this section. The copy should be accompanied by a cover letter that includes the reference "Civil Judgments for Congressional Reports under section 213A(i)(3) of the Act." Failure to file a certified copy of the final civil judgment in accordance with this section has no effect on the plaintiff's ability to collect on the judgment pursuant to law.

(2) If a Federal, state, or local agency or private entity that administers any means-tested public benefit makes a determination under section 421(e) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 in the case of any sponsored immigrant, the program official shall send written notice of the determination, including the name of the sponsored immigrant and of the sponsor, to the address listed in paragraph (c)(3) of this section. The written notice should include the reference "Determinations under 421(e) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996."

(3) The address referred to in paragraphs (c)(1) and (c)(2) of this section is: Office of Program and Regulation Development, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC, 20529.

**PART 299—IMMIGRATION FORMS**

■ 10. The authority citation for part 299 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103; 8 CFR part 2.

■ 11. Section 299.1 is amended in the table by revising the entries for Form I-864 and Form I-864A, and by adding Form I-864EZ and Form I-864W, in proper alphanumeric sequence, to read as follows:

**§ 299.1 Prescribed forms.**

\* \* \* \* \*

Form No.	Edition date	Title and description
I-864	09/15/2003	Affidavit of support under Section 213A of the Act.
I-864A	09/15/2003	Contract between sponsor and household member.
I-864EZ	09/15/2003	EZ Affidavit of support under Section 213A of the Act.
I-864W	09/15/2003	Intending immigrant's I-864 exemption.

■ 12. Section 299.5 is amended in the table by revising headings and the entries for Form I-864, Form I-864A, and Form I-865, and by adding Form I-

864EZ and Form I-864W, in proper alphanumeric sequence, to read as follows:

**§ 299.5 Display of control numbers.**

\* \* \* \* \*

Form No.	Form title	Currently assigned OMB Control No.
I-864	Affidavit of support under Section 213A of the Act	1615-0075
I-864A	Contract between sponsor and household member	1615-0075
I-864EZ	EZ Affidavit of support under Section 213A of the Act	1615-0075
I-864W	Intending immigrant's I-864 Exemption	1615-0075
I-865	Sponsor's Change of Address	1615-0076

**Department of Justice**

**8 CFR Chapter V—Authority and Issuance**

■ Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Attorney General of the United States, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

**PART 1205—REVOCATION OF APPROVAL OF PETITIONS**

■ 13. The authority citation for part 1205 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1155, 1182, and 1186a.

■ 14. Section 1205.1 is amended by revising paragraph (a)(3)(i)(C) to read as follows:

**§ 1205.1 Automatic revocation.**

- (a) \* \* \*
- (3) \* \* \*
- (i) \* \* \*

(C) Upon the death of the petitioner, except as provided for in 8 CFR 205.1(a)(3)(i)(C).

\* \* \* \* \*

**PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES**

■ 15. The authority citation for part 1240 is revised to read as follows:

**Authority:** 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277, (112 Stat. 2681).

■ 16. Section 1240.11(a)(2) is amended by revising the second sentence and adding a new sentence at the end, to read as follows:

**§ 1240.11 Ancillary matters, applications.**

(a) \* \* \*

(2) \* \* \* The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d). In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I-864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a.

\* \* \* \* \*

■ 17. Section 1240.34 is amended by adding at the end a new sentence, to read as follows:

**§ 1240.34 Renewal of application for adjustment of status under section 245 of the Act.**

\* \* \* In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I-864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a.

■ 18. Section 1240.49(a) is amended by adding after the sixth sentence a new sentence, to read as follows:

**§ 1240.49 Ancillary matters, applications.**

(a) \* \* \* In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I-864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a. \* \* \*

\* \* \* \* \*

Dated: June 13, 2006.

**Alberto R. Gonzales,**  
*Attorney General.*

Dated: April 11, 2006.

**Michael Chertoff,**  
*Secretary.*

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