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Immigration Form I-864 (Affidavit of Support) and Efforts to Collect Damages as Support Obligations Against Divorced Spouses — What Practitioners Need to Know

by Geoffrey A. Hoffman

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Imagine a spouse who can sue his or her former spouse for support every year until either dies. Imagine the suing spouse bringing an action in state court and, if unhappy with the outcome, moving to federal court for a new law suit for support, and then going back to state court to sue, yet again, for the following year's support. An impossible scenario? Not any longer.

The I-864, affidavit of support, is a little-known form (outside of immigration law) that has become pertinent in family law and federal court litigation. The form is required as part of the application process for an alien who seeks to obtain lawful permanent residence in the U.S.[1] The form requires that a U.S. citizen or lawful permanent resident petitioner agrees to support the beneficiary at 125 percent of the applicable federal poverty guidelines in the event the intended immigrant earns less than that amount or becomes a public charge.[2] Although the agreement is between the petitioner and the federal government, all courts that have considered the issue have held that the agreement constitutes a binding, enforceable contract.[3]

This simple and seemingly innocuous form implicates a wide array of issues including, inter alia, federal court procedure, state court preemption, family law, immigration, public benefits, and Social Security law. In a spate of recent cases, pro se and represented plaintiffs are coming forward seeking to enforce the terms of the I-864 against their ex-spouses. These individuals make such claims because courts have interpreted the obligations imposed on the petitioner as surviving divorce. In fact, the support obligations under the I-864 may *never* terminate, unless or until one or more of the following conditions occurs: the sponsored immigrant a) becomes a citizen of the United States; b) has worked, or can be credited with, 40 quarters of coverage under Title II of the Social Security Act; c) ceases to hold the status of an alien lawfully admitted for permanent residence and departs the U.S.; d) obtains in removal proceedings a new grant of adjustment of status; or e) dies.[4]

Efforts on the part of divorced spouses in particular to show that they are entitled to support payments under the I-864 have been successful in the federal courts.[5] In *Stump v. Stump*, 2005 WL 2757329 (N.D. Ind. Oct. 25, 2005), the original case to explore this issue, the plaintiff wife was a Russian citizen who entered the U.S. on a fiancé visa. The defendant husband married the plaintiff wife shortly after her arrival in the U.S. The defendant husband signed the affidavit of support and agreed to provide his wife with support necessary to maintain her at an income in the amount of at least 125 percent of the federal poverty guidelines. According to the court, the defendant husband "made this promise as consideration for the plaintiff's application not being denied on the grounds that she was an immigrant likely to become a public charge."[6]

Mr. Stump defended by arguing that his wife had failed to plead essential elements required to state a claim for relief in that she did not allege receiving any "means-tested benefits" from any "federal, state, or local government," and did not allege that she had attained permanent resident status.[7] The court rejected this argument, and instead granted summary judgment on liability in favor of the plaintiff wife. With respect to damages, the court found that since the plaintiff wife was now divorced, her household size would be one person, as opposed to three, which was the original size of the household at the inception of the marriage.[8] The reduced household size lessens the amount of damages to which Mrs. Stump would otherwise be entitled, because the federal poverty guidelines are dependent on number of persons in the household.[9]

With respect to the contract defenses of mitigation and set-off, the court found that such issues were properly before the court.[10] While the court noted there is no body of federal common law specifically addressing these issues, there is a general duty to mitigate damages as a "basic tenet" of contract law.[11] Applying these principles, the court found that any "funds the [p]laintiff received after her separation should be subtracted from the amount the [d]efendant must provide to 'maintain' the [p]laintiff at 125 [percent] of the poverty level."[12] The court further found that the plaintiff had made "reasonable efforts" to obtain employment and be self-sufficient.[13]

The legislative history behind the I-864 also supports the finding that the affidavit of support creates a binding, enforceable contract between the sponsoring petitioner and federal government, with the intended immigrant as the third-party beneficiary.[14] In the commentary relating to §551 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the new section was described as "creat[ing] a new, legally binding affidavit of support in order to seek reimbursement from sponsors for the costs of providing public benefits."[15] It was the intention that "the affidavit of support be a legally binding contract between an alien's sponsor, the sponsored alien, and the government." Interestingly, the drafters further intended that "public hospitals, private hospitals, and community health centers" be allowed to seek reimbursement from sponsors "for the costs of providing emergency medical services" to the extent that such services would be reimbursed by "means-tested public benefit programs." The provision was designed "to encourage immigrants to be self-reliant in accordance with national immigration policy."[16]

What Constitutes Mitigation or Set-offs?

While a finding of basic liability on the part of the sponsor under the I-864 is supported by the legislative history, the governing statute, and the attendant regulations, it is an open question regarding what exactly constitutes mitigation and/or set-off and, also, whether any further defenses may exist. For example, in *Shumye v. Felleke*, 555 F. Supp. 2d 1020 (N.D. Cal. 2008), the court held that the I-864 is legally enforceable but recognized certain set-offs. The court held that the value of "affordable housing subsidies" and student grants, such as "Pell grants," constituted "income" for purposes of reducing the damages available to a plaintiff under the affidavit of support.[17] In *Naik v. Naik*, No. A-6270-05T5 (N.J. Super. Apr. 14, 2008), the court held that the I-864EZ creates a legally enforceable contract, but recognized there is a set-off for spousal support, child support, and equitable distribution. Furthermore, the calculation of damages under the I-864 is based upon whether the third-party beneficiary had income that *annually* reached 125 percent of the poverty guidelines. The beneficiary's income over several years *cannot* be aggregated to determine the 125 percent per year, but must be determined year-by-year whether the individual's "annual income" under 8 U.S.C. §1183a(a)(1)(A) (March 13, 2002) met the 125 percent poverty threshold.[18] In *Cheshire v. Cheshire*, 2006 WL 1208010 (M.D. Fla. 2006), the court held that the "sponsor's financial obligation under the affidavit of support should be reduced by the amount of any income or benefits the sponsored immigrant receives from other sources."[19]

Another open question is what constitutes "reasonable efforts" to mitigate one's damages under the affidavit of support, which necessarily requires a fact-based inquiry dependent upon a variety of factors, such as the age and health of the immigrant, employment history, level of education. In *Yoonis v. Farooqi*, 597 F. Supp. 2d 552 (D. Md. 2009), for example, the court held that there is an obligation to make reasonable efforts to find employment and to mitigate damages.[20] In that case, "occasional" cash gifts received by the defendant's former wife from friends and members of her mosque following the parties' separation were held to be de minimis and, therefore, did *not* reduce the former husband's obligation to wife under the I-864.[21] Moreover, the husband-sponsor's child support obligation also did *not* reduce his obligation to his former wife under the I-864 because, according to the court, the purpose of child support was not to benefit the wife but, rather, to benefit the child and ensure that the child enjoyed the same standard of living as if the parents had remained together.[22] With respect to efforts on the part of the wife to find employment, the court held that her efforts were sufficient and "she need not apply for every available job in order to mitigate her losses; she need only make reasonable efforts."[23]

Other Contract Defenses: Fraud at Inception of Marriage

While there are no reported cases in which a defendant has successfully contested his or her liability under the I-864, fraud is an available defense. In the event the petitioner-sponsor was defrauded into marrying the intending immigrant, a potential defendant should be counseled to seek an annulment based upon fraud under Florida law, rather than a divorce. The existence of an annulment expressly based upon the fraud committed by the intending immigrant would present impediments to recovery in any subsequent action under the I-864.[24] Under the doctrine of "unclean hands," it could be argued that a plaintiff should be equitably estopped from claiming damages under the I-864, which was signed by the former spouse defendant on the basis of fraud.[25]

It is also well-settled that one of the conditions which terminates the sponsor's support obligations under the I-864 is the accrual of 40 qualifying quarters under the Social Security Act.[26] In addition, the legislative history makes clear that the 40 quarters cannot accrue unless or until the immigrant files his or her federal taxes.[27] Applying the doctrine of "unclean hands," the intending immigrant should not be entitled to recover any damages under the I-864 for the years in which he or she willfully failed to pay and/or avoided paying duly owed taxes.

Jurisdiction and the *Rooker-Feldman* Doctrine

There is another issue with respect to jurisdiction when an action to recover damages under the I-864 may be brought. The governing statute provides that "the sponsor agrees to submit to the jurisdiction of any [f]ederal or [s]tate court for purposes of actions brought under [8 U.S.C. §1183a(b)(2)]."[28] The governing statute also expressly contemplates concurrent jurisdiction of state or federal courts.[29] Plaintiffs have utilized this language to bring claims for support in both state and federal courts.[30]

It is presently an open question whether a plaintiff can switch between state and federal jurisdictions once having brought and disposed of the claim in the first instance in state court.[31] The so-called *Rooker-Feldman*[32] doctrine has been applied to preclude a federal court from considering a claim under the I-864, affidavit of support, in a subsequent federal court proceeding where the claim has already been fully settled by the state court.[33]

In *Schwartz,* the appellant-wife filed an adversary proceeding seeking a determination that her husband was liable under the I-864.[34] The appellee-husband argued that his support obligations terminated on June 1, 2004, in accordance with the terms of the decree of divorce issued by the state court.[35] He also argued that any liability under the affidavit would not constitute a domestic support obligation and, therefore, was dischargeable in bankruptcy.[36] The First Circuit upheld the federal bankruptcy court's order dismissing the proceeding for lack of jurisdiction under the *Rooker-Feldman* doctrine.[37]

In a detailed decision, the First Circuit in *Schwartz* noted that "[a] number of courts have held that the *Rooker-Feldman* doctrine, as refined by [*Exxon Mobil v. Saudi Basic Indus. Corp*., 544 U.S. 280, 283-84 (2005)] . . . bars federal court review of final state divorce decrees."[38] The court further held that "if, in fact, the [a]ffidavit of [s]upport was submitted in the divorce proceedings, the bankruptcy court lacked subject matter jurisdiction over the appellant's claims under the *Rooker-Feldman* doctrine."[39] Alternatively, even if the appellant-wife had not submitted the affidavit of support in the divorce proceedings, "the end result is the same because the appellant's claims were still barred by the doctrine of res judicata."[40]

In another I-864 case, *Davis v. United States*, 499 F.3d 590 (6th Cir. 2007), the Sixth Circuit upheld the district court's dismissal of the case for lack of subject matter jurisdiction under *Rooker-Feldman*. In that case, a legally separated husband filed suit against the U.S., the immigration service, as well as his Ukrainian wife, seeking a declaratory judgment regarding the amount of financial support he owed to his wife and stepsons under the I-864, affidavit of support.[41] The husband in *Davis* argued to no avail that his complaint did not address an issue of domestic relations law, but rather sought "an interpretation of the federal law" and did not seek "appellate review of the state court's final judgment."[42] The Sixth Circuit expressly rejected this position, holding that the plaintiff in fact was seeking federal review of the state court's order enforcing the affidavit of support in his divorce case.[43] "The remedy available to him from the state court's allegedly erroneous construction of the affidavit of support is an appeal within the state court system and ultimately to the U.S. Supreme Court, not a collateral attack in the lower federal courts."[44]

It should be noted that the *Rooker-Feldman* doctrine may not be applicable where the plaintiff does not seek to overturn or attack the prior state court judgment, but rather brings a *new* claim under the affidavit of support. The U.S. Supreme Court has made clear that "[t]he *Rooker-Feldman* doctrine . . . is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[45] Where a plaintiff is bringing a completely *new* claim for damages, for example, for a different time period than was previously sought before the state court, the federal court may not be amenable to apply *Rooker-Feldman* to divest itself of subject matter jurisdiction.

Other Possible Defenses and Unconscionability

Other possible defenses which may be raised against a claim for support obligations under the I-864 include the following: res judicata, collateral estoppel, due process, infringement on marital and familial rights, termination of right to enforce affidavit of support, collateral source set off, fraud, and other contract-based defenses, such as lack of consideration, void for vagueness/void for lack of definite terms, illusory contract, duress, and unconscionability. As a practice pointer, most or all of these defenses will be affirmative defenses and must be raised in the answer or first responsive pleading, pursuant to Fed. R. Civ. P. 12(b), otherwise they are waived.

The most interesting of these affirmative defenses, in addition to fraud, is unconscionability. Florida courts have defined unconscionability as a contract or clause "'where it turns out that one side or the other is to be penalized by the *enforcement* of [its] terms [such] that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good

offices in the enforcement of such unconscionability.'"[46] The court further stated that "[t]his principle of unconscionability is. . .an important, if infrequently used, safety valve in our law of contracts because 'courts should be enabled to refuse enforcement of a contract ... when such enforcement would not be in keeping with the basic function of any court — the administration of justice.'"[47]

Although the doctrine of unconscionability has yet to be applied in the context of the I-864, the form may be found unconscionable under certain specific circumstances where its enforcement would result in injustice or gross unfairness. It may be unreasonable, for example, to impose an obligation to support where the immigrant has failed to report his or her income to the government by filing taxes as required by law, thus, obviating the happening of one of the condition precedents to termination of the sponsor's obligations under the I-864. Unconscionability may also be shown where the beneficiary has frustrated the purpose of the contract not only by violating the federal tax laws, but the immigration laws as well, for example, by failing to file appropriate forms and evidence to maintain his or her status or failure to report for court hearings and/or other immigration-related appointments.[48]

The Settlement Agreement and Third-party Claims

Parties may desire to settle a claim for support obligations under the I-864 by entering into a settlement agreement whereby the plaintiff agrees to waive any past, present, or future claims under the I-864, affidavit of support. Settlement, however, raises a host of other, thorny issues. First, it must be remembered that the obligations imposed under the I-864 are between the petitioner-sponsor and the federal government. The fact that the government is a party to the I-864 contract means that any settlement will have to take into consideration that the government may still bring a claim for *reimbursement* against the sponsor, even where the beneficiary agrees to waive future claims. As the statute makes clear, "[u]pon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity. . .or the appropriate entity of the [f]ederal [g]overnment, a [s]tate, or any political subdivision of a [s]tate shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit."[49] The statute further provides for "actions to compel reimbursement" within 45 days after a request for reimbursement.[50]

One possible solution to the sponsor's liability to the government or even nongovernmental entities concerning payments made to the beneficiary would be an agreement by the immigrant to hold harmless or indemnify the sponsor in the event such entities seek reimbursement for such means-tested public benefits. Such a solution may have limited practical utility in the event the immigrant has no assets and is, thus, unable to cover the costs of any reimbursement. If the immigrant is solvent, working, or capable of future employment, then a clause in the settlement agreement providing for indemnification may be an effective way to resolve the case.

Second is the issue of whether the immigrant can ever modify the sponsor's obligations *to the government* or *nongovernmental agencies* who have paid out means-tested public benefits. The commentary to the I-864 provisions suggests that the "sponsored immigrant and the sponsor (or joint sponsor) may not. . .alter the sponsor's obligations to [the Department of Homeland Security] and to benefit-granting agency."[51] Even so, the commentary further provides that "[i]f 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."[52] From these authorities, there is no question that the immigrant may waive his or her right to receive support from the sponsor under the affidavit of support.

Conclusion

There has been and will be increasing state and federal litigation surrounding the obligations of a sponsor under the I-864, affidavit of support. Practitioners must advise their clients about the ramifications to a sponsor who executes the form as part of an adjustment of status process. Many clients remain unaware of their obligations and liability, let alone the pitfalls, which attach upon signing the form. Due to the lack of reported case law, there are many unresolved issues surrounding application of the I-864 to circumstances involving divorced spouses and the obligations of sponsors, as well as the duties owed to governmental and nongovernmental entities providing means-tested public benefits. Sponsors may be liable not only to the intending immigrant but also to third parties who seek reimbursement. Moreover, the sponsor's obligations may not be altered by an agreement between the sponsor and the immigrant.

[1] *See* Immigration and Nationality Act (INA) §213a; 8 U.S.C. §1183a (March 13, 2002); 8 C.F.R. §213a.1 *et seq*. (June 1, 2009). In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which modified the Immigration and Nationality Act. *See* 8 U.S.C. §1183a. The amended act required that sponsors who petitioned for intending immigrants likely to become a public charge execute an affidavit of support, the I-864. By signing the form, the sponsor "agrees to provide support to maintain the sponsored alien at an annual income that is no less than 125 percent of the [f]ederal poverty line during the period in which the affidavit is enforceable." 8 U.S.C.A. §1183a(a)(1)(A) (March 13, 2002).

[2] The I-864 is required in all family-based immigration adjustment cases and in a limited number of employment-based cases. Specifically, it is required in any residence applications involving immediate relatives including fiancés and orphans, unless the orphan becomes a citizen upon

adjustment of status. In the context of employment-based cases, it is required if the petitioning employer is a relative of the alien, and is a U.S. citizen or lawful permanent resident; and where the relative of the alien has a significant ownership interest (five percent or more) in the for-profit petitioning entity, and is a U.S. citizen or a lawful permanent resident. Michael Aytes, USCIS Memorandum, *Consolidation of Policy Regarding USCIS Form I-864*, Affidavit of Support, (AFM Update AD06-20) HQRPM 70/21.1.13 (June 27, 2006). If, for example, a person enters the U.S. under a K-1 (fiancé) visa, the petitioner would be obligated to fill out a form I-134, not I-864. If he or she then decides not to marry the person, there would be no liability under the affidavit of support (I-134), so long as the immigrant does not adjust his or her status through marriage to the fiancé, in which case there would be an obligation to execute the I-864.

[3] *See*, *e.g.*, *Stump v. Stump*, 2005 WL 2757329 (N.D. Ind. Oct. 25, 2005); *Cheshire v. Cheshire*, 2006 WL 1208010 (M.D.Fla. 2006); *Shumye v. Felleke*, 555 F. Supp. 2d 1020 (N.D. Cal. 2008); *Yoonis v. Farooqi*, 597 F. Supp. 2d 552 (D. Md. 2009).

[4] 8 C.F.R. §212a.2(e)(2)(i) (June 1, 2009).

[5] Previously, petitioners were required to sign the prior form, the I-134, which was held *not* to have constituted a legally binding contract. *See Tornheim v. Kohn*, 2002 WL 482534 at *3-6 (E.D.N.Y. Mar. 26, 2002). As the governing statute, 8 U.S.C. §1183a, relating to the new I-864 makes clear, however, the new form is meant to be a legally binding contract, enforceable in federal and/or state courts. *See* 8 U.S.C. §1183a(a)(1)(B) and (C) (March 13, 2002).

[6] *Stump v. Stump*, 2005 WL 2757329 at *2.

[7] *Id.*

[8] *Id.* at *4.

[9] *Id.*

[10] *Id.* at *7.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See* S. Rep. No. 249, 104th Cong., 2nd Sess., 1996 WL 180026 (Apr. 10, 1996).

[15] H.R. Conference Report 104-828, 104th Cong., 2nd Sess. (Sept. 24, 1996).

[16] *Id.*

[17] *Shumye v. Felleke*, 555 F. Supp. at 1026-27.

[18] *Id.* at 1025-27.

[19] *Cheshire v. Cheshire*, 2006 WL 1208010 at *6.

[20] *Yoonis v. Farooqi*, 597 F. Supp. 2d at 556.

[21] *See id.* at 554.

[22] *Id.* at 555.

[23] *Id.* at 556 (citing, *Sergeant Co. v. Pickett*, 401 A.2d 651, 660 (1979)).

[24] Under Florida law, an annulment in contrast to a dissolution of marriage renders the marriage void ab initio. *See*, *e.g.*, *Young v. Young*, 97 So. 2d 470 (Fla. 1957); *Kuehmsted v. Turnwall*, 138 So. 775 (1932).

[25] *See Seismograph Service Corp. v. Offshore Raydist, Inc.*, 263 F.2d 5, 22-23 (5th Cir. 1959). The doctrine of unclean hands "is a part of 'a universal rule guiding and regulating the action of equity courts,' namely, that he who seeks equity must do equity." *In re MacNeal*, 393 B.R. 805, 810 (S.D. Fla. 2008). "[W]henever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." *Id.* (citing, Pomeroy's Equity Jurisprudence, §397 at 657 (3d ed. 1905)). Furthermore, the courts require that the offending party's conduct relate to the matter in litigation. *Id.*

[26] *See* 8 C.F.R. §212a.2(e)(2)(i) (June 1, 2009).

[27] *See* S. Rep. No. 249, 104th Cong., 2nd Sess., 1996 WL 180026 (Apr. 10, 1996) ("A qualifying quarter is a [three]-month period, during which the immigrant 1) earned enough for the period to count as a quarter for Social Security coverage; 2) did not use welfare; and 3) which occurs in a year in which the immigrant paid [f]ederal income taxes.").

[28] *See* 8 U.S.C. §1183a(a)(1)(C) (March 13, 2002).

[29] *See* 8 U.S.C. §1183a(e) (March 12, 2002) ("An action to enforce an affidavit of support . . . may be brought against the sponsor in any appropriate court.").

[30] For an example of a Florida divorce proceeding involving a claim under the I-864, *see*, *e.g.*, *Iannuzzelli v. Lovett*, 981 So. 2d 557 (Fla. 3d D.C.A. 2008). The author's firm represented the defendant in this case.

[31] The scenario depicted in the opening paragraph of this article has happened, *e.g.*, in which the immigrant-beneficiary seeks damages under the I-864 in one jurisdiction, such as state court, and then subsequently seeks further damages for a different year in another jurisdiction, such as federal court. Except for application of the *Rooker-Feldman* doctrine, res judiciata, collateral estoppel, or in the event of some binding settlement, there would be nothing preventing the immigrant from switching from one court to another or filing repeatedly in one venue because the support obligation under the I-864 continues from year-to-year unless or until one of the terminating conditions occurs.

[32] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[33] *See*, *e.g.*, *Schwartz v. Schwartz*, 2008 WL 5582733 (1st Cir. BAP Aug. 26, 2008).

[34] *Id.* at *2.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at *3.

[39] *Id.* at *6.

[40] *Id.*

[41] *Davis,* 499 F.3d at 592-93.

[42] *Id.* at 595.

[43] *Id.*

[44] *Id.* (citing, *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir.2007)).

[45] *Exxon Mobil Corp.*, 544 U.S. at 284.

[46] *Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. App. 1982) (quoting, 14 S. Williston, A Treatise on the Law of Contracts §1632 at 51-52 (3d ed. Jaeger 1972)) (emphasis added).

[47] *Id.* (quoting, Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1, 2 (1969)).

[48] There is a further issue as to whether the so-called "fugitive disentitlement doctrine" applies in I-864 cases to foreclose the utilization of the judicial process by the intending immigrant where the person is, for example, subject to an order of deportation or removal and has willfully failed to report to immigration authorities. *See Pesin v. Rodriguez*, 244 F.3d 1250, 1252 (11th Cir. 2001); *Magluta v. Samples*, 162 F.3d 663, 664 (11th Cir. 1998); *Bar-Levy v. I.N.S.*, 990 F.2d 33, 35 (2d Cir. 1993); *see also Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 729 (7th Cir. 2004).

[49] 8 U.S.C. §1183a(b)(1)(A) (March 13, 2002).

[50] 8 U.S.C. §1183a(b)(2).

[51] 71 Fed. Reg. 35740 (June 21, 2006).

[52] *Id.*

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