

9 FAM 40.41 PROCEDURAL NOTES

*(CT:VISA-1358; 10-23-2009)
(Office of Origin: CA/VO/L/R)*

9 FAM 40.41 PN1 SUBMITTING FORM I-864, AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE ACT

9 FAM 40.41 PN1.1 Notarizing and Photocopying Documentation

(CT:VISA-1358; 10-23-2009)

- a. Required signatures do not need to be notarized. This includes the signature of the sponsor(s), or the sponsor's household members or dependents on Form I-864 and *Form* I-864-EZ, Affidavit of Support Under Section 213A of the Act; Form I-864-A, Contract Between Sponsor and Household Member; and Form I-864-W, Intending Immigrant's Affidavit of Support Exemption.

NOTE: The sponsor, by signing the Form I-864 under penalty of perjury, certifies that the transcript or photocopy is true and correct. This certification meets the statutory requirement of presenting a "certified" copy and, per 28 U.S.C. 1746, the requirement that the affidavit of support be sworn or affirmed before a notary, consular officer, or immigration officer.

- b. Principal applicants and accompanying spouses and/or children may travel together on one complete set of the documents prepared in support of Form I-864, Affidavit of Support under Section 213A of the Act.
- c. The supporting documents should be made a part of the principal applicant's Instruction Package for Immigrant Visa (IV). The principal applicant's alien registration number (the Department of Homeland Security (DHS) assigned "A number") should be recorded on each accompanying individual's Form I-864 in the "for agency use only" box (on page 1 of the form).
- d. Similarly, following-to-join applicants, traveling either alone or in a group, will require only one complete set of the documents prepared in support

of the principal applicant's Form I-864.

- e. For following-to-join applicants traveling together, the documents should be included in only one applicant's issued visa packet.
- f. The alien registration number of the applicant carrying the support documentation must be recorded on Form I-864 (page 1 of the form).
- g. Each individual must still present Form I-864 at the time of the visa interview (so that it becomes part of the Instruction Package for Immigrant Visa Applicants) and the signatures on each affidavit must be original (not required to be notarized).
- h. The supporting documents carried by the designated following-to-join applicant may be photocopies of the originals and do not need notarization or an original signature.

9 FAM 40.41 PN1.2 Where to Submit

(CT:VISA-1209; 04-28-2009)

- a. As of October 1, 2002, all posts are participants in a review program at the National Visa Center (NVC).
- b. The sponsor (or joint sponsor) is instructed to send the Form I-864, Affidavit of Support Under Section 213A of the Act, and all supporting documents (a complete set for the principal and a signed Form I-864 under penalty of perjury, (and Form I-864-A, Contract Between Sponsor and Household Member if necessary) for each accompanying dependent) directly to NVC.
- c. NVC will review the submitted Form I-864 and documents for clerical completeness and provide the sponsor two opportunities to supply any missing information or documents. After the second review, NVC forwards the Affidavit of Support with the case file directly to the post.
- d. The NVC review does not apply to immigrant visa (IV) cases where the petitioner has filed the Form I-130, Petition for Alien Relative, at post.

9 FAM 40.41 PN2 REVIEWING FORM I-864 OR FORM I-864-EZ, AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE ACT

(CT:VISA-1209; 04-28-2009)

You must ensure that each section of Form I-864 or Form I-864-EZ, Affidavit of Support (AOS) under Section 213A of the Act, has been completed properly. It is your responsibility to review the information provided with the petition packet and other documents provided at the time of interview.

9 FAM 40.41 PN2.1 Part 1 of Form I-864 or Form-864-EZ, Basis for Filing Affidavit of Support

(CT:VISA-1209; 04-28-2009)

Verify that sponsor has checked the appropriate box(es).

- (1) If Form I-864-EZ is being used, sponsors must checked "Yes" on boxes a, b, and c;
- (2) If Form I-864 is being used and box "d" has been checked, indicating a single joint sponsor, you should ensure that there are two Forms I-864: one from the petitioner and one from the joint sponsor; and
- (3) If Form I-864 is being used and box "e" has been checked, indicating two joint sponsors, you should ensure that there are three Forms I-864: one from the petitioner, one from the first joint sponsor, and one from the second joint sponsor.

9 FAM 40.41 PN2.2 Parts 2-4 of Form I-864 or Parts 2-3 of Form I-864-EZ: Information on the Principal Immigrant, Accompanying Family Members, and Information on the Sponsor

(CT:VISA-1209; 04-28-2009)

- a. Compare the information provided from other documents included in the application and/or verifying data with the sponsored immigrant at the time of the visa interview;
- b. If the sponsor is using Form I-864 only "accompanying" family members should be listed in the chart in Part 3. Be sure that the first and last name of each accompanying family member is listed; and
- c. Family members "following to join" (i.e., intending to immigrate more than 6 months after the principal intending immigrant) should not be listed in Part 3.

9 FAM 40.41 PN2.3 Part 5 of Form I-864 or Part 4 of Form I-864-EZ: Sponsor's Household Size

(CT:VISA-1209; 04-28-2009)

The sponsor's total household size is used to determine the correct Federal Poverty Guideline threshold. For Form I-864, a household size includes the following groups of individual:

- (1) Sponsor;

- (2) Person(s) the sponsor is sponsoring on the Affidavit of Support (will always be one if the sponsor is using Form I-864-EZ);
- (3) Sponsor's spouse, if the sponsor is married;
- (4) The sponsor's children, as defined in section 101(b)(1) of the Act, except those that have:
 - (a) Reached the age of majority (i.e., are at least 18 years old) or liberated under the law of sponsor's domicile; and
 - (b) Are not claimed as dependents on the sponsor's most recent Federal income tax return.
- (5) Other persons lawfully claimed as dependents on the sponsor's tax return for the most recent tax years; and
- (6) The number of siblings, parents, and/or adult children who:
 - (a) Have the same principal residence as the sponsor; and
 - (b) Have combined their income with the sponsor's income by submitting Form I-864-A.

9 FAM 40.41 PN2.4 Part 6 of Form I-864 or Part 5 of Form I-864-EZ: Sponsor's Income and Employment

(CT:VISA-1358; 10-23-2009)

a. General Rule and Active Duty Military Exception.

- (1) Either the petitioning sponsor, substitute sponsor, or a joint sponsor must show the ability to maintain his or her annual household income at 125% of the governing Federal Poverty Guideline threshold. (See also 9 FAM 40.41 N8.)
- (2) A petitioner on active duty in the U.S. Armed Forces, other than for training, needs to demonstrate an annual income equal to at least 100% of the Federal Poverty Guidelines if he or she is petitioning for a spouse or child.
- (3) A substitute sponsor or joint sponsor is not eligible to claim 100% income level based on petitioner's relationship to the intending immigrant, or petitioner's military status.
- (4) A substitute or joint sponsor may claim the 100% income level only if he or she is on active duty in the U.S. Armed Forces (other than training) and the intending immigrant is the spouse or child of the substitute sponsor or joint sponsor.
- (5) To qualify for the Military Exception:

- (a) The petitioner must provide evidence that he or she is on active duty, such as military dependent's identification card for the intending immigrant (spouse or child); and
 - (b) A photocopy of the military identification card of the sponsor (spouse or parent).
 - (6) Regardless of whether a sponsor qualifies for the military exception, all of his or her income counts toward the 125% (or 100%) income requirement, including (in the case of Armed Forces personnel) any allotments received for the dependents.
- b. Poverty Guidelines: See Exhibit I Poverty Income Guidelines
- c. Determining the Sponsor's Ability to Provide Sufficient Support.
- (1) If a sponsor is using Form I-864-EZ, he or she must only use his or her salary or pension as shown on his or her most recent Federal income tax return. If the sponsor provides a photocopy of the return, he or she must include a copy of W-2 provided by the sponsor's employer(s) and/or Form(s) IRS-1099 to show pension income. As with other sponsors these copies are not needed if the sponsor provides an IRS transcript of the return. (See Part 1(a) of Form I-864-EZ.)
 - (2) The sponsor must use Form I-864, rather than Form I-864-EZ, if the sponsor will be submitting any Forms I-864-A. (See also 9 FAM 40.41 N5.1e.)
 - (3) Sponsors who use Form I-864 may qualify based only upon their own income and/or assets if either or both are sufficient to reach the income requirement. If the sponsor's combined income and assets are not sufficient to meet the governing threshold, the sponsor may include the income and or/assets of another household member if the household member:
 - (a) Is at least 18 years of age;
 - (b) Is included in the calculation of the household size;
 - (c) Has the same principal residence as the sponsor (or is the sponsor's spouse); and
 - d) Has completed and signed the Form I-864-A.
 - (4) Federal Tax Return(s)
 - (a) Whether a sponsor submits Form I-864 or *Form* I-864-EZ, the sponsor must provide a copy or an IRS-generated transcript of the sponsor's Federal income tax return for the most recent tax year.
 - (b) By signing the Form I-864 or Form I-864-EZ under the

penalty of perjury, a sponsor certifies that the transcript or photocopy is true and correct. This certification meets the statutory requirement of presenting a "certified" copy of the transcript of photocopy. Certification of the returns by the IRS is not necessary, the sponsor's certification under the penalty of perjury is sufficient.

- (c) A sponsor who filed a joint tax return with a spouse, but is qualifying using only his/her own individual income must submit evidence of that individual income. For example: the sponsor's own W-2, Wage and Tax Statement, to reach the income requirement; and/or evidence of other income reported to the IRS which can be attributed to him *or* her on Form 1099.
- (5) Other Evidence of Income
- (a) Total income means before deductions in the sponsor's tax return for the most recent taxable year should be generally determinative. There is no requirement to determine whether the sponsor would have met 125% (or 100%) of the governing Poverty Guideline before the most recent tax year.
 - (b) You, however, may consider other evidence of income (e.g., pay stub(s), or employer letter(s), or both), if:
 - The sponsor establishes that he or she was not legally obligated to file a Federal income tax return for the most recent tax year
 - You *have determined* that the income listed on the Federal tax return for the sponsor's most recent tax year does not meet the governing threshold
 - (c) If a sponsor recently started a new job (that the officer is satisfied will likely continue), the income from the job now meets or exceed the legal requirement, you may find the Affidavit of Support (AOS) to be sufficient.
 - (d) 8 CFR 213a.2(c)(2)(ii)(C) permits you to conclude that a Form I-864 is not sufficient, even if the sponsor's household income meets the Poverty Guideline threshold. For example, if the sponsor's income is from a job that is merely temporary or seasonal, you might reasonably conclude that the AOS, for that reason, is not sufficient.
- (6) Means-Tested Public Benefits Received by the Sponsor
- (a) The Department of State and U.S. Citizenship and Immigration Services (USCIS) has decided that, as a matter of policy, it will require the sponsor to disclose his or her

receipt of means-tested public benefits and not consider the fact that a sponsor has receive such means-tested public benefits in the past in evaluating a Form I-864 or Form I-864-EZ.

- (b) The sponsor may not include any means-tested public benefits currently being received in calculating the household income. (See also 9 FAM 40.41 N10.)
- (7) Compare Total Household Income with Governing Poverty Guideline
- (a) If the sponsor's total household income (line 24c of Form I-864 or line 18 of Form I-864-EZ) is greater than or equal to the governing Poverty Guideline threshold, the sponsor does not need to show evidence of assets and does not require a joint sponsor. In this case, you may move to part 8 of Form I-864 or Part 6 of Form I-864-EZ.
 - (b) If Form I-864-EZ does not demonstrate means to maintain the required income, you may chose to request that the applicant submit a new Form I-864 from the sponsor (if the applicant seeks to qualify based on showing "significant assets"), or submit a sufficient Form I-864 from a joint sponsor.
NOTE: This request of evidence should go to the applicant, not to the sponsor.
 - (c) If a Form I-864 does not demonstrate means to maintain the required income, you should consider the assets listed in Part 7 of the form.

9 FAM 40.41 PN2.5 Part 7 of Form I-864: Use of Assets to Supplement Sponsor's Income

(CT:VISA-1358; 10-23-2009)

- a. If a sponsor cannot meet the Poverty Guideline requirement based upon total household income listed on line 24c, he or she may show evidence of assets owned by the sponsor and/or members of the sponsor's household that are available to support the sponsored immigrant(s) and can be readily converted into cash within 1 year.
- b. For assets of the intending immigrant and/or household member to be considered, the household member must complete and sign Form I-864-A.
- c. You should check to make sure that the Form I-864-A is completed and signed by the sponsor and the household member.

- d. Evidence of the sponsor's assets should be attached to the Form I-864. Evidence of the principal sponsored immigrant's and/or household member assets should be attached to Form I-864-A. (See 9 FAM 40.41 *N5.6.*)

9 FAM 40.41 PN 2.6 Joint Sponsor

(CT:VISA-1209; 04-28-2009)

a. Joint Sponsor Needed:

- (1) If the petitioner or substitute sponsor cannot demonstrate ability to maintain a household income of at least 125% (or 100% when applicable) of the Federal Poverty Guidelines, the intending immigrant may meet the AOS requirement by obtaining a joint sponsor who is willing to accept joint and several liability with the principal sponsor as to provide support to the sponsored alien during the period that the Affidavit is enforceable.
- (2) If a joint sponsor submits an AOS, remember that the petitioner (the principal sponsor) still must submit an AOS, regardless of whether the sponsor had no income, or did not make enough income to be required to file income tax returns.
- (3) The joint sponsor must demonstrate income or assets that independently meet the requirements to support the sponsored immigrant(s). It is not sufficient for the combination of incomes of the primary sponsor, sponsored immigrant and joint sponsor to meet the threshold.
- (4) 8 CFR 213a.2(c) allow but do not require two joint sponsors per family unit intending to immigrate based upon the same family petition. No individual may have more than one joint sponsor, but it is not necessary for all family members to have the same joint sponsor

b. Joint Sponsor not needed:

- (1) If the petitioning or substitute sponsor meets the income requirements based on his or her own income, there can be no joint sponsor.
- (2) If any additional Forms I-864 from the joint sponsors are included in the record, they should be removed from the file and returned to the intending immigrant. Remove all unneeded Forms I-864 from the file so there is no confusion about who is legally responsible for the immigrant and any enforcement action.

9 FAM 40.41 PN2.7 Part 8 of Form I-864 or Part 6

of Form I-864-EZ Sponsor's Contract

(CT:VISA-1209; 04-28-2009)

- a. Part 8 of Form I-864 or part 6 of Form I-864-EZ constitutes the bulk of contractual provisions and outline the purpose of Form I-864, AOS under Section 213A of the Act which is to overcome the public charge grounds of inadmissibility. It includes:
 - (1) Notice of Address requirements (the sponsor must notify Department of Homeland Security (DHS) of the sponsor's new address within 30 days);
 - (2) Means-tested Public Benefit Prohibitions and Exceptions;
 - (3) Consideration of sponsor's income in determining eligibility for benefits;
 - (4) Civil action to enforce the affidavit; and
 - (5) It requires certification under the penalty of perjury that the sponsor is aware of the legal ramifications of being a sponsor under section 213A of the Act.
- b. Once signed, the concluding provisions satisfy the statutory requirement that the sponsor must make written statement under the penalty of perjury indicating that the copies of the Federal income tax returns submitted with the AOS are true copies of the returns filed with the Internal Revenue Service.
- c. A photocopy of the signed Form I-864 may be submitted for each spouse and/or child of the principal beneficiary of the adjustment of status application. Copies of supporting documentation are not required.

9 FAM 40.41 PN2.8 Federal Income Tax Returns

(CT:VISA-1358; 10-23-2009)

See 9 FAM 40.41 *N5.5*.

9 FAM 40.41 PN2.9 When Sponsor Cannot Provide Income Tax Returns

(CT:VISA-1209; 04-28-2009)

If the sponsor is unable to provide Federal income tax return for the most recent taxable year at the time of the Form I-864 signing, he or she must provide a valid explanation. Failure to file does not excuse the sponsor from the requirement. If tax returns should have been filed, the affidavit will not be considered sufficient until the sponsor has done so and supplied the appropriate copies for consideration with Form I-864, Affidavit of Support

under Section 213A of the Act. If the declared income does not meet the 125 percent income requirement but the sponsor claims to have underreported his or her income, an amended return will be necessary for the affidavit to be considered sufficient.

NOTE: You do not have the authority to request and/or require an individual to pay taxes or correctly report income to the Internal Revenue Service (IRS). You may advise applicants or sponsors that an original or amended tax return will be required in order to process an immigrant visa petition to conclusion, however.

9 FAM 40.41 PN2.10 Part 9 of Form I-864 Preparer Information

(CT:VISA-1209; 04-28-2009)

If someone other than the sponsor prepares the form on the sponsor's behalf, the preparer must complete and sign Part 9 of the Form I-864. The preparer's signature is in addition to the sponsor's signature and does not replace the sponsor's obligation to sign the affidavit of support.

9 FAM 40.41 PN2.11 Consular Posts/U.S. Citizenship and Immigration Services (USCIS) Completion of "Agency Use Only" Box

(CT:VISA-1358; 10-23-2009)

In adjustment cases adjudicated by posts/U.S. Citizenship and Immigration Services (USCIS), you must complete the "agency Use Only" box on the first page of the Form I-864 or Form I-864-EZ. If the petitioner sponsor does not qualify, you should check the box "Does not meet." In order for the applicant to be approved, there must be in the file another Form I-864 that meets the requirements from a joint sponsor. In such a case you must check the "Meets" box, and then sign, date, and note the post code for location.

9 FAM 40.41 PN2.12 Verification of Information

(CT:VISA-1358; 10-23-2009)

- a. The Government may pursue verification of any information provided on or with Form I-864, *Form* I-864-EZ, *Form* I-864-A (e.g., employment, income, and/or assets) with the employer, financial or other institutions, the Internal Revenue Service, or the Social Security Administration. If the Department finds that a sponsor, joint sponsor, or household member has concealed or misrepresented material facts concerning income,

household size, or other material facts, we will conclude that the Affidavit of Support is not sufficient to establish that the sponsored immigrant is not likely to become a public charge.

- b. In this situation, the sponsor or joint sponsor may be liable for criminal prosecution under the general statutes relating to the submission of fraudulent immigration documents. Failure of the sponsor or joint sponsor to provide adequate evidence of income and/or assets will result in the denial of the application for adjustment to lawful permanent residence status.

9 FAM 40.41 PN3 ACCEPTING FORM I-864-W, INTENDING IMMIGRANT'S AFFIDAVIT OF SUPPORT EXEMPTION WHEN ALIEN CAN DEMONSTRATE 40 QUARTERS OF WORK UNDER SSA

(CT:VISA-1358; 10-23-2009)

- a. 9 FAM 40.41 N3.4-2 states that you must waive the Form I-864, Affidavit of Support Under Section 213A of the Act, requirement if the alien can demonstrate 40 quarters of earnings under the Social Security Act. Any individual seeking to demonstrate the number of quarters he or she has earned may request a Social Security earnings statement from the Social Security Administration, which shows income reported, years worked, and whether or not the applicant has earned 40 quarters (also known as "credits") and therefore qualifies for benefits.
- b. Even if the applicant qualifies for a waiver of the Form I-864 affidavit requirement, he or she must still complete a Form I-864-W, Intending Immigrant's Affidavit of Support Exemption. Form I-864-W is the applicant's signed statement that he or she has earned (or can be credited with) 40 quarters (credits) of coverage under the Social Security Act (SSA). The applicant must include SSA earnings statements with their completed Form I-864-W. Applicants may not count any quarters during which he or she received a means-tested public benefit. An applicant may be credited with all the qualifying quarters of coverage earned by their spouse during their marriage, provided that the applicant remains married to that spouse, or the spouse is deceased. As stated in 9 FAM 40.41 PN1.2, the National Visa Center (NVC) performs a review of documents, including AOS, for most consular posts. In those instances where the petitioner or the sponsor notifies NVC that they wish to use the Social Security quarters provision in lieu of a Form I-864, NVC requires submission of the Form I-864-W and the SSA earnings statement

described in 9 FAM 40.41 PN3 (b) before qualifying the case for forwarding to the post.

- c. If the petitioner and sponsor do not submit the Form I-864-W to NVC, indicating that they intend to use the Social Security quarters provision, NVC will require the Form I-864 and supporting documents, including the most recent Federal income tax return filed prior to the time of Form I-864 signing.

9 FAM 40.41 PN4 PROCEDURES FOR POSTING BOND

(TL:VISA-593; 11-05-2003)

See 9 FAM 40.41 N4.6-4.

9 FAM 40.41 PN4.1 Submission to Department

(CT:VISA-1209; 04-28-2009)

In the rare cases where you have to consider the use of a public charge bond (in cases where Form I-864, Affidavit of Support Under Section 231A of the Act, is required), you must consult with the Advisory Opinions Division (CA/VO/L/A) for assistance, given the changing status of this area of the law.

9 FAM 40.41 PN4.2 When Form I-864, Affidavit of Support Under Section 213A of the Act is Not Required

(CT:VISA-1358; 10-23-2009)

- a. The minimum bond that may be accepted is \$1,000 for each alien. When a family unit is proceeding to the United States, a bond may be required for more than one member of the family. You should specify the names of the persons for whom the bond is being requested, as well as its amount.
- b. When a bond is required for an IV applicant who is preceding family members, the number of the remaining family is ordinarily not to be taken into account. The question of public charge, as applied to the members of the family, should be examined at the time the family members apply for their visas. At that time you should consider, among other such factors the:
 - (1) Permanency of employment of the preceding immigrant;

- (2) Degree of responsibility taken for the family's support during the period of separation; and
 - (3) Plans set forth in the affidavit of support for their maintenance after their immigration.
- c. A public charge bond should be used only in marginal cases, since it is rarely sufficient by itself for INA 212(a)(4) purposes. A public charge bond is usually canceled when the alien dies, departs permanently from the United States, or is naturalized, provided the immigrant did not become a public charge prior to death, departure, or naturalization. However, a Department of Homeland Security/United States Citizenship and Immigration Services (DHS/USCIS) district director may cancel a bond at any time if the immigrant is found not likely to become a public charge. It will also be canceled upon review of the case following the fifth anniversary of the admission of the immigrant, provided the alien has filed Form I-356, Request for Cancellation of Public Charge Bond, and the district director finds that the immigrant did not become a public charge prior to the fifth anniversary. The bond otherwise will remain in effect, until Form I-356 is filed and the district director renders a decision to breach or cancel the bond after review of the evidence supporting the form.
- d. An applicant on whose behalf a bond has been accepted should be informed that DHS/USCIS might require a larger bond upon arrival at a port of entry. A visa issued to such an alien should bear a notation regarding the filing of the bond. The official notification received from DHS/USCIS regarding the posting of the bond should be attached to the visa. When the notification is received by telegram, a certified copy of the telegram should be so attached.

9 FAM 40.41 PN5 EVIDENCE OF SPONSOR'S AWARENESS OF OBLIGATIONS

(CT:VISA-1209; 04-28-2009)

In cases involving the use of Form I-134, Affidavit of Support (not Form I-864, Affidavit of Support Under Section 213A of the Act):

- (1) The Department shares the responsibility for ensuring that persons who undertake to sponsor the immigration of aliens are informed, prior thereto, that:
 - (a) If the alien applies for public assistance, the sponsorship affidavit will be made available to the public assistance agency;
 - (b) Sponsors may be required to provide additional information

concerning income and assets in connection with the alien's application for assistance; and

- (c) A form which posts are authorized to reproduce locally, designed to inform such sponsors of their responsibilities and obligations under the Social Security Act and the Food Stamp Act, must be included in all the "Instruction Package for Immigrant Visa Applicants" (formerly Packets 3) as an attachment to Form DS-2001, Notification of Applicant Readiness.
- (2) You may not accept an affidavit of support for purposes of INA 212(a)(4) unless the designated form concerning Social Security Insurance (SSI) benefits is signed by the sponsor(s) and attached to the affidavit.