

Advisory Memorandum #5

To: Chief Administrative Judge Lawrence Marks

From: Advisory Council on Immigration Issues in Family Court

Re: Guidance on Immigration Issues Relevant to Questions of Employment in Support Proceedings

Date: September 25, 2020

New York State law requires parents to support their children, including the payment of “fair and reasonable” child support, until age 21.¹ This requirement can become more complex where a parent, due to immigration status, cannot work lawfully. This Advisory Memorandum highlights issues that frequently occur in child support proceedings involving immigrant parties, and offers guidance for practitioners and jurists.² The information below is meant to provide support magistrates and others, including assigned counsel, with important context to understand the challenges that immigrant parties face, facilitate effective inquiry and inform the way that discretion may be exercised.

Overview of Work Authorization for Non-Citizens

One of the biggest issues facing support magistrates is when they have parties before them who may not have work authorizations. While it is not appropriate for support magistrates to inquire about a party’s immigration status, there may be other indicators of a lack of work authorization, such as lack of social security number, or parties may self-disclose. This section provides a broad overview so lawyers and magistrates can better understand the issues with which parties without work authorization may be grappling.

With few exceptions, federal immigration law prohibits undocumented immigrants³ from lawfully accepting employment.⁴ Only select categories of non-citizens are given the lawful right to work.⁵ These categories include individuals in valid non-immigrant status, such as highly skilled workers whose presence in the U.S. is sponsored by their U.S. employers, diplomats, family members of U.S. Citizens or lawful permanent residents who have pending petitions for lawful status in the U.S, and those who fall into certain humanitarian categories (e.g., refugees/ asylees, those with Temporary Protected Status (TPS), certain immigrant youth, and victims of human trafficking, domestic

¹ New York Family Court Act (“FCA”) § 413 (1)(a).

² Some of the issues presented here, including evidentiary issues, are not unique to cases involving immigrant parties. In addition, many of the issues are also relevant to spousal support proceedings. NY Family Court Act 412

³ We are using the term “immigrant” to refer to anyone who is not a citizen, rather than employing its technical definition which refers to a non-citizen who comes to the United States with the intention of remaining vs. staying for a discrete period of time. Immigration and Nationality Act (“INA”) § 101(a)(15).

⁴ INA § 274a.12. Note that the INA does not specifically prohibit self-employment but clearly prohibits immigrants from working for an employer.

⁵Id. Note that lawful permanent residents and conditional permanent residents (those who have “green cards”) have the lawful right to work in the U.S. without being required to have an Employment Authorization Document (“EAD”). Even when an individual’s lawful permanent resident card or conditional resident card has expired, that person’s resident status is not automatically terminated; however, green card holders can be divested of their resident status and deported by an immigration judge. INA § 1237.

violence and other crimes). Those that fit into these and other categories may be eligible to apply for an Employment Authorization Document (“EAD”). An EAD is a temporary card issued by United States Citizenship and Immigration Services (“USCIS”) permitting an immigrant to work in the U.S. for a discrete period of time.⁶ Once a person is granted an EAD, they are also eligible to apply for a social security number.⁷ Most EADs last one to two years, and may be renewed if there is a valid basis for renewal; it is not automatic.

Immigration law is an extremely complex and specialized area of law and only experienced immigration attorneys can determine which immigrants are eligible for an EAD. Even if an individual is legally eligible for relief leading to an EAD, it can take from three months up to as many as four years for an applicant to actually receive the EAD. Generally, immigrants may be ineligible for any immigration remedies, and therefore ineligible for EADs, if they entered the U.S. without inspection, were given permission to be in the U.S for a certain period of time that has expired (e.g., “visa overstay”), or had an EAD at one point but were unable or ineligible to renew it. These “undocumented immigrants” are often employed in the informal economy.⁸

Considerations Relevant to Petitioners/Payees and Respondents/Payors Alike

Lack of Conventional Proofs of Income

The calculation of how much each parent must contribute towards their child’s support is a formula based upon each parent’s income. Although certain financial disclosure is required,⁹ parties who do not have the lawful right to work will usually be unable to provide documentation such as tax returns, pay stubs and W-2 forms.¹⁰ However, many of these parties work off the books and may have income that is available for child support. When documentation is unavailable, incomplete or not credible, a full evidentiary hearing is generally conducted to determine income as part of the child support calculation.

Ineligibility to Comply with Job Log or Job Search Program Requirements

In the process of assessing each parent’s income, a child support magistrate may learn that a party is not working. At that point, many support magistrates will require the party to search for jobs and document the search using a “job log”. Some magistrates may also assign the party to participate in a job search program. While searching for a job without work authorization is not unlawful, accepting employment without valid authorization violates federal law. Requiring these activities may lead parties to accept unauthorized employment that could negatively impact their ability to obtain immigration status in the future. Assigning required job search activities may also encourage individuals to use fraudulent documents since most employers will require proof of work authorization or social security number, which could result in both criminal and immigration

⁶ For purposes of this memo, the terms “EAD” and “work authorization” are used interchangeably.

⁷ Many immigrants who do not have a social security number are able to file taxes using an “Individual Taxpayer Identification Number” or “ITIN” issued by the Internal Revenue Service.

⁸ For more information about the nature of working conditions for undocumented immigrants, see <https://www.migrationpolicy.org/research/migration-exploitation-illegal-labor-domestic-servitude-sex>.

⁹ FCA § 424-a.

¹⁰ Many undocumented people file tax returns and use an Individual Taxpayer Identification Number (ITIN) in lieu of a social security number. However, an undocumented person cannot get an ITIN if she does not have a stamped passport or a certified birth certificate combined with a secondary identification. Persons who entered without inspection, left their countries without their birth certificates, never had a birth certificate or are stateless will not be able to get an ITIN.

penalties. Practitioners can work with clients to determine the best way to address these problems with the court.

Fear of Revealing Immigration Status

Parties may be afraid to reveal during child support proceedings that they do not have EAD's for fear that they may be reported to ICE. As referenced earlier, permission to work is fluid and individuals can have an EAD at one point in time and then be denied renewals.

The I-864 Affidavit of Support

An individual who is a USC or LPR¹¹ who has sponsored an immigrant spouse for lawful immigration status will generally have signed an I-864, an immigration contract wherein the citizen/permanent resident spouse commits to the federal government that they will financially support the immigrant spouse and any dependents for five years. This document is an enforceable contract under federal law.¹² If the immigrant spouse's green card application is still pending and they have not yet been issued an EAD, working without authorization could jeopardize approval of the green card application. Even after issuance of work authorization, the citizen/permanent resident spouse is financially responsible for the undocumented spouse. If, for example, the immigrant spouse became chronically ill or injured and was unable to work for a period, the citizen/permanent resident spouse would be responsible to support them because the immigrant spouse is not eligible for government cash assistance during the first five years of lawful residence. Separation of the spouses does not absolve the sponsoring spouse of this duty once the I-864 contract (and underlying application) has been approved. Under this scenario, the immigrant spouse could arguably pursue spousal support or seek to enforce the I-864 in a court of law.¹³ In a support proceeding, the existence of an I-864 Affidavit of Support signed by either the petitioner or respondent could be a factor in the outcome of the case.

Considerations Relevant to Petitioners/Payees

Enforcement

Once child support is ordered, petitioners may not be able to access support enforcement services through the New York State Department of Child Support Enforcement (DCSE) or county child support enforcement offices where the respondent does not have an EAD. Support enforcement offices primarily rely on income executions to collect current or overdue child support directly from the payor's employer or income payor. However, in cases where employment is off the books and is not authorized, employers are not likely to even acknowledge that the payor is their employee, let alone deduct the required amount from the payee's income. If an employer were to face administrative sanctions or sanctions by the Court for not responding to an income execution, it is foreseeable that the employer would likely terminate the employment. Other mechanisms, such as unemployment insurance benefit intercepts, income tax refund intercepts, driver's license suspensions, passport denials, liens, credit bureau submissions, and property executions, may not be

¹¹ USC refers to United States citizen; LPR refers to legal permanent resident.

¹² INA 212(a)(4) and 213A.

¹³ *Moody v. Sorokina*, 40 A.D. 3d 14 (2007).

effective because respondent/payors without employment authorization are not likely to be engaged in any of these systems.¹⁴

Without the use of these administrative tools to collect overdue support, many petitioners will file violation petitions and seek enforcement through the courts. Family courts have means at their disposal to compel respondents to pay child support arrears. However, the most powerful of these tools, the power to incarcerate a respondent for willful failure to pay overdue support, could be objectionable to petitioners because of the risks of deportation or denial of immigration benefits to the respondent. As described further in the section below on “contempt,” once the payor is entered into the criminal booking system for non-payment of child support, they may be flagged by Immigration and Customs Enforcement (ICE) and subjected to removal (“deportation”) proceedings in front of an immigration judge (or summarily removed if they already have a removal order). After a person is removed from the U.S., not only do the chances of ever collecting any financial support from that person decrease drastically, but family relationships are disrupted resulting in potential trauma to the child or children. As discussed below, attorneys representing parties in support enforcement proceedings should be trained on the immigration consequences of such proceedings.

Considerations for Respondents/Payors

Challenges Forecasting Income and Proving Debts

Respondents without EADs may not be able to provide direct evidence of expenses because they do not have expenses for which records are available. For example, they may not have leases or utility accounts in their name, or may commonly pay rent and their share of utilities in cash to a roommate, or may pay a friend or family member to be added as a user on their cell phone plan. Undocumented workers also commonly have fluctuating incomes and may have difficulty forecasting income. For example, day laborers earn substantially more income in the warmer months and may have little or no income in the colder months. In addition, undocumented respondents are not eligible for medical insurance and are rarely salaried. In the event of illness or injury, they have to pay out of pocket for medical treatment and lose income on sick days. This reality may result in missed child support payments. A full evidentiary hearing should be conducted in these cases to determine whether there is available income for a child support order.

Enhanced Risk of Default/Violation

Undocumented respondents commonly live with multiple roommates in housing that does not provide secure mailboxes.¹⁵ As a result, they may not receive court issued mail such as hearing notices. It is not uncommon for roommates to accept service of petitions and for process servers to mistake the roommate for the respondent. In instances where the roommate does not give the petition to the respondent, the respondent may default. Under current immigration enforcement policies, immigrants are being arrested and detained in greater numbers for simply being out of

¹⁴ The exception is income tax refund intercept because many immigrants without work authorization still pay taxes using an Individual Taxpayer Identification Number (ITIN) which allows them to pay taxes despite not having a social security number.

¹⁵ <https://onlinelibrary.wiley.com/doi/10.1111/padr.12227>.

status and this fear may also cause a respondent to default, especially given the dramatic increase in ICE courthouse arrests.¹⁶

Respondents are usually *pro se* and may not be fluent in English. In the absence of court interpreters, counsel and materials in their language, they may not understand that they need to update their addresses with the Court and file modification petitions if there is a substantial change in circumstances. It is not uncommon for violation petitions to be served at respondents' prior addresses and not be forwarded. It is also not uncommon for respondents to be in violation of child support orders for bona fide reasons such as illness or injury but not have the knowledge or resources to file a modification petition. Providing accessible information about the importance of court orders, changes in address and modification petitions in multiple languages can decrease the instances of default orders or violations of orders.

Good Moral Character

Child support proceedings can both help and hurt immigrants with pending immigration applications. When an immigrant applies for various immigration remedies, they may have the burden to demonstrate that they are "admissible" to the U.S.¹⁷ Whether the immigrant is affirmatively applying for immigration status through USCIS or seeking relief from deportation in immigration court, applicants must answer a litany of questions under penalty of perjury about their family history and past conduct. One of the standard questions is "Have you ever willfully failed to pay child support?"¹⁸ Proof of good moral character may also be required, and can include financial documentation such as tax transcripts and evidence that the applicant is in compliance with existing child support orders if relevant. DCSE printouts reflecting that respondent's child support payments are current are a good source of supporting documentation.

On the other hand, an affirmative answer to the question about failure to pay child support will most likely trigger a denial of the application. For those seeking the immigration remedy called "cancellation of removal" in immigration court because of the extreme hardship that deportation would cause a U.S. born child, immigration judges often compel applicants to divulge information about their family court cases because proof of materially supporting a child is relevant to the relief being sought. In addition, when considering an application, USCIS may demand to see family court records when it is clear from an application that the child does not reside with the applicant to ensure that the applicant supports their children. Although family court records are private and protected by state sealing laws, immigration authorities will often reject these arguments and use their broad discretion to view an immigrant's refusal to produce family court records as a basis to deny relief and support removal from the United States.¹⁹

¹⁶ <https://www.legalservicesnyc.org/news-and-events/press-room/1457-new-report-measures-devastating-impact-of-increased-ice-arrests-on-new-york-courts>.

¹⁷ An immigrant is "inadmissible" when they are ineligible to enter the U.S., or obtain any type of visa, humanitarian status or green card once in the U.S. 8 U.S.C. §1182; INA §212. Common grounds of inadmissibility include, but are not limited to, being convicted of or admitting to the essential elements of acts that constitute a crime involving moral turpitude, conviction or admission to a controlled substance offense, having a history of certain immigration law violations, being without a source of financial support, or health-related grounds which include lack of certain vaccinations or being diagnosed suffering from certain communicable diseases.

¹⁸ USCIS Forms I-600 and I-485.

¹⁹ For more information about adverse immigration consequences of Family Court proceedings, see Advisory Memorandum #3 from Chief Administrative Judge Lawrence Marks dated October 27, 2017 available at

Contempt

In the scenario where a respondent is incarcerated for contempt due to willful violation of a child support order, the respondent's fingerprints and information will be processed into a database that is shared with ICE. Though failure to pay child support is not a deportable offense, contempt may be a trigger for bringing a respondent to the attention of ICE and for removal proceedings being instituted on the basis of other immigration violations, such as being present in the U.S. without lawful status. For respondents with pending green card or naturalization applications, contempt for willful failure to pay child support will likely result in denial and may make them subject to removal.

Considerations in Determining “Fair and Reasonable” Child Support

In addition to the financial disclosure required by Domestic Relations Law (“DRL”) § 236 and Family Court Act § 424-a, magistrates may require that the income and expenses of either party be verified with documentation including, but not limited to, past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses any other means of verification as the court determines appropriate.²⁰ Magistrates may also elicit evidence of income through testimony and unconventional proofs of income such as ledgers, deposit records and work schedules as long as the records conform with evidentiary rules.²¹ The list below contains suggestions for handling cases when one or both parties to a child support case are not authorized to work in the U.S.

Undocumented Individuals Are Not Eligible for Work Authorization and May Feel Pressured to Engage in Document Fraud if Ordered To Comply with Job Logs/Imputed Income Orders

As discussed earlier, some parties may not be able to comply with job logs because they are not authorized to accept employment, and as a result some payors may purchase fraudulent social security numbers/work authorizations in order to comply with a job search directive. Alternative forms of confirming income and job search efforts, such as requiring corroboration of testimony relating to income and efforts to increase income, can mitigate this risk.

Work Authorizations are Temporary – A Factor to Consider Before Making a Finding that a Payor has Become Voluntarily Under-Employed

An immigrant may only apply for a work authorization in connection with an application for immigration status. If they do not have a pending or approved application, they do not have permission to accept employment. Work authorizations need to be periodically renewed - they are not permanent. In addition, there are frequently gaps between the expiration date and the issuance of a renewed work authorization due to backlogs at USCIS, and immigrants may be temporarily without authorization for that reason (and can be terminated from employment as a result). Finally, if the application that generated the work authorization is denied, the individual will no longer be authorized to work in the United States. Such a denial may result in a payor being terminated from

<http://immigrants.moderncourts.org/wp-content/uploads/sites/2/2017/12/AdverseConsequences-GuidanceMemoCharftGlossary1.pdf>.

²⁰ FCA §§ 413, 424-a; DRL § 236.

²¹ FCA § 439(d); Uniform Rules of the Family Court §§ 205.35, 205.36

“on the books employment” and being temporarily or permanently barred from accepting lawful employment, and having to return to the informal economy.

Undocumented Litigants May Not Have Conventional Proofs of Income and Expenses, and Support Magistrates and Counsel May Need to Take Detailed Testimony

As previously discussed, testimony will often be the primary source of income and expense evidence. Through detailed questioning, magistrates and attorneys can elicit information regarding average monthly income and expenses. In the event that the fact finder wants to corroborate testimony, they may request alternative proofs such as bank records (which may reflect regular deposits derived from work income); letters from employers (though most employers may refuse to produce such a letter due to fear of being fined or prosecuted for hiring someone without work authorization); testimony from a co-worker; work ledgers, calendars or other tools the party may use to document income.

Income Fluctuates For Many Undocumented Workers, and Magistrates May Need to Base Income Orders on Average Earnings

For seasonal and self-employed workers, income can change from week to week and month to month. Cold months tend to be particularly slow earning months for day laborers and agricultural workers. A chart or other aid could be helpful to average monthly income before calculating the support amount.

Many Categories of Immigrants Are Not Eligible for Health Insurance and Insurance Orders May Not Be Appropriate

“Unqualified” immigrants²² are not eligible for public or private medical insurance and it may not be appropriate to order a parent to provide a spouse or child with medical insurance. However, for undocumented parents with children under age 19, it is worthwhile to explore whether either parent enrolled dependent children in Children’s Health Insurance Program (“CHIP”). It may be appropriate to order that parents share in out of pocket health care costs.

Most Immigrant Litigants Will be *Pro Se* and May Have Limited English Proficiency

To ensure that immigrants are receiving equal justice in support proceedings, the provision of interpreters is essential to ensure that parties can ask questions, seek clarification and advocate for themselves, and so that magistrates can confirm that parties comprehend what is being said and directed including, but not limited to:

- a. understanding that they must update their addresses if they relocate so that payees can receive checks if there is no income deduction order, and so that payors do not default in the event that a violation petition is served at an old address in the future;
- b. understanding they must return to court to file a modification or violation petition in the event that income significantly changes or in event of default, and describing the process;
- c. explaining the amount and frequency of child support payments, and collection process.

²² <https://www.healthcare.gov/immigrants/lawfully-present-immigrants/>.

Consequences for Violations are Heightened for Immigrant Payors

Because there can be adverse immigration consequences for failure to comply with a child support order, it is advisable that appointed counsel in child support enforcement cases be trained on how to advise immigrant clients. Publicly available and language accessible information about the consequences of failing to comply with child support orders – including brochures, posters and videos that identify the potential adverse immigration consequences of not complying with a child support order, descriptions of the process for seeking modification and updating change of address, and local resource lists that include non-profit immigration legal providers – are an important resource.²³

There May be Additional Areas of Inquiry in Violation/Willfulness/Contempt Proceedings

What appears to be a clear violation of a child support order may not be willful. As discussed earlier, a sudden loss of income may occur if the payor loses a job, becomes ill or gets injured. Without inquiring into immigration status, magistrates can inquire into whether the payor has medical insurance, paid leave and request documentation of medical costs, etc. Findings of willfulness or contempt can result in the denial of an immigration application or trigger deportation proceedings, which can decrease the payor's ability to provide material support.

²³ The New York Unified Court System's web page for child support is available at <http://nycourts.gov/courthelp/Family/support.shtml>.

Attachment A:
Advisory Council Members and Consultants

Advisory Council on Immigration Issues in Family Court²⁴

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²⁴ Affiliations are listed for identification purposes only.