

Intercountry Adoption, Domestic Adoption and the Post-Hague Landscape

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In the past few years, the world of intercountry adoption has dramatically changed for families, practitioners and vulnerable children. Most notably, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention), an international treaty on adoption, came into force in the U.S. on April 1, 2008. The Hague Adoption Convention has the admirable goals of regulating outgoing and incoming cases to ensure more transparency and prevent abuse and trafficking. [The Hague Conference on Private International Law is a global inter-governmental organization working for the “progressive unification” of private international laws. The Hague Conference on Private International Law had generated 39 conventions as of February 2009. The only convention discussed in this article is Convention 33, Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption.] The Hague Adoption Convention has brought much needed reform to intercountry adoption. It supplants the existing “orphan” procedures for children coming into the U.S. from a Hague Convention Partner country. Families do not have the choice of which procedure to use, but must use the Hague Adoption Convention procedures if the child to be adopted is considered a “habitual resident” of a Convention partner country, the family is considered a “habitual resident” of the U.S., and the child is obtaining an immigration benefit based on an adoption.

The second major change is that the number of overall placements to the U.S. has dramatically declined. Intercountry adoption to U.S. families dropped by more than half from 22,884 in FY 2004 to 9319 in FY 2011. [http://adoption.state.gov/about_us/statistics.php] The reasons for this decline are widely debated. Some of the changes are no doubt due to the coming into force of the Hague Adoption Convention, which has added a level of complexity to an already complex process. Large sending countries such as Guatemala and Vietnam are currently closed to U.S. citizens

attempting to adopt. Other large sending countries, such as China and Russia have seen overall numbers of placements decline and more referrals for older and special needs children instead of infants and toddlers. There have been concerns about fraud and the lack of transparency in some countries, such as Ethiopia, which have led to a slowdown in the processing of cases. Domestic adoption has been on the rise in some developing countries, such as Korea and India, leading to a decline in intercountry placements. [For a fuller discussion of this topic, see “Global Trends in Intercountry Adoption: 2001-2010,” Dr. Peter Selman, Ph.D, *Adoption Advocate*, No. 44, National Council for Adoption, February 2012.]

The third major change is that the options for children already present in the U.S. have narrowed. In the past it was common for a U.S. citizen relative to seek an immigration benefit through adoption for a child that was present in the U.S. In that situation, the family law attorney might have handled the domestic adoption and referred the client to an immigration attorney for further assistance. The immigration attorney would then wait for the family to accumulate the two years of legal custody and physical residence and then, file the USCIS Forms I-130 and I-485. However, since April 1, 2008, the attorney who takes that course of action may incur significant malpractice liability due to lack of compliance with the Hague Adoption Convention. Sadly, the attorney and the family often do not learn of this error until more than two years after the adoption has been completed, at the time of the adjudication of the USCIS Form I-130.

The reason for this narrowing of options is that the Hague Adoption Convention also applies to domestic adoptions when the adoptee is a citizen of another country where the Hague Adoption Convention is also in force. At the outset now of every adoption, both domestic and intercountry, an analysis must be made as to whether the case at hand falls under the scope of the Hague Adoption Convention. This analysis is nec-

essary even when the child to be adopted is present in the U.S. and is being adopted by prospective adoptive parents also present in the U.S. [8 CFR § 204.2(d)(2)(vii)(D) and (F)] It is no longer possible to obtain a domestic adoption for a child whose country of citizenship is a Convention country, and then, seek to comply with immigration regulations for the adoption thereafter.

There are several exceptions to this rule. If the prospective adoptive parent lives with the child outside the U.S. for the two-year physical residence period, the USCIS Form I-130 may be filed. This is because USCIS then deems both the prospective adoptive parent and the child to be “habitual residents” of the country where they are residing. [8 CFR § 204.2 (d)(2)(vii)(D) and (E)] If the adoptive parents are married, it would be possible for one spouse to reside abroad with the child while the second spouse travels back and forth because the “physical residence” of one spouse is imputed to the other spouse. [Matter of YKW, 9 I&N Dec. 176 (AG 1961), Matter of Patel, 17 I&N Dec. 414 (BIA 1980)] However, there are not many families who can suspend their lives in the U.S. to live abroad with an adopted child for two years.

Also, if both spouses are lawful permanent residents, it would be possible for them to file the Form I-130 once the two years have elapsed, even if they lived with the child in the U.S. The Hague procedure is not required if neither of the adoptive parents is a U.S. citizen. But, of course, in that scenario, the child would face a lengthy wait for the visa and would have to consular process unless one of the parents became a U.S. citizen after the USCIS Form I-130 was approved.

APPLICABILITY OF THE HAGUE ADOPTION CONVENTION

The Department of State website [<http://adoption.state.gov/hague/overview/countries.html>] and the Hague Conference website [<http://hcch.net>] list the countries where the Convention has entered into force. [It is not enough that a country has merely signed or ratified the Hague Adoption Convention. The Hague Convention must have entered into force for the case to be considered a Hague case.] Practitioners should refer to the list early and often as a new country might be added to the list at any time.

If the prospective adoptive parents are considered “habitual residents” of the United States, and the child is considered a “habitual resident” of a different Convention country, and the child will be moving, or has moved, from one Convention country to another for purposes of adoption, the Hague Adoption Convention governs the case. [8 CFR §204.301, Definitions, “Convention Adoption.”] The three critical inquiries, then, in determining whether an adoption is governed by the Hague Adoption Convention are the “habitual residency” of the prospective adoptive parents and the child to be adopted and the movement of the child from one country to another in connection with the adoption. [The third inquiry, as to the movement of the child from one country to another, would not apply if the child to be adopted and the adopted parents were both considered “habitual residents” of the same country because there would be no movement from one country to another for purposes of adoption by definition. This could also occur in a step-parent adoption scenario when the child is already present in the U.S. due to his mother’s marriage and has obtained an immigration benefit on that basis and thus, there is no movement between countries due to an adoption.]

In terms of the first two factors, neither the Hague Adoption Convention itself nor its implementing legislation, the Intercountry Adoption Act, offers a definition of “habitual residency”. The Code of Federal Regulations however, sheds some guidance as to the definitions of “habitual residence” for both the prospective adoptive parents and the child. For a more thorough treatment of this topic, see Carine Rosalia-Marion and Amber Fellure, “Determining Habitual Residency,” in *The International Adoption Sourcebook*, pp. 45–54 (AILA 2008).

Habitual Residence of Prospective Adoptive Parents

8 CFR §204.303(a) provides that a U. S. citizen with a domicile in the United States (even if temporarily living abroad) is considered a “habitual resident” of the United States. [8 CFR §204.303(a)] Thus, a married couple or single people living in the United States, who are U.S. citizens, are considered “habitual residents” of the United States. [Our Central Authority, the Dept. of State, has taken the view that if the family has lawful permanent resident status (green card) in lieu of U.S. citizenship, they are still considered “habitual res-

idents” of the U.S. However, if the foreign nationals are living in Virginia under a temporary visa, they would NOT be considered “habitual residents” of the U.S., but of their country of citizenship. See “A Web-guide for State Authorities on Outgoing Adoption Cases from the United States to Another Convention Country”, updated as of April 2008. Available at http://adoption.state.gov/pdf/web_guide_state_authorities.pdf]

Habitual Residence of Child to be Adopted

8 CFR §204.303(b) provides that the child is a habitual resident of his country of citizenship, not domicile. [8 CFR §204.303(b)] This differs from the analysis used by many other Convention countries where “habitual residence” is defined more akin to domicile.

However, under the U.S. definition, if a child is living in another country and the Central Authority of the sending country determines that the child’s status in that country is sufficiently stable for it to exercise jurisdiction, the child may be considered “habitually resident” in that country. The same regulation cautions against children being sent to another country as a prelude to adoption, perhaps to avoid complying with Convention requirements. [Id.]

In 2008, USCIS offered some further guidance for cases where the child is a citizen of a foreign Convention country but is residing in the United States. [Frequently Asked Questions of September 29, 2008, available as AILA InfoNet Doc. No. 08093064, Scialabba & Neufeld memo on Intercountry Adoption under Hague Convention, available as AILA InfoNet Doc. No. 08103190] USCIS explained that the regulations could be interpreted to permit a finding that a child is no longer a habitual resident of the country of citizenship and is instead a habitual resident of the United States where the child is domiciled if an affirmative ruling from the Central Authority of the child’s country of citizenship is obtained. This affirmative ruling must state that the Central Authority of the child’s country of citizenship 1) is aware of the child’s presence in the United States, 2) is aware of the adoption, and 3) finds that the child is no longer a habitual resident of the country of citizenship [“USCIS will determine that 8 CFR 204.2(d) (2)(vii)(F) no longer precludes approval of a Form I-130 if the adoption order that is submitted with the Form I-130 expressly states that the Central Authority

is aware of the child’s presence in the United States, and of the proposed adoption, and that the Central Authority is aware of the child’s presence in the United States, and of the proposed adoption, and that the Central Authority has determined that the child is not habitually resident in that country. A copy of the written statement from the Central Authority must also be submitted with the Form I-130 and the adoption order.” USCIS Frequently Asked Questions of September 29, 2008, AILA InfoNet Doc. No. 08093064.]

The factors that may mean that a child’s status in another country is sufficiently stable for it to exercise jurisdiction are:

- duration of presence in the other country
- how the child entered the other country
- school attendance in the other country
- number of relatives in the other country
- remaining relatives in the other country
- activities in the other country (participation in school sports or academic programs, etc.)
- whether the prospective adoptive parents have obtained guardianship of the child in that country
- transfer of personal possessions [Id.]

If these factors are present, the prospective adoptive family could contact the Central Authority of the child’s country of citizenship to request a written determination that the child was no longer a “habitual resident” of that country. As long as the written determination was filed with the U.S. state court and was incorporated in the state adoption decree, the family could proceed with the U.S. state court adoption without fear of violating the requirements of the Hague Adoption Convention [C. Hemphill, K. Stoutamyer Law, and C. Rosalia, “Intercountry Adoptions: Understanding the Procedures One Year after Implementation of the Hague Adoption Convention,” Immigration and Nationality Law Handbook, 885 (AILA 2009-10 Ed.)] Recently, USCIS has stated that if the habitual residency determination is obtained after the adoption decree is entered and the state Court issues a supplemental order with the findings, USCIS would treat the supplemental order as part of the adoption decree and allow the case to proceed as a Form I-130 case [USCIS Questions and Answers, USCIS International Operations-AILA meeting, October 5, 2011, AILA InfoNet Doc. No. 12011863, Answer to Question 9(c)]

Alternatives for Children Present in the United States

These authors' practices have a special concentration in adoption immigration cases. In their experiences, it is very difficult to obtain the written determination from the Central Authority that the child is no longer a "habitual resident" of that country. The difficulty arises because the U.S. is one of the only countries currently requesting such a written determination. Other Central Authorities are unfamiliar with the request and do not make it a high priority to comply. There are some countries whose Central Authorities have reportedly indicated to the U.S. Department of State that they will never issue such a letter, such as the People's Republic of China, Bolivia and England. Other countries, such as Mexico, are very problematic, because the entity that is authorized to issue the letter has changed from the local DIF office to the centralized office of the Central Authority [USCIS has stated that if the entity from whom the letter was obtained was the correct entity at the time of the request, the nonhabitual residence letter will be accepted. *Id.*, Answer to Question 9 (b)]. Further, at the time of this article's publication, Mexican Central Authority has indicated that it will not issue the letter at all [See letter attached to the end of this article from Mexican Central Authority]. This has huge implications for the many Mexican citizen children who have been domiciled in the U.S. since birth but whose adoptions would fall under the Hague Adoption Convention absent the non-habitual resident determination. This situation is very fluid and the attorney is advised to contact our Central Authority, the U.S. Department of State, Office of Children's Issues, for an update as to the possibility of obtaining a nonhabitual residence letter from the Mexican Central Authority and the implications for a domestic adoption and I-130 process if a specific letter cannot be obtained.

As a result of these difficulties, it may be the best course for the attorney to advise the client of the Hague Adoption Convention implications of pursuing a domestic adoption and suggest alternatives. There are three possible alternatives.

First, the child could return to their previous country and the family could begin the Hague Adoption Convention adoption process. The potential problems with this route are the prohibited prior contact between the child and adoptive parents [8 C.F.R. §204.309(b)(2)

states that an I-800 must be denied if "the petitioner, or any additional adult member of the household had met with, or had any other form of contact with, the child's parents, legal custodian, or other individual or entity who was responsible for the child's care when the contact occurred." An exception may arise in such a situation if the Central Authority makes a finding that the contact was not prohibited, however, this will be a case specific determination. Another exception is provided in the case of relative adoptions, where, the prospective adoptive parents would usually have had prior contact with the child. The definition of a "relative adoption" is detailed in the regulations] that they have already obtained a custody or adoption decree, which would have to be vacated, voided or annulled [In a Convention case, the I-800 must be provisionally approved before the adoption or guardianship decree is obtained or the I-800 will be denied. If the family has obtained the decree too early, the regulations allow for the court decree to be voided or vacated and the family may begin the process over.] In addition, the child's birth family may not be able to provide proper care for the child and a return to the same situation may not be in the child's best interests. Finally, in some instances, the foreign Central Authority has indicated that there will be no guarantee that the specific child will be matched with the same family in the Hague Adoption Convention process.

Second, the family could obtain permission from the Central Authority of the child's last country of habitual residence to process the case pursuant to the Hague with the child physically present in the U.S. [8 CFR 204.309(b) (4)] Our Central Authority would need to work with the Central Authority of the foreign country to generate the Article 16 Report. Additionally, the adoption would need to be completed in the foreign country and the child would need to return to the Consulate abroad for issuance of the visa. Assuming that these hurdles could be overcome, the benefit would be immediate legal status for the child at the conclusion of the process.

Finally, and more practically, the family could seek lawful permanent residence status for the child through Special Immigrant Juvenile (SIJ), VAWA, or asylum in lieu of a domestic adoption. These pathways do not require compliance with the Hague Adoption Convention procedures because the immigration benefit is not obtained through an adoption, but through an

other part of the INA and its related regulations. For a more thorough treatment of these topics in the context of intercountry adoption, see the Immigration Alternatives to Adoption section of the AILA International Adoption Sourcebook (2008 ed.). [Jennifer V. Rogers, “Child Asylum Seekers,” at pp. 403–416; Jane Rocamora, “Special Immigrant Juvenile Status,” at pp. 417–438; Christa Stewart, “Exploring Remedies for Youth in Crisis; Relief Under the Violence Against Women Act (VAWA, U, and T Visas),” at pp. 439-444]

A case where the SIJ option may be a better alternative to adoption is that of “Jessica”, a child from Brazil whose mother has died and her father is unable to care for her. Jessica originally entered the United States on a tourist visa and is now living with her grandmother in the U.S. and has fallen out of status. Brazil is a Hague Adoption Convention partner country and the adoption process would be lengthy and complicated as a Hague adoption. Even if the Central Authority of Brazil agreed in writing that the child is a habitual resident of the U.S. thus taking the case out of the Hague Adoption Convention, recognition of the adoption by the U.S. Immigration Service would require two full years of legal custody. Jessica’s grandmother would like the child to have legal status as soon as possible. In this case, the best option would be obtaining a permanent guardianship order from the U.S. state where the child and grandmother reside, and filing the I-360 Self-Petition as a Special Immigrant Juvenile to classify her as a Special Immigrant Juvenile. The guardianship order must have some of the exact language from the immigration regulations, including a determination that it is not in the child’s best interest to return to his or her country of origin. It may take some advocacy and education with the state court judge to explain why a template guardianship order from that state is not sufficient. The child might be adopted later, but it is not the pathway to long-term Immigration status.

The Violence Against Women Act (VAWA) provides for permanent residence for certain children who have been abused, or whose parents have been abused. Moreover, the U (victims of crime who assist law enforcement) and T (victims of trafficking) visa categories provide additional options. If these circumstances might apply, then these categories are worth exploring. The VAWA, U and T visas are handled by a special unit at the Vermont Service Center, and the path to legal status and some interim social service benefits in these

cases can be relatively quick.

Political asylum may be a possibility for a child based on his or her particular circumstances. For example, there is a line of case law that discusses the treatment of disabled children – if the child would face serious and systemic discrimination in the home country. [See, e.g., *Gonzales v. Tchoukhrova*, (Sup. Ct. Oct. 2, 2006)(vacating April 21, 2005, 9th Cir. panel decision, reported at 404 F.3d 1181, see AILA InfoNet Doc. No. 05050975)] Approval rates for asylum cases vary widely over time, and with certain offices and judges. In addition, children can have trouble presenting a coherent case at an interview or before a judge, especially if they are suffering from post-traumatic stress. It is recommended to discuss a child asylum case with an expert before proceeding.

After the child receives lawful permanent resident status through one of these pathways, the family could go on to adopt the child pursuant to state law. [Junck, Kinoshit & Brady, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, 3rd Edition, Immigration Legal Resource Center (2010), an excellent resource on Special Immigrant Juvenile procedures]The underlying state court order in a Special Immigrant Juvenile case can be obtained through custody or an adoption proceeding. However, the adoption should not be finalized until the immigration benefit is obtained.

Once the analysis of whether the Hague Adoption Convention governs the case is completed, the attorney may delve into the specific requirements of the applicable immigration route for the child.

WHEN THE HAGUE ADOPTION CONVENTION DOES NOT APPLY

Adopted Child Route

Petitions for an “adopted child” and “orphan” continue to be governed by INA §§ 101(b)(1)(E) and (F) respectively in lieu of the Hague Adoption Convention. An “adopted child” is defined as one who is adopted before the 16th birthday, and who has been in the joint legal custody of, and has resided with the qualifying adopting parents or parent for at least two years. [INA §101(b)(1)(E)(i); See also, *Cynthia Hemphill, Karen Stoutamyer Law, and Carine Rosalia-Marion, Inter-*

country Adoptions: Procedures and Potential Issues After Ratification of the Hague Adoption Convention, 2008-09 Immigration & Nationality Law Handbook 537 (ed.); Daniel E. Marcus and Irene A. Steffas, with contributions from Boyd F. Campbell, International Adoption--A Basic Guide to the Three Visa Categories, 2006-07 Immigration & Nationality Law Handbook 364 (ed.), Kathleen Sullivan, Intercountry Adoption: A Step-by-Step Guide for the Practitioner, 95-9 Immigr. Briefings (Sept. 1995)] The adoption can occur either in the U.S. or abroad. The provisions of this section apply if the adoption decree granted to the adoptive parents predates the child's 16th birthday. [Both INA §§ 101(b)(1)(E) and (F) contain a sibling exception that provides that a child between the ages of 16 and 18 is still eligible to be the beneficiary of a petition for an adopted child if her biological sibling is adopted before the age of 16.] If the adoption is not finalized before the child's 16th birthday, under certain circumstances the court may amend the adoption decree nunc pro tunc to reflect that the adoption should have been finalized prior to the child's 16th birthday. See *Messina v. U.S. Citizenship and Immigration Services*, where the district court held that USCIS must recognize an adoption nunc pro tunc to a date prior to child's 16th birthday under certain circumstances. [Messina v. USCIS F.Supp.2d 2006, E.D. Mich. (Feb. 16, 2006), which rejected Matter of Cariaga. See also, Allen v. Brown, 953F.Supp.199, 1997, N.D. Ohio. and Mathews v. USCIS (No. 11-11126, Non-Argument Calendar, United States Court of Appeals, Eleventh Circuit, Feb. 21, 2012) unpublished.]

The prospective adoptive parent(s) file a Form I-130 visa petition and supporting documents for each adopted child with USCIS once both the two-year legal custody and physical residence requirements of INA §101(b)(1)(E) have been satisfied. If the child is physically present in the United States and eligible to adjust status, then Forms I-485 and I-130 can be filed concurrently. [The qualifying adoptive parent (petitioner) can be a lawful permanent resident (LPR) or a U.S. citizen. If the petitioner is an LPR, the child will be classified as family-sponsored second preference and an immigrant visa number may not be immediately available. Check the USDOS Visa Bulletin to verify when the priority date will become current and when the petitioner can file Form I-485. Unlawful presence may become an issue if the child turns 18.]

Recurring Issues in "Adopted Child" Cases

The most common issue that arises with INA §101(b)(1)(E) revolves around the two-year physical residency requirement. Frequently, foreign nationals adopt children in their home country without understanding that they have to meet this requirement. They are astounded to learn that they are financially and legally responsible for the child in the foreign country but that they have no way to ever live together as a family because they cannot obtain a visa to bring the child to live with them in the U.S. for the two years and they cannot move to the foreign country for two years.

With respect to the two-year physical residence requirement, USCIS requires proof that at least one of the prospective adoptive parents resided with the child in a parent-child relationship where the parent exerted "primary parental control" over the child [8 CFR §204.2(d)(2)(vii)(B); 9 FAM 42.21 N12.4. See Matter of Cuello, 20 I&N Dec. 94 (BIA, 1989); Matter of Yuen, 14 I&N Dec. 71 (BIA 1972); Matter of Tang, 14 I&N Dec. 180 (BIA 1972)] The joint residency period may be interrupted provided that the aggregate period of time totals at least two years [9 FAM 42.21 N12.5] Issues concerning primary parental control occur in situations such as where the child has resided with the birth parents for all or part of the requisite joint residency period and in instances where the physical residency requirement is accrued over a long period of time, calling into question whether the adoptive parent is indeed exercising parental control or merely visiting the child. [See Matter of Cuello, 20 I&N Dec. 94 (BIA, 1989); Matter of Yuen, 14 I&N Dec. 71 (BIA 1972); Matter of Tang, 14 I&N Dec. 180 (BIA 1972). See also, Matter of Repuyan, 19 I&N Dec. 119 (BIA 1984)] Providing as much evidence as possible to prove parental control with the initial filing is incumbent upon the petitioner in these cases in order to prevail. Acceptable documentation to show that the adoptive parent resided jointly with the child could include school and/or medical records, baptismal or other religious documents, U.S. tax return showing the child as a dependent, proof of health/life insurance, executed will, as well as affidavits from friends, relatives, church officials, teachers, etc. The evidence as a whole should provide information concerning such details as the physical living arrangements of the child, and the residences of the petitioners and of the birth parents during the two-year period. [8 CFR §204.2(d)(2)(vii)

(B), 9 FAM 42.21 N12.4. Note that providing sufficient evidence to prove the custody and residency requirements at the filing of the I-130 may lead to a waiver of the interview requirement for younger children.]

Orphan Route

Only a U.S. citizen is eligible to file an orphan petition as indicated at INA §101(b)(1)(F), provided that the Form I-600 petition is filed prior to the child's 16th birthday and the child meets the definition of orphan. [INA § 101(b)(1)(F) See Cynthia Hemphill, Karen Stoutamyer Law, and Carine Rosalia-Marion, *Inter-country Adoptions: Procedures and Potential Issues After Ratification of the Hague Adoption Convention*, 2008-09 *Immigration & Nationality Law Handbook* 537 (ed.); Daniel E. Marcus and Irene A. Steffas, with contributions from Boyd F. Campbell, *International Adoption--A Basic Guide to the Three Visa Categories*, 2006-07 *Immigration & Nationality Law Handbook* 364 (ed.), Kathleen Sullivan, *Inter-country Adoption: A Step-by-Step Guide for the Practitioner*, 95-9 *Immigr. Briefings* (Sept. 1995)] A child is an orphan due to the:

- 1) death or disappearance of, abandonment or desertion of, separation or loss from both parents, or
- 2) the sole or surviving parent is incapable of providing proper care for the child and has irrevocably released parental rights to the child in writing for emigration and adoption. [INA § 101(b)(1)(F)(i)]

The Foreign Affairs Manual at 9 FAM 42.21 and 8 CFR § 204.3(b) provide definitions of many of the terms in INA §101(b)(1)(F). If both biological parents are alive but have abandoned the child to an orphanage or other authorized institution of the child's home country, the child may be considered to be an orphan. [8 CFR § 204.3(b) and 9 FAM 42.21 N13.2-5(3)(b)] The termination of all parental rights and obligations must be permanent and unconditional.

The orphan petition process consists of three steps. The petitioners: (1) may establish their suitability and ability to provide proper care to the child using Form I-600A [I-600A, Application for Advance Processing of Orphan Petition. Filing of Form I-600A is optional.] (2) file Form I-600 and provide supporting evidence that the child is an "orphan" once the adoption decree is issued by the court [Petitioners must file one Form

I-600 per child.] and (3) obtain an immigrant visa from the U.S. consulate to enter the United States and acquire U.S. citizenship. Form I-600 cannot be filed if the child is physically present in the United States unless the child was paroled into the United States. [If the child is in the United States on a nonimmigrant visa or entered without inspection, then filing an I-130 under INA §101(b)(1)(E) should be pursued unless the Hague provisions are applicable.]

Recurring Issues in Orphan Cases

Questions that come up in orphan cases revolve around the determination of whether the child meets the definition of orphan, especially where one or both of the biological parents are living. Releasing the child into the care of a specific person who is to adopt the child does not meet the definition of abandonment. [8 CFR § 204.3(b). See also, Nancy Elkind, *Immigration of Orphans to the United States*, 1995-96 *Immigration & Nationality Law Handbook* 150, 153 (R. Patrick Murphy et al. eds., 1995)] Instead, the child must be surrendered to an orphanage or other authorized institution of the country.

In cases where there is a sole or surviving parent, [The definitions of "sole parent" and "surviving parent" are found at 8 CFR § 204.3(b)] the petitioner must prove that the biological parent is "incapable of providing proper care" to the child. ["Incapable of providing proper care" is defined at 8 CFR § 204.3(b). See *Rogan v. Reno*, 75 F. Supp. 2d 63 (E.D.N.Y. 1999)] The fact that the parent is impoverished and unemployed is insufficient to show that the biological parent is incapable of providing care unless a showing can be made that the poverty level in the sending country falls below the national average. [Id. See also, Darlene Seligman, *Problematic Issues in Obtaining Immigration Benefits for the Orphan Adopted Child*, in 1994-95 *Immigration and Nationality Law Handbook* 418, 423-25 (R. Patrick Murphy et al. eds., 1994)]

Examples of inability to support a child include a parent with a terminal illness, who is incarcerated, or experiencing an overwhelming financial burden.

If the U.S. citizen parent(s) have not both personally seen and observed the child, they must re-adopt in the United States. The child will enter the United States on an immediate relative fourth preference (IR-4) visa

and re-adoption in their home state must occur prior to the child's 18th birthday for the child to become a US citizen under the Child Citizenship Act of 2000. [INA § 320, 9 FAM 42.21]

WHEN THE HAGUE ADOPTION CONVENTION APPLIES

Attorney's Role in a Convention Adoption

Once, the attorney determines that the case is in fact governed by the Convention, the next inquiry will be the attorney's role in the case. Attorneys must be careful not to provide "adoption services" to clients, which would require them to be approved as an adoption service provider, unless they have in fact been approved. Section 404(a) (1) and (c) of the Intercountry Adoption Act provide civil and criminal penalties for anyone who provides, or facilitates the provision of, adoption services without authorization. [IAA §404 (a)(1) and (c)] Hence, attorneys may not engage in any of the following without first having been approved by the Council on Accreditation:

- 1) Identifying a child for adoption and arranging an adoption;
- 2) Securing necessary consent to termination of parental rights and to adoption;
- 3) Performing a background study on a child or a home study on a prospective adoptive parent and reporting on such a study;
- 4) Making determinations of the best interests of a child and the appropriateness of adoptive placement for the child;
- 5) Post-placement monitoring of a case until final adoption; and,
- 6) Where made necessary by disruption before final adoption, assuming custody and providing child care or any other social service pending an alternative placement.

The approval and accreditation processes are beyond the scope of this article. [See 22 CFR §96] These regulations do not prohibit attorneys from assisting clients in the preparation of immigration forms to be filed

with USCIS, providing legal advice, and representing adoptive parents before USCIS. But if a lawyer is providing (or facilitating) any of the above six "adoption services", the lawyer must obtain from the Council on Approval. [22 CFR § 96.2]

Alternatively, the attorney who will be providing one or more of the six adoption services could enter into a supervised provider relationship with an accredited adoption agency. [22 CFR §96.45] The supervisory relationship is relatively rare – although the authors suspect that it may become more common over time. For example, if a Salvadoran-American client calls her immigration attorney to ask about adopting a niece from El Salvador – the attorney must find an accredited primary Hague provider with which to partner under the auspices of a supervisory agreement. That agreement per the regulations must delineate clearly the qualifications and licensing of the attorney, the method of supervision, and procedures for keeping confidential records. These are relatively common situations in Hague countries – but it can be a challenge to find a primary provider willing to get involved in a private adoption in a Hague country, especially if the country is not one that they have a presence in. The other option in such cases is to seek out one of the very few immigration attorneys who has gone through the rigorous process of obtaining designation as a primary Hague provider.

Overview of the Process

The attorney will often be called upon to describe the Convention adoption procedure. Convention adoptions track the orphan petition with some very important differences. The case will proceed in a step-by-step manner and if a step is performed out of sequence, the child may not obtain a visa. In summary, the prospective adoptive family first obtains a home study from a Hague accredited agency. If the placing agency is accredited but not licensed in the state where the prospective adoptive family resides, the home study may be conducted by an exempt provider or a supervised provider. [Many smaller licensed home study agencies have not chosen to undergo the expensive and time-consuming accreditation process. However, they may still perform home studies for Convention adoptions if they are either "exempt" because their only role is to conduct the home study, 22 CFR §96.13, or because they are "supervised" by an accredited agency,

22 CFR §96.13.] After the home study is completed, the family or their attorney files the I-800A with supporting evidence with the USCIS Texas Lockbox address [Always confirm the correct filing address at the time of filing on the www.uscis.gov website.] After the I-800A is approved, the approval notice, home study and other supporting documentation are forwarded to the Central Authority of the country from which the family is planning to adopt. The Central Authority, or its designee, then refers an eligible child to the family, providing the Article 16 Report on the psychological, social and medical background of the child and making certain required findings. These findings include determinations that the child is eligible for adoption; intercountry adoption is in the child's best interests; the child's current and previous legal custodians have consented in writing to the placement after counseling; the child has consented in writing after counseling if the consent of the child is required; and that no payment or other inducement has been given to obtain the written consents. [IAA, Article 4] Under U.S. regulations associated with the Hague Convention, the family should be given a minimum of two weeks to consider whether to accept the referral. Practically speaking, however, the policies and practices of the country of origin, the child-placing agency, and other factors may often result in less than 2-weeks' time for family decision-making.

If the family accepts the referral, they then file the I-800 with supporting evidence and forms at the USCIS Texas Lockbox address. [Always confirm the correct filing address at the time of filing on the www.uscis.gov website.] The I-800 is then provisionally approved and forwarded to the DOS consular officer at the visa issuing post through the National Visa Center (NVC). The family then files a visa application for the child with that post and the consular officer preliminarily adjudicates the application. If the consular officer finds that "the child would not be ineligible to receive an immigrant visa", the visa application is annotated with this conclusion. The consular officer must also take note that there are no grounds of inadmissibility that would preclude the child's admission to the U.S. following the adoption or grant of custody. The consular officer then notifies the Central Authority with an Article Five letter that the prospective adoptive parents may proceed with the adoption or custody decree. [Certain countries do not have provisions in their law for adoption, such as India and most Muslim countries. In

those countries, the family will obtain a guardianship decree, which specifically releases the child for emigration and adoption in the United States, and finalize the adoption in their home state. The practitioner should check with the U.S. State Department adoption website, www.adoption.state.gov, to determine the usual type of decree issued by the particular country. The web-site has invaluable country-specific information for attorneys, social workers and adoptive families.] At this point, the family obtains the adoption or custody decree. They then obtain a new birth certificate for the child and a passport for the child from the child's country of citizenship. They take the adoption decree or custody decree along with the new passport, birth certificate, results of the medical exam performed by the U.S. Panel physician and other DOS visa forms back to the consular officer, who takes a final look at the case and certifies it as Hague compliant.

As one can see from the above sequence of events, the attainment of the adoption or custody decree happens late in the process. By way of contrast, in the orphan process the adoption decree may be obtained before the initial petition, I-600A, is filed. In a Convention adoption, if the adoption decree is obtained prior to the issuance of the Article Five letter, it may not be possible to obtain the visa. The only remedy would be to void or vacate the adoption decree in the foreign country. [8 CFR 204.309(b)(1)] If the country of origin does not have a mechanism to void or vacate the decree, USCIS would make an individualized determination as to whether the case would be denied. In this situation, the family should submit with the I-800 the following three items: (1) a statement from the petitioner, signed under penalty of perjury under United States law, explaining why, despite the clearly stated requirement in 8 CFR 204.309(b)(2) and the warnings on the Instructions for Forms I-800A and Form I-800, the petitioner obtained the adoption or custody order before obtaining provisional approval of a Form I-800 ; AND (2) a statement from the Central Authority indicating that, under the law of that country, the petitioner is not able to obtain an order voiding, vacating, annulling or otherwise terminating the adoption or custody order; AND (3) a copy of the law governing the voiding , vacating, annulling or termination or adoptions, as well as a certified English translation of that law. If USCIS is satisfied from this evidence that obtaining the adoption or custody order too early was not done to circumvent the Hague procedures, it

may provisionally approved the Form I-800 and send it to the [Scialabba & Neufeld memo on Intercountry Adoption under Hague Convention, available as AILA InfoNet Doc. No. 08103190; Frequently Asked Questions of September 29, 2008, available as AILA InfoNet Doc. No. 08093064, states that evidence from the Central Authority of the country of the child's habitual residence establishing that the law of that country does not permit the adoption to be voided, vacated, annulled, or otherwise terminated should be submitted. In addition other evidence may be required and the case may not be approved.]

Under the Child Citizenship Act of 2000, if the family has obtained a final order of adoption, the child will be issued an IH-3 visa and will become a U.S. citizen upon admission to the U.S. as a lawful permanent resident. Unlike in an orphan case, there is no requirement that both parents travel and observe the child prior to or during the adoption. The child will receive a Certificate of Citizenship from the Buffalo USCIS District Office within 45 days of USCIS receipt of the visa packet. [Id.] If the family has obtained a guardianship decree, the child will be issued an IH-4 visa and will become a U.S. citizen once the adoption is finalized in the home state as long as the child is under the age of eighteen when the adoption is finalized. [INA § 320] Shortly after his or her arrival home, the child will receive a lawful permanent resident card. Once the adoption is finalized, the family can apply for a Certificate of Citizenship using Form N-600.

How the Hague Process Differs from Orphan Procedures

On the positive side, the type of child that can be adopted in a Convention adoption is broader than in an orphan case. An eligible child is defined as a child, under the age of sixteen at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under Section 201(b), who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States, by a United States citizen and spouse jointly, or by an unmarried U.S. citizen at least 25 years of age—if the child's natural parents (or parent in the case of a child who has one sole or surviving parent because of the

death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child's emigration and adoption; and in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child. The Convention also allows for the sibling of an adopted child to be adopted up until the age of 18. [See INA 101(b)(1)(G); International Adoption Simplification Act, Pub. L. No. 111-287, 124 Stat. 3058 (2010).]

There are several other key differences between an orphan and the adoptable child in a Hague Convention case. First, unlike in orphan cases, it is possible for two birth parents to release a child for adoption as long as they are incapable of providing proper care according to the standards of the country. Currently, it is impossible to obtain an orphan visa in many non-Convention cases because the child has two living birth parents. Hence, this is an important broadening of the category of children who can be placed for international adoption. Moreover, under orphan cases, only an unmarried birth mother may be considered a "sole parent" with the ability to release her child for adoption and emigration. Thus, if an unmarried birth father wishes to release the child for adoption and emigration when the birth mother has abandoned the child, that child will not qualify for an "orphan" visa. In Convention adoptions, the sole parent may be either a mother or father. A child will be eligible for adoption as the child of a sole parent if the child has only one legal parent, based on the competent authority's determination that the other legal parent has either abandoned or deserted the child, or has disappeared from the child's life.

However, the lengthy and involved procedure outlined in the regulations must still be followed in the proper order, a daunting task. Until recently, many families adopted first in the foreign country and then considered how to obtain the visa. This procedure fit within both the orphan petition process and the adopted child petition process and it is still possible to take this approach if the child is not habitually resident in a Convention country. However, if the adoption decree obtained after April 1, 2008, for a relative who was a habitual resident of a Convention country and the family had not filed an I-600A or I-600 prior to that date, the adoption must be voided and the entire

process begun again. [8 CFR 204.2(d) (2) (vii) (D)—adopted child; 8 CFR 204.3(a) (2)—orphan petition. If the foreign country does not have a procedure to void or vacate an adoption, the visa may be impossible to obtain. 8 CFR 204.309(b)(1)]

How the Process Is Currently Working

USCIS has done an excellent job of adjudicating these cases. Adjudication is centralized at the National Benefits Center and practitioners and families have found that officers are available by email to answer questions and are still processing cases in a timely fashion. The Consulates also seem to handle these cases efficiently. The process in general seems to be working well in cases where the child to be adopted is not related to the adoptive family.

However, that is not the case for relative adoptions. Many of the cases which have come into an attorney's office involve U.S. citizen parents who are foreign nationals attempting to adopt relatives who live in Convention countries. The prohibition against prior contact between the adoptive parents and the child or birth parents does not apply if the child fits within the list of family relationships defined by the regulations. [8 CFR §204.309 (b)(2)(i), 8 CFR § 204.309 (b)(2)(ii) and (iii)] The greater issue is that the regulations are not tailored for relative adoptions and currently there is not a lot of guidance on the subject from either USCIS or from DOS. In some Hague Adoption Convention countries, such as the Philippines, the foreign Central Authority will only work with Hague accredited agencies or approved persons that have also been licensed by them. In those countries, relative adoptions are working well but are expensive due to the necessity of the U.S. family selecting an adoption service provider that is licensed by both countries and in some instances, involving a second adoption service provider to complete the home study. In other countries, such as the People's Republic of China, there is no clear pathway that has been established for relatives to adopt and it is impossible to complete a relative adoption that would lead to the child emigrating to the U.S. unless the U.S. adoptive family moves to that country for two years after the adoption [8 CFR § 204.2 (d)(2)(vii) (D) and (E)].

Further, the Hague Adoption Process has not supplanted the orphan procedures. In FY 2011, about

two-thirds of children entered the U.S. on orphan visas, as opposed to Hague Adoption Convention visas. [Fiscal Year 2011 Annual Report on Intercountry Adoption (November 2011, U.S. Department of State), available at <http://www.adoption.state.gov>] In April 2008, the U.S. Department of State and USCIS believed that the orphan process would quickly be replaced almost entirely by the Convention. In reality, the lack of infrastructure, political pressures and lack of enabling legislation have prevented many other countries from fully enacting the Convention. As a result, USCIS, the Department of State. And nongovernmental agencies are seeking to improve the orphan process since it will most likely continue to exist for a long time. The belief is that the two-tiered program that the U.S. currently employs does not adequately protect families, children and birth parents in that the standards are looser and less rigorous in orphan cases. Since orphan cases will continue to exist, the goal would be to transplant some Hague protections into the orphan process. Several alternatives include reinstating the "Orphan First" pilot program in which the preliminary determination is made that the child is eligible for an immigration benefit prior to the family's completion of the adoption. This would have the benefit of helping families ensure that the adoptee would actually be able to live with them in the U.S. prior to becoming responsible for the child under the foreign law. Most likely, this program would be instituted in larger sending countries first. Additionally, there is a push toward universal accreditation, which would mean that all adoption service providers would meet Hague Adoption licensing criteria. Further, all home-studies would meet Hague Adoption Convention standards. Finally, legislation has been proposed to improve remedies in cases of international adoption fraud under the Convention and the orphan procedures. [Katie Rasor, Richard M. Rothblatt, Elizabeth A. Russo, and Julie A. Turner, *Imperfect Remedies: the Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States*, New York Law School Law Review, Volume 55, 2010/11]

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