

**PRACTICAL ASPECTS OF IMMIGRATION: CHANGES TO
INTERNATIONAL ADOPTION AS A RESULT OF THE HAGUE
ADOPTION CONVENTION**

**Montgomery County Bar Association
Continuing Legal Education
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WHAT IS INTERNATIONAL ADOPTION?



The process of adopting, either abroad or domestically in the U.S., a child who was born outside of the U.S. and who is not a permanent resident or U.S. citizen, so that the child will be entitled to become a U.S. citizen or permanent resident as a result of the adoption.

THE GOAL OF A SUCCESSFUL INTERNATIONAL ADOPTION IS
TWO-FOLD: ADOPTION AND IMMIGRATION



#1 Child is legally adopted under the applicable law.

#2 Child will be entitled to U.S. immigrant status as a result of the adoption.

WHAT IS IMMIGRATION STATUS?



- Immigration status refers to the child's entitlement to live in the U.S. permanently with the adoptive family -- to immigrate to the U.S. if adopted from abroad or if already in the U.S., to apply for permanent U.S. residency and U.S. citizenship as a result of the adoption.
- This does not mean that getting immigration status should be the sole reason for the adoption, however, if a foreign born child is adopted, eligibility for U.S. immigration status is an integral part of the process.

WHY IS INTERNATIONAL ADOPTION SO COMPLICATED?



Three different sets of law are often involved:

1. U.S. immigration law.
2. Law of the child's country of citizenship/origin.
3. Law of the applicable U.S. state.

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THREE DIFFERENT PROCEDURES UNDER U.S. LAW



#1

I-600 Orphan Petition process: INA 101 (b)(1)(F)

Prior to April 1, 2008, most adoptions abroad of foreign born children by U.S. citizens were done through this process.



#2

**I-130 Adopted Child (Two Year) process: INA 101 (b)
(1)(E)**



On April 1, 2008, the “Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (Hague Adoption Convention) came into force and the U.S. became a “Convention Country.”

#3

I-800 Hague Petition process: INA (b)(1)(G)

WHAT IS THE HAGUE ADOPTION CONVENTION?



- A multi-country treaty that establishes new procedures and safeguards to ensure that the adoption is in the best interests of the child and to prevent the abduction, sale of or trafficking of children.
- There are currently more than 80 other “Convention Countries”. (See the Department of State (DOS) website at: www.adoption.state.gov)



- Each Convention Country has a designated Central Adoption Authority (CAA), and has enacted its own laws to implement the Convention.

U.S. implementation of the Hague Adoption Convention



- The U.S. law that implements the Convention is the Intercountry Adoption Act of 2000 (IAA), 42 USC 14901, et seq; Public Law 106-279.
- The U.S. “Central Adoption Authority” (CAA) is the Department of State (DOS) however the USCIS (previously the INS) continues to be responsible for the adjudication of the I-800 Hague Petition and other immigrant petitions.



- Interim and final regulations have been issued by the CIS and DOS for example: 8 CFR 204.300, et seq., 8 CFR 204.2(d)(2)(vii); 22 CFR 42.24 and 22 CFR 96.
- The U.S. process is referred to as the I-800 Hague Petition process.

SOME QUALIFICATIONS



- The IAA and regulations are relatively new and so far there is very little official guidance or useful case law on how to interpret and apply the law.
- The determination of “habitual residency”, especially as applied to children who have been in the U.S. for many years is problematic and U.S. definition is stricter than other countries.



- Many of the regulations that have been issued are interim.
- The solutions/exceptions suggested to date by the CIS and DOS are generally not practical or sufficient.
- Only a broad overview of the Convention and its impact is being presented today.

WHAT COUNTRIES ARE “CONVENTION COUNTRIES” IN ADDITION TO THE U.S. ?



- Examples of Convention Countries: China, Mexico, Hong Kong, India, Philippines, Thailand.
- Examples of countries that are not Convention Countries yet: Haiti, Ethiopia, South Korea.
- The number of Convention Countries is expected to grow. A number of countries are in various stages of the process, for example, Ukraine, Vietnam.
- Should always check the DOS website and Hague Convention website at: http://www.hcch.net/index_en.php?act=text.display&tid=45t

HOW DO YOU KNOW IF AN ADOPTION COULD BE A “CONVENTION ADOPTION”?



- It could be a Convention Adoption if the child being adopted is an “habitual resident” of a Convention Country other than the U.S. (for example, the adoption of a child from China by a USC).
- It is not a Convention Adoption if the child being adopted is an “habitual resident” of a country that is not a Convention Country (for example, the adoption of a child from Russia, Haiti, Korea) or if the child and the adopting parent are habitual residents of the same Convention Country.

HOW TO DETERMINE THE COUNTRY OF “HABITUAL RESIDENCE”



“Habitual residence” is not defined in the Convention itself or the IAA.

Some “principles” are set forth at 8 CFR 204.303:

- If the adopting parent is a U.S. citizen, the country of habitual residence is generally the U.S.
- Child’s country of “habitual residence” is presumed to be the child’s country of citizenship or possibly the country of prior residence, even if the child is living in the U.S.



- Generally a child who is in the U.S. as a nonimmigrant is not considered an habitual resident of the U.S. and will remain an habitual resident of the child's country of citizenship or prior residence.
- Possible exception suggested by the CIS: If the CAA of the child's country of citizenship/previous residency issues a written determination that the child is no longer an habitual resident or subject to its jurisdiction.

ONE OF THE MOST IMPORTANT CHANGES INVOLVES U.S. DOMESTIC ADOPTION



- Previously if a 12 year old child born abroad came into the U.S. on a visitor visa, that child could potentially be adopted by a U.S. citizen under the applicable U.S. state law, and then apply to become a permanent U.S. resident/U.S. citizen two years later through the two year Adopted Child process.
- However, as of April 1, 2008, the adoption by a U.S. citizen of a child who is a citizen or resident of a Convention Country will be a Convention Adoption. If so, the child will no longer be able to become a permanent resident or U.S. citizen under the Adopted Child process after being adopted under U.S. state law in the U.S.

WHAT HAPPENS IF THE CHILD IS ADOPTED IN THE U.S BUT NO IMMIGRANT STATUS?



Unless the case can be excepted from the Convention process, this means that the child will not be able to get a social security number, work authorization, a driver's license, etc. and the child and adoptive family will live under the threat that the child will be removed from the U.S.



Solutions are limited:

- Determine whether the adoption can be “undone” and then do the adoption again in accordance with the I-800 process.
- Usually this will require that the child return to the country of citizenship unless the CAA agrees to allow the adoption to go forward in the U.S.
- Not practical and unlikely that CAA will allow this.

SOME OTHER THINGS TO KNOW ABOUT THE I-800 PROCESS



- The process is very detailed and requires a specific step by step sequence that must be followed in a certain order.
- The I-800 process must be followed -- it is not optional.
- Generally to comply with the I-800 U.S. process and the Hague process of the child's country of habitual residency, the child will be living in the country of habitual residency and not in the U.S.



- Generally contact between the adoptive parent and the child is not allowed until there has been a determination by the CIS that the adoptive parent is suitable to adopt and the child's country of origin has determined that the child is available for adoption under its laws.
- All entities or persons who provide or facilitate the provision of "adoption services" must be accredited or otherwise approved or supervised. "Adoption services" are broadly defined. Violations may result in criminal or civil penalties.

SOME RECOMMENDATIONS



- Do not initiate an adoption of a foreign born child until and unless a determination is made that it is not a Hague adoption or that it can be excepted from the Convention.
- Make sure that you advise any clients about the Hague Convention and its requirements if they are considering adopting a child who is a citizen of or residing in a Convention Country.
- If you are involved with a case that may be a Convention Adoption, make sure that you are only providing legal services, unless you are an accredited service provider.
- A conservative approach is strongly recommended.

Hypothetical #1



You are asked by long term clients to handle the adoption of their nephew who was born in Thailand and recently came to the U.S. on a visitor visa. You find out that the nephew is 14 years old and that both of his parents are deceased. You remember that about ten years ago you handled the clients' adoption of another relative from Thailand and that after two years the child was able to apply to become a U.S. citizen.



Is this a Convention Adoption?

What is the child's country of habitual residence?

Is Thailand a Convention Country?

How do you advise your clients?

Possible solutions?

- Child returns Thailand and proceed with I-800 process in Thailand. What if both parents are alive and able to care for him? Child still must meet Hague eligibility requirements.



- As mentioned previously, one possible solution is to ask the Thai CAA to issue a statement that the child is no longer an habitual resident of Thailand because the child has developed substantial ties to the U.S. -- this argument is more persuasive if the child has been living in the U.S. for an extended period of time; Even so, it is virtually impossible to get such statements.

Hypothetical #2



Clients have met a 12 year old in an orphanage in Mexico while on a service trip. They want to adopt her and have discussed this with the orphanage director. They have also retained an attorney in Mexico to handle the adoption itself.

Is this a Hague adoption?

Is Mexico a Hague Country?

Is their contact with the child and orphanage director a potential problem? Solution? Ask CAA of Mexico to allow exception.

Hypothetical #3



You have just met with clients who have completed an adoption in Kenya, without complying with the Hague?

Is Kenya a Convention Country?

Is there a problem?

Ask when the adoption took place?



Again, possible remedies/exceptions are limited:

- Determine whether the adoption can be “undone” under Kenyan law and then do the adoption again in accordance with the I-800 process.
- If it can’t be undone under Kenyan law, request exception from CIS.

Good Resources for more information



Department of State website at:

www.adoption.state.gov

CIS website at: <http://www.uscis.gov>

ADDENDUM: I-800 Hague Petition Process:



Who is adoptable under this process (the “Hague orphan definition”)?

- The child must be under the age of 16 when the Petition is filed unless the sibling exception applies.
- The definition of an adoptable child is broader than the I-600 orphan definition, for example, two living parents can release a child for adoption and emigration if they are unable to provide basic care for the child; If only one parent, inability to provide basic care is not considered.