

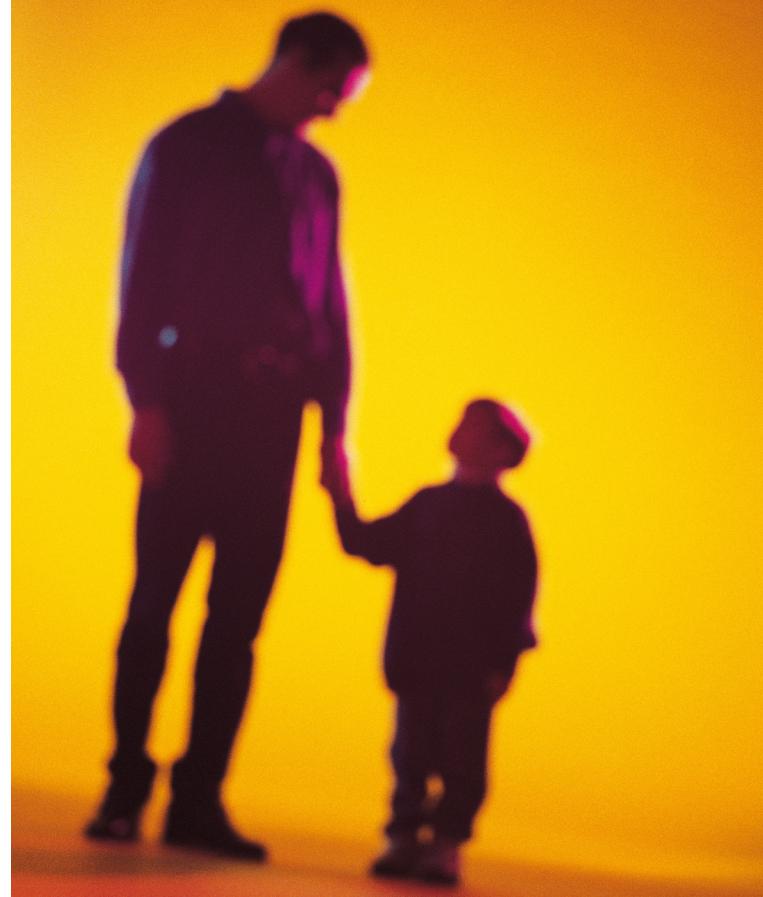
The Hague Adoption Convention and Its Impact on All Adoptions

By Irene Steffas

In 1993, The Hague's Commission on Private Law responded to the deplorable adoption practices around the world and created the Convention on Protection of Children & Co-operation in Respect of Intercountry Adoptions.¹ Countries that were sending their children to the United States wanted assurances for the safety and welfare of their children. All countries agreed that the rights of biological parents needed safeguards. Like the United States, European countries that were receiving orphans wanted everyone to abide by the same rules and regulations. Representatives from the United States played an important role in the drafting of this convention. On May 29, 1993, the Hague Adoption Convention was ready to be signed, and the United States became a signatory in 1994. Because, historically, Americans adopt more children than any other country's citizens,² the international adoption community looked to the United States for leadership and support for the new procedures embodied in the convention. The United States took a very long road toward becoming an active participant, however.

In 2000, the U.S. Congress passed the implementing legislation for the convention with the Intercountry Adoption Act (IAA).³ Fourteen years have passed between the time the United States signed the Hague Adoption Convention and the date of ratification. During this time, many organizations, adoption agencies, and attorneys deliberated the issues involved. The U.S. government held meetings with small groups and hosted open forums; the Department of State and the Department of Homeland Security listened and drafted regulation after regulation. When regulations were published, more than 1,500 comments were submitted for review. Finally, on April 1, 2008, the United States ratified the Hague Convention. On that date, the United States was en force with the convention, and the Intercountry Adoption Act became the most important adoption legislation of the century.

What followed caught the legal community by surprise. Adoption attorneys practicing before state courts did not know—and still do not know—what impact this new federal law has on their practices. Most practitioners did not consider the adoption of a child born in another country and residing in the United States to be an international adoption. Since immigration reform has not occurred, what would happen to the thousands of children of undocumented aliens residing in the United States? To fill the void created by the congressional inaction, friends and families started adopting more and more undocumented children.



Immigration attorneys, accustomed to filing family petitions and guiding families through orphan visa applications, did not realize the far-reaching impact of the IAA and how it would affect their law practices. All the complex regulations included in the IAA changed both *adoption* law and *immigration* law. The act was designed for adoptions between two countries that were signatories to the convention; adoptions between the United States and nonsignatories to the convention were outside the purview of this statute. Intentionally or not, the U.S. government even applied the IAA to children residing in the United States and thus changed family-based immigration. The IAA has extremely clear and precise regulations and includes a very sophisticated procedure.

It soon became evident to the international adoption community that the United States was no longer satisfied with the old orphan visa process. Shouldn't all international adoptions be held to standards as high as those adopted by the Hague Convention? When the Vietnamese government asked U.S. authorities for a list of credible adoption agencies, the U.S. consulate listed only agencies that were accredited by the Hague Convention. Some could argue that such a list was easily ascertainable. Other agencies saw this as a way to discredit any agency that had not gone through the accreditation process developed solely for adoptions regulated by the Hague Convention. Slowly, one could see the new standards seeping into the orphan visa process, and the landscape for all intercountry adoptions changed.

The goals of the IAA were to "streamline the costly and cumbersome process of intercountry adoption, eliminate abusive and fraudulent practices, and ensure fair procedures

and greater protection for birth and adoptive family and serve the children's best interests.⁴ Today, intercountry adoptions are more regulated, more complex, and more expensive. The purpose of the Hague Adoption Convention was to stop unethical practices such as child trafficking and make adoption agencies assume responsibility for their adoption support providers working on their behalf in the countries that were sending children to other countries. However, the IAA, like a dragon with an unruly tail, unintentionally strikes innocent passers-by. Adoption agencies, attorneys, and families are now trying to comprehend the full reach of this new statute.

Three Statutes for Children Adopted Internationally

Prospective adoptive parents hope to provide loving, stable, and supportive homes for their adopted children. Families presume that they will have the benefit of family unity—one of the cornerstones of immigration law. First, a court or proper authority must terminate the rights of the biological parents. Once a child is free for adoption, a new parent-child relationship is established and then the prospective adoptive parents apply for their adopted child's immigrant visa. The federal government grants immigration status and citizenship to adopted children through one of three federal statutes. These statutes, which are separate and distinct from other statutes, include specific criteria that must be satisfied before parents of an adopted child can even apply for the benefits; the criteria may be found in the Immigration and Nationality Act (INA).

E Route to Gaining Immigration Status

The first route to gaining immigration status for adopted children, referred to as the E Route, uses standard family petitions, which are also used in petitions for spouses, children, and siblings. INA § 101(b)(1)(E)⁵ is frequently referred to as the family petition.

The E Route has four requirements:

- a full and final decree of adoption,
- timeliness of the decree prior to a child's 16th birthday,⁶
- joint residency for 24 months, and
- legal custody lasting 24 months.⁷

Adoptions may occur either in the United States or abroad.⁸ After April 1, 2008, children who are citizens of a country that is a signatory to the Hague Convention and reside in the United States were processed differently than children who are citizens of countries that are not signatories. A comparison of the two is discussed below under the heading of habitual residence.

F Route to Gaining Immigration Status

Prior to the ratification of the Hague Adoption Convention, most adopted children who immigrated to the United States entered through the Orphan Route, INA § 101(b)(1)(F), which will be referred to as the F Route in this article.⁹ The F Route requires harmony among—

- U.S. federal statutes (INA § 101(b)(1)(F) and its regulations (8 C.F.R. § 204.3),

- the laws of the state where the prospective adoptive parents reside related to home study requirements, and
- the international laws of the child's country of origin.

The first step, for prospective adoptive parents in the orphan visa route, is to obtain a home study from a licensed child-placing agency. An agency investigates a family by researching abuse registries and criminal records. If an agency favorably recommends a family, the home study is forwarded to the Department of Homeland Security Citizenship and Immigration Service. The service then authorizes another FBI clearance and reviews a family's home study. The service has the last word on approving prospective adoptive parents. From the time the service approves prospective adoptive parents until the issuance of their child's visa, a family agrees to comply with the duty of candor. Hence, a family must alert the service when there is a change in employment, residence, or occupants to their home.

The prospective adoptive family and/or an international adoption agency provides evidence to the U.S. consul that demonstrates how a child satisfies the orphan definition in the statute.¹⁰ Foreign government entities also use their country's laws to terminate the rights of the biological parents.

The prospective adoptive family will present documents obtained from their foreign adoption provider and the appropriate legal entity to the U.S. consulate having jurisdiction over the child's country of birth. Federal law requires a thorough investigation to verify compliance with the foreign country's law and verification that the documents presented are genuine and free of fraud and wrongdoing. Consular processing is so thorough and rigorous that state courts should consider the consular officer's issuance of an IR-3 or IR-4 visa as *prima facie* evidence that the biological parents' rights have been terminated and that a valid relationship between the adoptive parents and the child has been accomplished in the foreign court's proceedings.

G Route to Gaining Immigration Status

The third route for adopted children to immigrate to the United States is via the Intercountry Adoption Act. The statute providing immigration benefits for an adopted child through this route is INA § 101(b)(1)(G)¹¹ (appropriately referred to as the G Route or a Hague Adoption). Hence, this avenue is the offspring of the Convention on Protection of Children & Co-operation in Respect of Intercountry Adoptions. Maneuvering through the Intercountry Adoption Act is not sufficient when evaluating an adoption processed according to the Hague Convention. One must also have a working knowledge of the regulations, 8 C.F.R. § 204.300, and implementing legislation of the signatory to the convention that is sending the child. The implementing legislation of the sending country must be harmonized with the implementing legislation of the receiving country. Often, the country's central authorities will provide very good information; at other times, it is prudent to hire an attorney who is knowledgeable about the convention to guide the practitioner through the idiosyncrasies of the corresponding country's laws.

To illustrate the complexities of adoptions regulated by

the Hague Convention it is helpful to think of the process as a door: one side of the door represents the law of the sending country and the other side of the door represents the law of the receiving country. Compliance with the adoption laws and immigration laws of both countries is required. For example, while residing in Spain, a couple that has dual citizenship in the United States and Spain decides to adopt a child who is a citizen and resident of the United States. Even though, according to U.S. law, this is a domestic adoption, the family must take Spanish immigration law into account before bringing the child to Spain.

Another illustrative example is that of a single Australian woman residing in the United States on an L-1 visa—an inter-company transfer. If she adopts a child while residing in the United States on her L-1 visa, her adoption is considered a domestic adoption. However, she also needs to take the other side of the door into consideration. What will happen to the child if the mother's company transfers her to England? How will the British issue the child a visa? Alternatively, how will the child immigrate to Australia if the mother comes down with a serious illness and decides to return to Australia?

Procedure and Sequence of Procedures is Paramount

The volume of regulations for the Intercountry Adoption Act is immense. A solicitor from South Africa noted that the purpose of the Hague Adoption Convention is to regulate adoptions, not to facilitate them.¹² The following list explains the precise nature of the regulations:

- Home study: A home study may only be conducted by an accredited agency. If there is no accredited agency willing to conduct the home study, an accredited agency must certify the home study completed by an exempt provider.
- Child study: Article 16 of the Hague Convention requires a child study to be conducted only by an accredited agency and provided to the prospective adoptive family prior to the family's acceptance of a referral. The list of accredited agencies can be found at www.adoption.state.gov. Once the family receives the child study, the family has two weeks to determine whether or not to adopt this specific child.
- Agreement by the central authorities of both countries: According to Article 17c, before a child is placed in the custody of the prospective adoptive parents, both the sending country and the receiving country must agree to the adoption.
- Sequence of procedures: If the prospective adoptive parents obtain legal custody of the child or finalize the adoption before the U.S. consul issues an Article 5 Determination—the consul's evaluation of child's eligibility for a visa—the United States or the sending country may deny the visa application.
- Waivers of Procedure (going out of order) and the Waiver of Communication (none permitted except in family adoptions): These waivers must be filed with Form I-800.
- Duty of Candor: Prospective adoptive families must agree to and are obligated to maintain their file with the Duty of Candor to the Citizenship and Immigration Service. A breach of the duty of candor includes not disclosing a

misdemeanor that occurred 20 years ago, moving across town, or failing to update a home study after the birth of a child. If CIS determines that a family has breached the Duty of Candor, the case will be denied and the family will be barred from filing a new petition for one year.¹³

- Individual responsible for processing a case through the Hague Convention protocol: A thorough review of the statute and regulations¹⁴ leads a reasonably prudent attorney to believe that he or she may perform legal services in an adoption regulated by the Hague Convention. What the regulations do not reveal, however, is that foreign governments/central authorities will only communicate with accredited bodies and will send necessary documents only to accredited bodies. Therefore, an attorney who is not an accredited entity cannot effectively assist a family in processing its case through the Hague Convention's procedures.¹⁵

Where is the Habitual Residency of a Convention Child Residing in the United States?

Our closest neighbors, Canada and Mexico, have ratified the Hague Adoption Convention through their own implementing legislation. During the last two and one-half years, the United States, Canada, and Mexico have worked together to understand the quagmire of regulations each country has put in place for adoptions governed by the Hague Convention. One of the greatest challenges is determining the country of a child's habitual residence. The U.S. regulations define a convention adoptee as "a child *habitually resident* in a convention country who is eligible to immigrate to the United States on the basis of a convention adoption."¹⁶ Hence, a child with Canadian citizenship whom Canada's central authority no longer considers a habitual resident of Canada may be adopted by a person living in the United States; such an adoption would be viewed as a domestic adoption and the child is not considered a convention child. Therefore, the adoptive family may utilize the E Route to obtain immigration benefits for the child.

Although the United States defines a child's habitual residency as the country of the child's citizenship,¹⁷ most other signatories to the Hague Convention define habitual residence as the place in which one regularly resides. A hint of flexibility is buried deep in the regulations: 8 C.F.R. § 204.303(b) provides that, if a child lives in a country other than the country of his or her citizenship, the central authority of the child's country of citizenship may determine that the child is a habitual resident of the country where he or she resides if the *child's status is substantially stable* for that country to exercise jurisdiction over the child's adoption or custody.

The CIS has issued two documents to assist practitioners with this issue. The first is in the form of questions and answers,¹⁸ and the second is an interoffice memorandum.¹⁹ According to these official communications, a full and final decree of adoption can only be used as an anchor for a child's immigration benefits, if, prior to the finalization of the adoption, the central authority of the child's country of citizenship determined in writing that the child was no longer a habitual resident of that country.²⁰ Only the central authority of the child's country of birth or that central authority's designee can

make the determination as to a child's habitual residence.²¹

Since the United States ratified the Hague Adoption Convention on April 1, 2008, jurisprudence addressing the issue of habitual residence has been minuscule, and very few practitioners have had the opportunity to challenge the U.S. definition. One hopes that, by the year 2015, attorneys, agencies, and courts will be aware of the new procedures and regulation. However, practicing in this area of the law is ominous even for attorneys who are accredited entities.

Future of the Intercountry Adoption Act

At this time, the United States is still operating under the Hague Convention's interim regulations. Many hope that the final regulations will bring clarity to the current regulations and practice.

In communicating with foreign central authorities, a significant difference is noticed. The central authority in the United States is a new entity that is made up of career government employees and one sole social worker. In this body, the approach is always strict compliance with the regulations. Other central authorities have a different composition—pediatricians, social workers, psychologists, anthropologists, a handful of attorneys, and even fewer career government employees—and their emphasis is the *best interest* of the child. At this time, the United States' central authority operates on the premise that the regulations included in the Hague Adoption Convention include details about the best interest of the child.

Conclusion

We are at the threshold of utilizing the Hague Convention and the Intercountry Adoption Act. In 2010, it is still too early to tell whether or not the objectives of the Hague Convention and the Intercountry Adoption Act will come to fruition. However, the new procedures and the myriad of regulations create many safeguards and promote uniformity. **TFL**



Irene Steffas is an "approved lady (person)," also referred to as an accredited body for incoming and outgoing adoption convention cases under the Intercountry Adoption Act and The Hague Convention on Protection of Children & Co-operation in Respect of Intercountry Adoption; only three attorneys have been designated as approved persons in the United States. The State Department's Bureau of International Information Programs has sent Steffas as a goodwill ambassador for international adoptions to Kyrgyzstan (2009), Kazakhstan (2006 and 2007), Ukraine (2006), Armenia (2005), and Spain (2003). Steffas is a member of the American Immigration Lawyers Association and the American Academy of Adoption Attorneys. Her practice is limited to adoption, surrogacy, and immigration with an emphasis on intercountry adoption. © 2010 Irene Steffas. All rights reserved.

Endnotes

¹Hague Conference on Private International Law,

Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, available at www.hcch.net/index_en.php?act=conventions_text&cid=69 (last visited Sept. 15, 2010). (This convention is number (33)).

²Joan Heifetz Hollinger, *ADOPTION LAW AND PRACTICE*, (Matthew Bender and Co., 2005) 11.

³Intercountry Adoption Act, Pub. L. No. 106-279 (Oct. 6, 2000). This federal law implements the Convention on Protection of Children & Co-operation in Respect of Intercountry Adoption.

⁴Hollinger, *supra* note 2.

⁵8 U.S.C.A. § 1101(b)(1)(E) is the source cited in the U.S. code that correlates to the INA.

⁶INA § 101(b)(1)(E)(ii) provides for the family unity of siblings when one child is under the age of 16 and another child is older than 16 but younger than 18 years of age. This provision is also found for cases involving orphans under the F Route and for convention adoptees under the G Route.

⁷Legal custody, in relation to adoption, is defined as when an adoption is finalized or when a court or competent authority grants custody.

⁸*In re Adoption of D. J. F. M.*, a child, 643 S.E.2d 879 (Ga. Ct. App. 2007).

⁹8 U.S.C.A. § 1101(b)(1)(F).

¹⁰8 C.F.R. § 204.3(b), 9 FAM § 42.21N13, and Adjudicator's Field Manual (AFM) § 21.5, (available www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html).

¹¹8 U.S.C.A. § 1101(b)(1)(G), 9 FAM § 43.21N14, and AFM § 21.6.

¹²Caroline Nicholson, "*The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993*," in C.J. Davel, ed., *INTRODUCTION TO CHILD LAW IN SOUTH AFRICA* at 248 (Juta & Co., 2000).

¹³8 C.F.R. § 204.311(d).

¹⁴8 C.F.R. § 204.302 (a) and (b).

¹⁵For more information about accredited agencies, visit the Department of State's website, www.adoption.state.gov/hague/accreditation.html.

¹⁶8 C.F.R. § 204.301(b).

¹⁷8 C.F.R. § 303(b).

¹⁸USCIS, Office of Communications, Frequently Asked Questions on Intercountry Adoption, (Sept. 28 2008); also found at AILA InfoNet Doc. No. 08093064 (posted Sept. 30, 2008).

¹⁹8 C.F.R. § 204.2(d)(2)(vii)(F); 8 C.F.R. § 204.2(d)(2)(vii)(E); and Lori Scialabba and Don Neufeld, USCIS Interoffice Memorandum, "Intercountry adoption under the Hague Adoption Convention and the USCIS Hague Adoption Convention rule" at 8 C.F.R. §§ 204, 213, and 322, available at www.uscis.gov/files/nativedocuments/Hague_AFMemorandum31oct08.pdf (last visited Oct. 31, 2008).

²⁰Each country defines its own central authority. In Mexico, the appropriate central authority to issue a Habitual Residency Letter is not the official central authority in Mexico, but the Desarrollo Integral de la Familia (DIF) office in the state where the child last resided.

²¹Scialabba and Neufeld, *supra* note 19.