9 FAM 42.21 NOTES

(CT:VISA-1743;   10-19-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 42.21 N1 "IMMEDIATE RELATIVE" DEFINED

(CT:VISA-1178;   04-03-2009)

The Immigration and Nationality Act (INA) defines "immediate relative" to include the following:

(1) Spouse of a U.S. citizen (see 9 FAM 40.1 N1);

(2) Certain spouses (and the accompanying or following-to-join children) of deceased U.S. citizens (see 9 FAM 42.21 N1.2);

(3) Child of a U.S. citizen (see 9 FAM 40.1 N2);

(4) Adopted child of a U.S. citizen (see 9 FAM 42.21 N12);

(5) Orphan to be adopted by a U.S. citizen residing in the United States (see 9 FAM 42.21 N13);

(6) Parent of an adult U.S. citizen (see INA 201(b)(2)(A)(i)); and

(7) Child under 16 adopted or to be adopted under the terms of the Hague Convention (see 9 FAM 42.21 N14 below).

9 FAM 42.21 N1.1 "Spouse," "Child," and "Parent" Defined

(TL:VISA-170;   10-01-1997)

See 9 FAM 40.1 Notes.

9 FAM 42.21 N1.2 "Spouse and Child of Deceased U.S. Citizen" Defined

(CT:VISA-946;   04-11-2008)

a. INA 201(b)(2)(A)(i) (8 U.S.C. 1151(b)(2(A)(i)) as amended by section 101(a) of Public Law 101-649 changed the definition of "immediate relatives" to include the spouse of a deceased U.S. citizen, provided the spouse:

(1) Was married to the U.S. citizen for at least two years prior to the U.S. citizen’s death;

(2) Was not legally separated at the time of the spouse’s death;

(3) Has not remarried; and

(4) Files a petition under INA 204(a)(1)(A)(ii) within two years after the death of the spouse.

b. Section 219(b)(1) of Public Law 103-416 further amended the definition to include the child(ren) of the spouse of the deceased U.S. citizen. Such children, however, may not petition in their own behalf, but are derivatives of the principal beneficiary. Consequently, they can obtain status only as derivatives by accompanying or following to join the principal beneficiary. Derivative status does not extend to unmarried sons or daughters of widows or widowers.

c. Section 423(a)(1) of Public Law 107-56 (the "USA Patriot Act") further extended the self-petitioning right to the spouses (widows/widowers) of U.S. citizen victims of one of the terrorist acts of September 11, 2001, with no requirement that the marriage has existed a specific minimum period. The other requirements placed on spouses of deceased U.S. citizens do apply, however. (See 9 FAM 42.21 N1.2 a(2), (3), and (4) above.) The children of such spouses may be included in the petition of the parent.

d. Section 423(a)(2) of the USA Patriot Act provides that the child of a deceased U.S. citizen victim may retain immediate relative "child" status, regardless of changes of age or marital status, if the child files a petition for such status within two years of the parent's death.

9 FAM 42.21 N1.2-1 Applying for Status Under Section 423 (the USA Patriot Act)

(CT:VISA-728; 04-07-2005)

Under section 423 of the USA Patriot Act, the surviving spouse or child must file a Form I-130, Petition For Alien Relative, with either the U.S. Citizenship and Immigration Services (USCIS) office that has jurisdiction over the place of residence, or with the consular post abroad in which district the beneficiaries reside. Applicants must provide evidence that the U.S. citizen spouse or parent was killed in the attacks of September 11 (see 9 FAM 40.1 N12), as well as relationship.

9 FAM 42.21 N1.2-2 Consular Processing

(CT:VISA-946; 04-11-2008)

Applicants will be processed as Immediate Relative (IR1/IR2), even if the

IR2 is 21 years or older. The usual national crime information center (NCIC), security checks, medical exam, as well as birth, death, divorce, and/or marriage certificates are required. No Form I-864, Affidavit of Support Under Section 213A of the Act, may be required. Applicants are exempt from the public charge inadmissibility of INA 212(a)(4). You should issue an IR1 to a spouse who qualifies under section 423 of the USA Patriot Act and issue an IR2 to the alien child, son, or daughter who qualifies under this section regardless of age or marital status. You should annotate the visa:

"Beneficiary of USA Patriot Act Section 423"

9 FAM 42.21 N1.3 "Adopted Child" Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 42.21 N12.1.

9 FAM 42.21 N1.4 "Orphan" Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 42.21 N13.1.

9 FAM 42.21 N2 ENTITLEMENT TO STATUS

9 FAM 42.21 N2.1 Immediate Relative (IR) Petition Beneficiaries

(CT:VISA-878; 04-25-2007)

An alien is entitled to status as an Immediate Relative (IR) if you have received a properly approved petition from the Department of Homeland Security (DHS) and you are satisfied that the claimed relationship exists.

9 FAM 42.21 N2.2 Derivative Immediate Relative (IR) Status for Spouses or Children

9 FAM 42.21 N2.2-1 Generally No Derivative Status

(TL:VISA-179; 08-21-1998)

The INA does not generally (see exception under 9 FAM 42.21 N2.2-3) accord derivative status for family members of immediate relatives as it does for preference applicants. INA 203(d) does not apply to the classes described in INA 201(b). A U.S. citizen must file separate immediate

relative petitions for the spouse, each child, and each parent.

9 FAM 42.21 N2.2-2 Spouse/Child of Immediate Relative (IR5) Not Entitled to Derivative Status

(CT:VISA-878; 04-25-2007)

"Parents" of U.S. citizens are accorded IR5 status only upon U.S. Citizenship and Immigration Services approval of a Form I-130, Petition for Alien Relative, establishing that the appropriate child-parent relationship exists. In certain circumstances, a U.S. citizen may be entitled to petition for only one parent, such as when the beneficiary's spouse does not meet the definition of "parent" as set forth at INA 101(b)(2). For example, an alien who becomes a stepparent of an 18 year old is not considered to be the "parent" of that child for immigration purposes (see INA 101(b)(1)(B)). Consequently, should that stepchild become a U.S. citizen, USCIS would be unable to approve a Form I-130, Petition for Alien Relative (for IR5 status) for that stepparent. Further, spouses and children of IR5s cannot benefit from derivative status through the principal alien. Spouses, who cannot qualify in their own right for IR-5 status, and any children of an IR5, would require the filing of a separate Form I-130 petition (family-based second) upon the principal's admission to the United States as a permanent resident.

9 FAM 42.21 N2.2-3 Exception

(CT:VISA-946; 04-11-2008)

Section 219(b)(1) of Public Law 103-416 makes an exception to the general rule by providing derivative status for the accompanying or following-to-join children of spouses of deceased U.S. citizens.

9 FAM 42.21 N3 PETITION PROCEDURES FOR U.S. CITIZENS ABROAD

(TL:VISA-23; 04-04-1989)

See 9 FAM 42.41 N4.

9 FAM 42.21 N4 REFUSAL TO FILE IMMEDIATE RELATIVE (IR) PETITION

(CT:VISA-946; 04-11-2008)

In general, the spouse, child, or parent of a U.S. citizen who is entitled to classification as an immediate relative (IR) should be processed as an IR.

However, if you are fully satisfied that the U.S. citizen relative has refused to file a petition on behalf of the spouse, child, or parent, for reasons other than financial consideration or inconvenience, you may consider the applicant for any other type of immigrant visa (IV) for which he or she is qualified.

9 FAM 42.21 N4.1 Alien Classifiable as Immediate Relative (IR) or Preference Immigrant

(CT:VISA-946; 04-11-2008)

If an alien is classifiable both as an IR and a preference immigrant, and the alien's spouse refuses to file an IR petition to avoid conditional status, you may process the alien case as that of a preference immigrant. (See 9 FAM 42.21 N7.)

9 FAM 42.21 N4.2 Spouse/Child of Abusive U.S. Citizen or Lawful Permanent Resident (LPR)

(CT:VISA-878; 04-25-2007)

Abusers generally refuse to file relative petitions because they find it easier to control relatives who do not have lawful immigration status. Section 40701 of Public Law 103-322 contains provisions that allow the qualified spouse or child of an abusive U.S. citizen or LPR to self-petition for immigrant classification.

9 FAM 42.21 N5 ALIEN CLASSIFIABLE AS IMMEDIATE RELATIVE (IR) AND SPECIAL IMMIGRANT

(CT:VISA-946; 04-11-2008)

An alien classifiable as an immediate relative (IR) who is also classifiable as a special immigrant under INA 101(a)(27)(A) or (B) may establish entitlement to classification under either category, depending upon which of the two may be more easily established. Since special immigrants under INA 101(a)(27)(A) and (B) are not subject to numerical limitations, this procedure is in accord with the original intent of Congress in enacting INA 201(b), namely, to prevent the use of immigrant visa (IV) numbers by aliens who are able to immigrate in a visa category not subject to numerical limitations.

9 FAM 42.21 N6 PETITIONER'S NATURALIZATION SUBSEQUENT TO APPROVAL OF FAMILY SECOND PREFERENCE PETITION

(CT:VISA-946; 04-11-2008)

a. In the event of the petitioner's naturalization after approval of a family second petition but before visa issuance, Department of Homeland Security (DHS) regulations (8 CFR 204.2(h)(3)), the petition is automatically converted as of the date of the petitioner's naturalization to accord immediate relative (IR) status under INA 201(b) for the spouse (automatically converted from F21 to IR1) or child (automatically converted from F22 to IR2), or first preference status under INA 203(a)(1) for an unmarried son or daughter (automatically converted from F24 to F11).

b. Proof of naturalization must be submitted to you when considering the visa application and you must include it in the issued visa. The petition need not be returned to USCIS for re-approval. If notification of the naturalization has been received from USCIS in the form of a letter, you must attach it to the petition.

c. Automatic conversion of a petition is not authorized for an alien who is a derivative beneficiary (F23 or FX3) of a petition filed by an legal permanent resident (LPR) who subsequently becomes a U.S. citizen. The principal beneficiary must file (and obtain USCIS approval of) a Form I-130, Petition for Alien Relative (family second preference) upon the principal's admission to the United States before the derivative alien may be granted a visa.

9 FAM 42.21 N7 CONDITIONAL STATUS FOR CERTAIN IMMEDIATE RELATIVES (IRS)

(CT:VISA-946; 04-11-2008)

a. The Immigration Marriage Fraud Amendments Act of 1986 (Public Law 99-639) amended the Immigration and Nationality Act by adding section 216 (8 U.S.C. 1186a) which provides conditional permanent resident status for certain immediate relative (IR) categories at the time of admission.

b. You classify the spouse of a U.S. citizen or the child of a U.S. citizen as a conditional immigrant at the time of visa issuance if the basis for immigration is a marriage that was entered into less than two years prior

to the date of visa issuance.

9 FAM 42.21 N8 MARRIAGE BETWEEN RELATIVES

(CT:VISA-1178; 04-03-2009)

Under INA 204, the USCIS has the responsibility for determining whether an alien is entitled to immediate relative (IR) or preference status by reason of the alien's relationship to a U.S. citizen or permanent resident alien. If USCIS approves a petition with the knowledge that the parties concerned are related to each other such as uncle and niece or as first cousins, you should accept such determination and not attempt to reach an independent conclusion. (See 9 FAM 42.43 PN1.) For information on petitionable marriage relationships, (see 9 FAM 40.1 Notes).

9 FAM 42.21 N9 STEPPARENT/STEPCHILD RELATIONSHIP

(CT:VISA-946; 04-11-2008)

A stepparent or stepchild may confer or derive immigrant status even when parties to a marriage creating the stepparent/stepchild relationship have legally separated provided the family relationship has continued to exist between the stepparent and stepchild.

NOTE: The stepparent-stepchild relationship must have been established prior to the stepchild's 18th birthday (see INA 101(b)(1)(B), 8 U.S.C. 1101(b)(1)(B)).

9 FAM 42.21 N10 EFFECT OF PRIVATE LEGISLATION ACCORDING "CHILD" STATUS

(CT:VISA-946; 04-11-2008)

A petition according preference status shall be regarded as approved to accord immediate relative (IR) status under INA 201(b)(2) (8 U.S.C. 1151) if the beneficiary has been declared a "child" of the petitioner by private legislation. You should regard such a petition as approved for that purpose as of the date of the enactment of the private legislation or of the effective date stated in the language of the private law.

9 FAM 42.21 N11 PROCESSING VISAS IN ADOPTION CASES

(CT:VISA-1178; 04-03-2009)

a. The Bureau of Consular Affairs (CA) considers adoption cases to be of the highest priority. Consular sections should provide helpful, courteous, and expeditious assistance to U.S. citizens and maintain sound visa-issuance policies.

b. Consular sections should be responsive to inquiries, schedule interviews quickly, and make prompt decisions. An adoption involves both the adopting parents and the child. Even if the final resolution is that the child is ineligible for immigration, you best serve all parties by making this determination as quickly as possible. Any required field investigations or record checks in an adoption case must be given priority over other immigrant and nonimmigrant visa (IV/NIV) cases, and must be completed expeditiously so that the case may be resolved in a timely manner. If you determine that a petition is not "clearly approvable" or that a USCIS-approved petition may have been approved in error, you should forward it to the appropriate USCIS office without delay together with a cover memo detailing the reasons for the return.

c. Correspondence on orphan and adoption issues should be shared with other concerned offices outside the Visa Office (CA/VO) in particular the Office of Children's Issues (CA/OCS/CI) and, when appropriate, the Office of Fraud Prevention Programs (CA/FPP). Posts should use CVIS, CASC, KOCI, and KFRD tags respectively, on adoption-related correspondence, to ensure timely distribution of cables to these offices. Posts should keep the Department and USCIS informed of general adoption issues, especially changes in local documentation or legal and/or procedural requirements.

d. Properly documenting adopted children is important. Depending on the purpose of the travel and circumstances of the case, one of the following options would be most appropriate.

    (1) Immigrant visa (IV) classifications:

        (a) INA 101(b)(1)(E) (8 U.S.C. 1101(b)(1)(E)) allows a U.S. citizen to petition for an unmarried, under age-21 "child" who was adopted while under the age of 16 and has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years (IR2, see 9 FAM 42.21 N12);

        NOTE: The two year requirement does not apply in certain cases involving child abuse.

        (b) INA 101(b)(1)(F) (8 U.S.C. 1101(b)(1)(F)) permits a U.S.

citizen to petition for an under age-16 “orphan” if the parents have been found suitable to adopt and meet age and citizenship requirements, if the child has no parents or a sole or surviving parent who is unable to care for him or her and has irrevocably released the child for emigration and adoption, and if the child is unmarried and under age 21 at the time of immigration (IR3 or IR4, see 9 FAM 42.21 N13); or

(c) Once the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption has entered into force for the United States on April 1, 2008, adopted children in Hague countries will generally need to demonstrate that they meet the qualifications established in INA 101(b)(1)(G) for Hague children. However, until the Hague Convention has entered into force for the United States, adopted children in Hague countries must demonstrate that they fit into either the INA 101(b)(1)(E) “child” or INA 101(b)(1)(F) “orphan” classification in order to obtain an immigrant visa (IV) based on the adoptive relationship. (See 9 FAM 42.21 N14, including guidance on pipeline cases.)

(2) Nonimmigrant visas (NIVs) classifications:

(a) Children adopted by American citizens who do not intend to live in the United States may visit the United States on NIVs (see 9 FAM 41.31 N14.3) and, in some cases, qualify for a B-2 visa to participate in expeditious naturalization procedures (see 9 FAM 42.21 N13.2-9 g, 9 FAM 42.21 N14.13-9 and 9 FAM 41.31 N14.6).

(b) Adopted children who meet INA 101(b)(1)(E) criteria may also qualify for nonimmigrant status as the derivative child of a principal NIV applicant. For example, the principal applicant for a nonimmigrant F visa may bring their adopted child to the United States under the nonimmigrant F-2 classification as long as the otherwise-qualified child was adopted before age 16 and has already spent two years in the applicant’s residence and custody.

NOTE: Unless INA 101(b)(1)(E) requirements are met, the adopted child does not qualify as a derivative child; INA 101(b)(1)(F) criteria cannot be applied to nonimmigrant derivative cases. However, as stated in 9 FAM 41.21 N5.1-1, to qualify for derivative A or G NIV status as a member of the principal alien’s immediate family, a legal son or daughter need not have qualified as a “child” as defined in INA

101(b)(1).

(c) You should carefully review NIV applications for children who have been adopted or will be adopted by U.S. citizens and who intend to live in the United States with their adoptive parents. Such children may wish to visit the United States for a short period of time and return to their country of residence for IV processing, thereby satisfying 214(b) provisions and qualifying for a B-2 visa. However, for cases where you are not satisfied that the child will return to their place of residence, a NIV should not be issued to the child. Such an issuance would violate the law, circumvent scrutiny intended to protect the child and adoptive parents, and place the child in an untenable immigration predicament since DHS regulations generally prohibit the approval of an immigrant petition for a child who is in the United States either illegally or in nonimmigrant status.

(3) In rare cases where there are significant humanitarian concerns (i.e., natural disaster, civil disorder/war, etc.), adoptive parents may seek humanitarian parole for an adoptive child who will be legally able to adjust status in the United States based on an immigrant classification (see 9 FAM 42.1 N4).

(4) You should also recognize that you may also very occasionally encounter cases of adopted children who are not eligible for any immigrant or NIV classification, usually due to their advanced age or the circumstances of the adoption.

e. Effect of foreign laws and customs on immigrant petitions for adopted children:

(1) Some foreign states have no statutory provisions governing adoption, and in some of these states the concept of adoption is not legally recognized. Legal adoption for the purpose of immigration does not exist in foreign states that apply Islamic law in matters involving family status.

(2) Accordingly, Department of Homeland Security (DHS) and the Department hold that relationships through claimed adoptions in such countries cannot be established for visa petition purposes. DHS and the Department also hold that an adoptive relationship claimed to have been effected in a country which has no statutory provisions governing adoption cannot be recognized for visa classification purposes unless the relationship is sanctioned by local custom or religious practice, judicially recognized in the country, and the relationship embraces all the usual attributes of adoption, including the same irrevocable rights accorded a natural born child.

9 FAM 42.21 N12 ADOPTED CHILD UNDER 101(B)(1)(E) - IMMEDIATE RELATIVE (IR2)

9 FAM 42.21 N12.1 "Child" Defined

(CT:VISA-878; 04-25-2007)

a. Under INA 101(b)(1)(E), an alien is defined as a child and is classified IR2, if the child:

   (1) Was adopted while under the age of 16 (or is the natural sibling of such child who was adopted by the same parents while under the age of 18); and

   (2) Has been in the legal custody of, and has resided with, the adopting parent(s) for two years.

b. A child who satisfies all the requirements of INA 101(b)(1)(E) with respect to an U.S. citizen adoptive parent/petitioner may be the beneficiary of an Form I-130, Petition for Alien Relative, and classifiable as an IR2. A child who satisfies the requirements of this subsection with respect to an alien may seek any immigration benefit appropriate to a legitimate child of that alien.

9 FAM 42.21 N12.2 Adoption Requirement

(CT:VISA-878; 04-25-2007)

The adoption must have been both final and legal in the jurisdiction in which it occurred. A "simple" or "limited" adoption (an adoption which does not create a permanent parent-child relationship or give the adopted child the same rights as a child legitimately born to the adoptive parent; i.e., inheritance) does not constitute an adoption for immigration purposes. Similarly, some foreign states have no statutory provisions governing adoption or legal mechanism for adoptions to exist (see 9 FAM 42.21 N11 e for additional details).

9 FAM 42.21 N12.3 Legal Custody Requirement

(TL:VISA-372; 03-18-2002)

"Legal custody" means the assumption of responsibility for a minor by an adult under the laws of the state and under the order or approval of a court of law or other appropriate government entity. This provision requires that a legal process involving the courts or other recognized government entity take place. If the adopting parent was granted legal custody by the court or recognized governmental entity prior to the adoption, that period may be counted toward fulfillment of the two-year legal custody requirement.

However, if custody was not granted prior to the adoption, the adoption decree shall be deemed to mark the commencement of legal custody. An informal custodial or guardianship document, such as a sworn affidavit signed before a notary public, is insufficient for this purpose.

9 FAM 42.21 N12.4 Residence Requirement

(TL:VISA-372; 03-18-2002)

Evidence must also be submitted to show that the adopted child and/or beneficiary resided with the adoptive parent and/or petitioner for at least two years. Generally, such documentation must establish that the petitioner and the beneficiary resided together in a parent-child relationship. The evidence must clearly indicate the physical living arrangements of the adopted child, the adoptive parent(s), and the natural parent(s) for the period of time during which the adoptive parent claims to have met the residence requirement. When the adopted child continued to reside in the same household as the natural parent(s) during the period in which the adoptive parent/petitioner seeks to establish his or her compliance with this requirement, the petitioner has the burden of establishing that he or she exercised primary parental control during that period of residence. Evidence of parental control may include, but is not limited to, evidence that the adoptive parent provided financial support and day-to-day supervision of the child, and owned or maintained the property where the child resided.

9 FAM 42.21 N12.5 Applying Two-Year Custody and Residence Requirement

(TL:VISA-372; 03-18-2002)

The two years the child was in the legal custody of the adoptive parent do not have to be the same two years the child resided with the adoptive parent. The requisite two-year custody and two-year residence may take place either prior to or after the adoption, but both must be completed before the child will be eligible for benefits under INA 101(b)(1)(E). Both legal custody and residence are counted in aggregate time. A break in legal custody or residence, therefore, will not affect the time already fulfilled.

9 FAM 42.21 N12.6 Processing Immigrant Visas (IV) for Adopted Children

(CT:VISA-878; 04-25-2007)

An adopted child who has satisfied all of the requirements of INA 101(b)(1)(E) while still unmarried and under the age of 21 qualifies as a child of the adoptive parent. An immigrant visa (IV) for such a child is

processed in much the same way as an IV would be for a legitimate biological child of the same parent. In support of the Form I-130, Petition for Alien Relative, the adoptive parent and/or petitioner must provide:

(1) A certified copy of the adoption decree;

(2) The legal custody decree; if custody occurred before the adoption;

(3) A statement showing dates and places where child resided with the parents; and

(4) If the child was adopted while aged 16 or 17 years, evidence that the child was adopted together with, or subsequent to the adoption of, a natural sibling under age 16 by the same adoptive parent(s).

9 FAM 42.21 N12.7 Adopted Children Do Not Have To Be Orphans

(CT:VISA-878; 04-25-2007)

Adopted children may be properly documented as children, orphans, or, eventually, as Hague children, and in some cases should receive nonimmigrant visas (see 9 FAM 42.21 N11). A child immigrating to the United States who satisfies the requirements of INA 101(b)(1)(E) does not also have to qualify as an orphan under INA 101(b)(1)(F), nor does he or she have to have been an orphan prior to the adoption. If a child qualifies under INA 101(b)(1)(E), adopting parents should not be encouraged to pursue orphan processing for the child.

9 FAM 42.21 N12.8 Adoptive Stepchildren

(CT:VISA-878; 04-25-2007)

A child can be considered the stepchild of his or her adoptive parent's spouse only if he or she qualified as the child of the adoptive parent under INA 101(b)(1) at some point when both a legal marriage existed between the adoptive parent and spouse and the child was still under age 18. For example, if an alien woman adopts a small child, fulfills the two-year custody and joint residence requirements per INA 101(b)(1)(E), and then marries an U.S. citizen while her adoptive child is still under age 18, the child qualifies as the stepchild of the U.S. citizen. If she marries the U.S. citizen before fulfilling the two-year custody and joint residence requirements, then the child does not become a stepchild of the American citizen for immigration purposes until those requirements are fulfilled, provided she is still legally married to the U.S. citizen and the child is still under age 18.

9 FAM 42.21 N12.9 Relating 101(b)(1)(E) to Adult

or Married Sons or Daughters

(TL:VISA-372;   03-18-2002)

An alien may subsequently be considered the son or daughter of an adoptive parent provided he or she had satisfied the requirements of INA 101(b)(1)(E) with respect to that adoptive parent while still unmarried and under the age of 21. An alien who never satisfied the requirements of that subsection with respect to an adoptive parent, however, may not petition for or be the beneficiary of a petition filed by a previous parent, regardless of whether or not any benefit has been sought based on the adoptive relationship.

9 FAM 42.21 N12.10 Child Citizenship Act

(CT:VISA-946;   04-11-2008)

Many adoptive parents have questions related to the Child Citizenship Act and its impact on their child. They can be referred to the USCIS Web site or State Web site for additional information and important details on the legislation's impact on adopted children. In general, IR2 adopted children under the age of 18 at the time of admission to the United States are granted automatic citizenship upon admission. Adoptive parents must file an Form N-600, Application for Certificate of Citizenship request with USCIS or request a U.S. passport to obtain proof of citizenship.

9 FAM 42.21 N13 ORPHANS ADOPTED UNDER INA 101(B)(1)(F) - IMMEDIATE RELATIVE (IR3 AND IR4) CLASSIFICATIONS

9 FAM 42.21 N13.1 "Orphan" Processing

(CT:VISA-1178;   04-03-2009)

a. Introduction

   (1) Many parents who adopt a child overseas or are granted legal custody of a child for purposes of adoption will petition for the child to enter the United States based on immigrant classification under INA 101(b)(1)(F) as an "orphan." More detailed information on the orphan classification is provided in 9 FAM 42.21 N13.2.

   (2) All adoption cases must be treated with considerable sensitivity and processed as quickly as is reasonably possible to avoid hardship for the child or adopting parents.

b. Providing proper travel documentation to adopted children is important,

and particularly given the fairly complicated nature of orphan processing, parents and consular officers should carefully consider the nature of the intended travel prior to beginning orphan processing. Depending on the purpose of the travel and circumstances of the case, adopted children could receive immigrant visas (IVs) based on the orphan, child (IR2, per INA 101(b)(1)(E)) (see 9 FAM 42.21 N12), or, eventually, Hague child (per INA 101(b)(1)(G)) (see 9 FAM 42.21 N14) classifications based on intent to immigrate to the United States. Alternatively, some adopted children qualify for nonimmigrant visas (NIVs) as family members of other nonimmigrant visa (NIV) holders (see 9 FAM 42.21 N11), or as short-term tourists or participants in a naturalization hearing (see 9 FAM 42.21 N13.2-9 and 9 FAM 41.31 N14.3 and 9 FAM 41.31 N14.5). You should not issue a NIV to an adopted child who is immigrating to the United States as a result of this trip to reside with his or her adoptive parents. (See 9 FAM 42.21 N11 for additional details on appropriate options for documenting adopted children.)

c. Processing an orphan case requires the following steps:

(1) Prospective adopting parents establish their suitability and ability to provide a proper home environment for the adopted child, usually through an approved Form I-600-A, Application for Advance Processing of Orphan Petition (see 9 FAM 42.21 N13.3);

(2) Prospective adopting parents establish that a particular child may be classified as an orphan, as demonstrated by an approved Form I-600, Petition to Classify Orphan as an Immediate Relative and confirmed through the Form I-604, Determination on Child for Adoption (see 9 FAM 42.21 N13.4 and 9 FAM 42.21 N13.5); and

(3) A visa application is filed on behalf of the child, providing all necessary documentation for production of the visa and demonstrating that no ineligibilities apply; the application is adjudicated by you, and, the visa, if issued, serves as the basis for their request for admission into the United States and acquisition of citizenship (see 9 FAM 42.21 N13.6).

d. Because processing of orphan cases varies somewhat from standard IV processing, 9 FAM 42.21 N13 examines each of the stages for processing these cases. Questions related to processing of such cases should be directed to CA/VO/F/P; classification questions should be directed to CA/VO/L/A (with a copy to CA/VO/F/P); and reporting on countries' adoption practices should be directed to CA/OCS/CI, with a copy to CA/VO/F/P.

9 FAM 42.21 N13.2 "Orphan" Classification

9 FAM 42.21 N13.2-1 Key Elements of Classification

(CT:VISA-1178; 04-03-2009)

a. There are three key elements to the orphan classification:

(1) The child is under the age of 16 at the time a petition is filed on his or her behalf (or under the age of 18 if adopted or to be adopted together with a natural sibling under the age of 16) and is unmarried and under the age of 21 at the time of petition and visa adjudication (see 9 FAM 42.21 N13.2-2);

(2) The child has been or will be adopted by a married U.S. citizen and spouse, or by an unmarried U.S. citizen at least 25 years of age (see 9 FAM 42.21 N13.2-2 and 9 FAM 42.21 N13.2-3); and

(3) The child is an orphan because either:

(a) The child has no parents because of the death or disappearance, abandonment or desertion by, or separation from or loss of both parents (see 9 FAM 42.21 N13.2-4 and 9 FAM 42.21 N13.2-5); or

(b) The child's sole or surviving parent is incapable of providing proper case and has, in writing, irrevocably released the child for emigration and adoption (see 9 FAM 42.21 N13.2-4 and 9 FAM 42.21 N13.2-6).

b. In addition, you must be satisfied that the petitioner (and spouse, if applicable) intends to enter into a bona fide parent-child relationship with that orphan (see 9 FAM 42.21 N13.2-7), and that there is no credible evidence of child-buying, fraud, or misrepresentation associated with the case (see 9 FAM 42.21 N13.2-8).

c. Children who are determined to be orphans may be classified as an IR3 or IR4. Proper classification is very important given passage of the Child Citizenship Act of 2000, and is addressed in 9 FAM 42.21 N13.2-9.

9 FAM 42.21 N13.2-2 Age and Citizenship Requirements

(CT:VISA-946; 04-11-2008)

a. To be considered an orphan, the adopted child must have an Form I-600, Petition to Classify Orphan as an Immediate Relative filed on his or her behalf before the child's 16th birthday, or, in the case of natural siblings, before the child's 18th birthday.

(1) Form I-600 must be filed, but does not have to be approved, before the beneficiary's 16th (or 18th for natural siblings) birthday.

(2) Because an "orphan" must meet the general definition of a child in INA 101(b)(1), the beneficiary must be unmarried and under the

age of 21 at all stages of petition adjudication, visa processing, and travel to the United States.

(3) Public Law 106-139 was enacted to prevent the separation of natural siblings through adoption where the circumstances of the older child are essentially those of the younger child except that the older child is age 16 or 17. Therefore, 16- or 17-year olds traveling with or after younger siblings travel may also benefit from an Form I-600 as long as the petition is filed prior to their 18th birthday.

(4) See 9 FAM 42.21 N13.3 on other case-specific age-related requirements that may have to be met at the time of petition filing based on USCIS' approval of individual parents' suitability to adopt overseas.

b. Only a U.S. citizen may file Form I-600 for an orphan.

(1) If the petitioner is legally married, the spouse does not have to be a U.S. citizen, but if not a U.S. citizen, must be in lawful immigrant status. There are no age requirements for a married petitioner and spouse. Regardless of any legal separation or separation agreement, the spouse must sign the Form I-600.

(2) If the petitioner is unmarried, he or she must be at least 24 years old at the time he or she submits a Form I-600-A, Application for Advance Processing of Orphan Petition (see 9 FAM 42.21 N13.3), and at least 25 years old at the time he or she files the Form I-600.

9 FAM 42.21 N13.2-3 Adoption or Intent to Adopt

(CT:VISA-1743; 10-19-2011)

The petitioner(s) must have adopted or intend to adopt the orphan, as demonstrated by either (1) or (2) below:

(1) Evidence of a full and final adoption under the laws of the foreign sending country. For adoptions abroad where the adoptive parent(s) did not personally see the orphan prior to or during the adoption proceeding abroad or, if petitioners are married, where the adoption is not done in the name of both parties, the petitioner(s) must also have evidence that the state of the orphan's proposed residence allows re-adoption or provides for judicial recognition of the adoption abroad.

(a) Evidence of a full and final adoption would usually be in the form of an adoption decree, giving the adopted child the same rights and privileges which are accorded to a natural legitimate child (such as inheritance rights, etc.) Simple, conditional, or limited adoptions, such as those conducted under Islamic Family Law in some countries, are more

accurately described as guardianship and are not considered valid adoptions for U.S. immigration purposes (see 9 FAM 42.21 N11 e). If married, both petitioners must be party to the adoption.

(b) A foreign adoption, even if documented with a valid local adoption decree, is not valid for purposes of demonstrating a full and final adoption unless the adoptive parent(s) actually saw the child at some point prior to or during the foreign adoption procedures. If the petitioner is married, the spouse must also have seen the child prior to or during the adoption proceedings. If neither or only one of the two adoptive parents actually saw the child, the foreign adoption cannot be considered full and final, although it should adequately prove legal custody of the child for purposes of emigration and adoption (see 9 FAM 42.21 N13.2-3 *paragraph* (2)). In such a case, if the petitioners can demonstrate that their state of residence allows re-adoption, provides for judicial recognition of the adoption abroad, or that pre-adoption requirements have been met, the petitioner should be considered to have adequately shown evidence of the intent to adopt.

NOTE: For proxy adoptions where neither adopting parent has seen the child, the Form I-600 will need to be filed with a USCIS office in the United States since the petitioner will not be physically present overseas. (See 9 FAM 42.21 N13.4.)

(2) An irrevocable release of the orphan for emigration and adoption from the person, organization, or competent authority which had the immediately previous legal custody or control over the orphan. The petitioner (and spouse, if applicable) must intend to, and be legally able, to adopt the child in the United States; petitioners must present evidence showing that any state pre-adoption requirements noted in the approval of their suitability to adopt (Form I-600-A approval notice) have been met (unless they cannot be complied with prior to the orphan's arrival in the United States).

(a) Evidence of custody of the child for purposes of emigration and adoption will vary greatly depending on local laws and regulations governing child custody. Generally, this evidence will consist of documentation from a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage legally authorized to release the child for emigration and adoption according to local law or regulation. The evidence does not have to include specific reference to the custody being granted for purposes of emigration and adoption, but should not prohibit the child's ability to leave

the country or otherwise limit the custody arrangements of the parents (i.e., guardianship for academic purposes, temporary custody, etc.). Generally speaking, grants of guardianship under Islamic sharia provisions do not meet custody requirements.

(b) Petitioners who have custody of the child for purposes of emigration and adoption must also demonstrate that they have met or will meet the pre-adoption requirements of the state of the child's proposed residence. Form I-600-A approval notice should note any pre-state requirements that must be met. Adoptive parents must provide you with evidence that all such identified pre-adoption requirements (except those that cannot be complied with prior to the child's arrival in the United States) have been met. Officers should be as flexible as possible in evaluating such evidence, opting for the minimum level of proof acceptable in each case. If questions arise regarding pre-adoption requirements, you can consult with CA/OCS/CI and CA/VO/F/P.

(c) You need to be well versed in the host country's adoption, custody and guardianship laws and procedures, and should rely on competent local authorities to make responsible decisions about the facts surrounding child custody and final adoptions, not second-guessing whether such authorities are correctly implementing their own laws or regulations. At the same time, you must keep in mind that terms used by such local authorities (such as "abandonment") may not always be equivalent to definitions for such terms in U.S. immigration law. In all cases, the requirements of U.S. immigration law must be met. If you have evidence of a trend involving inappropriate application of local laws or local officials' decisions contributing to child-buying, fraud or misrepresentation in adoption cases, details of post's findings should be reported to CA/VO/F/P and CA/OCS/CI.

9 FAM 42.21 N13.2-4 Status of Natural Parents - Introduction

(CT:VISA-1178; 04-03-2009)

a. A child may be considered an orphan if he or she has no parents because of the death or disappearance, abandonment or desertion by, or separation from or loss of both parents (see 9 FAM 42.21 N13.2-5). A child may also be considered an orphan if they have a sole or surviving parent unable to care for the child who irrevocably releases the child for emigration or adoption (see 9 FAM 42.21 N13.2-6).

b. These two sets of criteria are distinct and separate, and only one set of requirements must be met for the child to be considered an orphan. For example, a child whose sole parent is unable to provide proper care does not have to have been abandoned by both parents in order to qualify as an orphan. Similarly, if one of the child's parents has died and local courts have legally separated the child from the remaining parent, there is no need under U.S. immigration law for the separated parent to irrevocably release the child for emigration and adoption.

c. Department of Homeland Security (DHS) regulations establish very specific meanings for terms describing an orphan's natural parents, and specific documentation is required in each case, as outlined in 9 FAM 42.21 N13.2-5 and 9 FAM 42.21 N13.2-6. Questions related to whether the circumstances of and evidence submitted for a particular case are sufficient for orphan status should be directed to CA/VO/F/P and CA/VO/L/A. If primary evidence is not available but posts feels the case may still merit orphan classification, you should consult with CA/VO/F/P and CA/VO/L/A.

9 FAM 42.21 N13.2-5 Orphan With No Parents

(CT:VISA-878; 04-25-2007)

An orphan may have no parents due to any combination of the following six reasons: death, disappearance, abandonment, desertion, separation, or loss. For example, if one parent disappeared and the second parent was legally separated from the child, the child may qualify as an orphan. A parent-child relationship is terminated by any one of these conditions: a child "separated" from a parent, for example, does not also have to have been "abandoned" by that parent.

(1) Death of child's parent(s).

(a) A child whose natural parents are deceased and who has not acquired another parent (such as a stepparent or legal adoptive parent) under the INA is considered an orphan. For example, a legitimate child's natural parents who were just killed in an accident could be considered an orphan (assuming other criteria met). That child would continue to qualify as an orphan even after a court named her grandmother as her guardian, as long as the child was not legally adopted.

(b) Primary evidence that the biological parent has died is a death certificate in the name of the parent.

(2) Disappearance of child's parent(s).

(a) "Disappearance" means that the parent(s) has unaccountably or inexplicably passed out of the child's life; his or her or their

whereabouts are unknown; there is no reasonable hope of reappearance; and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

(b) Primary evidence of disappearance consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such disappearance and unconditionally divesting the parent(s) of all parental rights over the child.

(3) Abandonment by the child's parent(s).

(a) "Abandonment" means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A child who is placed temporarily in an orphanage should not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child.

(b) A relinquishment or release by the parent(s) to the prospective adoptive parents or for a specific adoption does not constitute "abandonment." Similarly, the relinquishment or release of the child by the parent to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute "abandonment" unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child released to a government-authorized third party, however, could be considered to have been abandoned even if the parent(s) knew at the time that the child would probably be adopted by a specific person or persons, so long as the relinquishment was not contingent upon adoption by a specific person or persons.

(c) Primary evidence of abandonment is a document signed by the parent(s) unconditionally releasing the child to an orphanage, or a decree from a court or other competent

authority making the child a ward of the state and unconditionally divesting the parent(s) of all parental rights over the child.

(4) Desertion by the child's parent(s).

(a) "Desertion" means that the parent(s) has willfully forsaken the child and has refused to carry out normal parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country. Desertion does not mean that the parent(s) has disappeared, but rather that he and/or she refuses to carry out his or her parent rights and obligations towards the child. Desertion differs from abandonment in that the parent(s) has not taken steps to divest him or herself of parental duties, but that parent's inaction has caused a local authority to step in and assume custody of the child.

(b) Primary evidence of desertion consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such desertion and unconditionally divesting the parents of all parental rights over the child.

(5) Separation from the child's parent(s).

(a) "Separation" means the involuntary severance of the child from his or her parent(s) by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. This is often called "termination" of parental rights and often occurs because of child abuse or neglect, or because a competent authority deems the parent to be "unfit." The parent(s) must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

(b) Primary evidence of separation consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such separation and unconditionally divesting the parent(s) of all parental rights over the child.

(6) Loss from the child's parent(s).

(a) "Loss" means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

(b) Primary evidence of loss consists of a decree from a court or other competent authority (such as an empowered international organization) making the child a ward of the state by virtue of such loss and unconditionally divesting the parent(s) of all parental rights over the child.

9 FAM 42.21 N13.2-6 Orphan with Sole or Surviving Parent

(CT:VISA-1178; 04-03-2009)

If a child is not an orphan by nature of having no parents, he or she may still be considered an orphan if the child has a sole or surviving parent who is unable to provide proper care and who has irrevocably released the child for emigration and adoption. This is the only circumstance where a child released directly to the adoptive parent(s) can qualify as an orphan.

(1) Sole or surviving parent.

(a) A "surviving" parent is defined as a child's living parent when the child's other parent is dead, and the child has not acquired another parent (i.e., a stepparent per definition in INA 101(b)(2)). Primary evidence would be a death certificate in the name of the deceased parent.

(b) A "sole" parent is one who is the mother of the child and whose situation meets all of the following criteria:

(i) The child was born out of wedlock (regardless of whether or not local law deems all children to be legitimate at birth);

(ii) The child has not been legitimated under the law of the child's residence or domicile or under the law of the natural father's residence or domicile while the child was in the legal custody of the legitimating parent or parents;

(iii) The child has not acquired a stepparent; and

(iv) The natural father of the child is unknown, or has disappeared or abandoned or deserted the child, or has in writing irrevocably released the child for emigration and adoption.

(c) Evidence of "sole" parent status would be the birth certificate of the child or other proof of out-of-wedlock status, and documentation per 9 FAM 42.21 N13.2-5 or 9 FAM 42.21 N13.2-6 (1)(a) on the whereabouts or status of the natural father.

(d) Note that under current DHS regulations, a father may not be considered to be a child's "sole" parent, and therefore could only release a child for emigration and adoption if he is a "surviving" parent.

(2) "Incapable of providing proper care" means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign sending country. A parent could be unable to provide proper care due to a number of reasons, including extreme poverty, mental or emotional difficulties, or long-term incarceration.

(3) The sole or surviving parent's irrevocable release for emigration and adoption must be in writing, in a language that the parent is capable of reading and signed by the parent. The release must be irrevocable and without stipulations or conditions which would cause custody of the child to revert to the birth parent. The release may, however, identify the person(s) to whom the parent is releasing the child, even if that person is the prospective adoptive parent. If the parent is illiterate, but in an interview satisfies the you that he or she had full knowledge of the contents of the document and understood the irrevocable nature of the release, the officer may also treat the document as evidence of the release required for the orphan classification.

(4) There is no requirement that the irrevocable release be completed in the presence of a consular officer or notary, and in most cases the natural parent's presence should not be required to process an orphan case. However, when post has serious concerns with a particular case regarding the natural parent's intent or understanding of the release, you may request an interview of the natural parent. If there are concerns that purported natural parents may not be the biological parents of the child, DNA tests may be used to affirm that the true natural parent is releasing the child for emigration and adoption.

9 FAM 42.21 N13.2-7 Bona Fide Parent-Child Relationship, Severing of Previous Relationship

(CT:VISA-946; 04-11-2008)

a. Petitioners seeking to bring an orphan to the United States must intend to enter into a bona fide parent-child relationship with that orphan. A bona fide parent-child relationship implies the provision of care, support and direction to the orphan, without the intent to profit financially or otherwise from the presence of the child.

b. An adoption is intended to sever previous parental ties. Therefore, a

caretaker relationship in which the adopting parents intend to return the child to their natural parents or former guardians in the future would generally not constitute a bona fide parent-child relationship. Also, as provided in INA 101(b)(1)(F), no natural parent or prior adoptive parent of an orphan may obtain any immigration benefit as a result of their relationship with an orphan.

9 FAM 42.21 N13.2-8 Child Buying, Fraud, Misrepresentation

(CT:VISA-1178; 04-03-2009)

a. Orphan classification is not appropriate for cases involving clear and documented evidence (or an admission) of child-buying, fraud, or misrepresentation.

b. Child-buying.

   (1) A child should not be considered an orphan if the adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's natural parent(s), agent, or other individual as payment for the child or as an inducement to release the child. You must seriously review allegations of child-buying, and carefully weigh the evidence available to substantiate such charges.

   (2) However, the prohibition on payments does not preclude reasonable payment for necessary activities such as administrative, court, legal, translation, or medical services related to the adoption proceedings. Foreign adoption services are sometimes expensive and their costs can often seem disproportionately high in comparison with other social services. Further, in many countries there is a network of adoption facilitators, each playing a role in processing an individual case and thus reasonably expecting to be paid for their services. In most adoption cases the expenses incurred can be explained in terms of "reasonable payments." Even cash given directly to a biological mother may be justifiable if it relates directly to expenses such as pre-natal or neo-natal care, transportation, lodging, or living expenses. Investigations of child-buying, therefore, should focus on concrete evidence or an admission of guilt.

c. Fraud or misrepresentation.

   (1) A child should not be considered an orphan if there is evidence of fraud or misrepresentation with the purpose of using deception to obtain visas for children who do not qualify. In many cases, both the U.S. citizen adoptive parents and adoptive children may be

unwitting victims of a fraud which was actually perpetrated upon them by unscrupulous agents misrepresenting important facts about these children. If the fraud involves stolen or kidnapped children, biological parents may also be victims. In some cases, biological parents may also have been misled about the permanent nature of their separation from the child.

(2) You must carefully scrutinize documentation presented in support of orphan cases. In some cases, it may be necessary to conduct field investigations, DNA tests, or additional interviews in order to investigate possible adoption fraud. Because adoption cases are multi-faceted, a successful anti-fraud program should engage the entire adoption community, including agents, lawyers, orphanages, foster care providers, medical personnel, judges, local officials, and law enforcement personnel.

(3) You should keep in mind, however, that the responsibility for enforcing local laws and for protecting the rights of children and biological parents rests primarily with local authorities. Also, anti-fraud efforts must be balanced with the mandate to provide service to U.S. citizens and the need to be sensitive to the victims of fraud. Whenever possible, posts should use anti-fraud techniques which do not unnecessarily delay processing or create further hardship for fraud victims.

9 FAM 42.21 N13.2-9 Immediate Relative (IR3 vs. IR4) Classifications and the Child Citizenship Act

(CT:VISA-946; 04-11-2008)

a. Orphans may be classified as either IR3 or IR4. The correct classification of immigrant visas issued to orphans is particularly important due to the passage of the Child Citizenship Act of 2000 (Public Law 106-395). As a result of that Act, orphans properly admitted to the United States based on the IR3 classification while under the age of 18 will automatically acquire U.S. citizenship, while those admitted as a result of an IR4 classification will not immediately acquire citizenship (see 9 FAM 42.21 N13.2-9 e and f for additional details). You should take particular care to classify orphan petitions and visas correctly and to inform prospective parents of the significance of the immigrant visa classification their child receives. (See 9 FAM 42.21 N11 d on adopted children who should be issued other types of visas, and 9 FAM 42.21 N13.2-9 g on treatment of other adopted children under the Child Citizenship Act of 2000.)

b. Although proper classifications should be noted on Form I-600, Petition to Classify Orphan as an Immediate Relative or petition approval notices, the final determination of proper classification for the visa rests with the

adjudicating consular officer. Travel plans and circumstances change, such that parents expecting to apply for an IR3 visa for their adopted child may not be able to complete the adoption abroad and/or may not have both seen the child. If the child cannot be classified as an IR3, you may approve the case based IR4 classification if the IR4 criteria noted below have been met.

c. The IR3 classification is appropriate for orphans who meet the following criteria:

   (1) The orphan was the subject of a full, final, and legal adoption abroad by the petitioner (or spouse, if married) prior to visa issuance; and

   (2) The petitioner (and spouse, if married) physically saw the child prior to or during the foreign adoption process.

d. The IR4 classification is appropriate for orphans who meet the following criteria:

   (1) The orphan will be adopted by the petitioner (or spouse, if applicable) after being admitted to the United States (requires both petitioner intent and satisfaction of any applicable pre-adoption requirements of the home state); and

   (2) The petitioner (or someone working on his and/or her behalf) must have secured custody of the orphan under the laws of the foreign sending country sufficient to allow the child to be taken from the foreign sending country and adopted elsewhere.

e. Upon being legally admitted into the United States, and assuming the IR3 classification was appropriate and the child is under the age of 18, the child will automatically acquire U.S. citizenship as of the date of admission to the United States. The USCIS Buffalo office processes newly entering IR3 visa packets, automatically sending Certificates of Citizenship to eligible children without requiring additional forms or fees. Adoptive parents may also request a U.S. passport for the child.

f. IR4 visa recipients become Legal Permanent Residents (LPR) upon admission to the United States, but do not automatically acquire U.S. citizenship. A child who enters the United States on an IR4 visa acquires U.S. citizenship as of the date of a full and final adoption decree in the United States (assuming the child is under age 18 at the time of adoption). While citizenship is acquired as of the date of the adoption in such cases, beneficiaries will need to file Form N-600, Application for Certificate of Citizenship and submit it to the local USCIS District Office or Sub-Office that holds jurisdiction over their permanent residence to receive a Certificate of Citizenship. Alternatively, adoptive parents may request U.S. passports for the child as evidence of citizenship.

g. Many adoptive parents have questions related to the Child Citizenship Act. They can be referred to the USCIS Web site or State Web site for additional information and important details on the legislation's impact on adopted children. U.S. citizen parents of children adopted overseas who reside overseas and do not intend to reside in the United States may apply for naturalization on behalf of the child by filing Form N-600-K, Application for Citizenship and Issuance of Certificate under Section 322 at any USCIS District Office or Sub-Office in the United States. The naturalization process for such a child cannot take place overseas. The child will need to be in the United States temporarily to complete naturalization processing and take the oath of allegiance. You may therefore receive applications for B-2 nonimmigrant visas (NIVs) to attend Section 322 naturalization hearings (see 9 FAM 41.31 N14.6). You are encouraged to give positive consideration to such cases whenever possible, and should not force or encourage such parents and children to undergo the immigrant visa process if they do not intend to reside in the United States.

9 FAM 42.21 N13.3 Adoptive Parent(s)' Suitability and Ability to Provide a Proper Home Environment (Form I-600-A, Application for Advance Processing of Orphan Petition)

(CT:VISA-878; 04-25-2007)

The Department of Homeland Security's Citizenship and Immigration Services has responsibility for determining that adopting parents are suitable and able to provide a proper home environment for adopted children. You may assist in this process by providing information or necessary forms to prospective petitioners, or taking fingerprints or forwarding paperwork on behalf of such individuals under certain limited circumstances. You will also need to refer to USCIS suitability approvals in order to adjudicate orphan petitions or visa applications (see 9 FAM 42.21 N13.3-4).

9 FAM 42.21 N13.3-1 Purpose of the Form I-600-A, Application for Advance Processing of Orphan Petition

(CT:VISA-878; 04-25-2007)

a. INA 101(b)(1)(F) requires that USCIS be satisfied that proper care will be furnished to a child if admitted to the United States as an "orphan."

b. Form I-600-A allows the adopting parent(s) to demonstrate that they are financially, logistically, and otherwise prepared to adopt a child internationally. Form I-600-A is not designed to evaluate a particular child's classification as an orphan. Because Form I-600-A reviews

suitability, rather than a specific beneficiary's orphan status, a single Form I-600-A may result in approval for parents to adopt multiple children. Adopting parents are often encouraged to begin the overseas adoption process early by filing Form I-600-A before identifying a particular child to adopt.

c. You will sometimes adjudicate visas for orphan cases where the suitability/ability to provide proper home decision has been made based on an Form I-600 filed with a USCIS office – such cases are discussed in 9 FAM 42.21 N13.3-6.

9 FAM 42.21 N13.3-2 Filing the Form I-600-A, Application for Advance Processing of Orphan Petition

(CT:VISA-1178; 04-03-2009)

a. The U.S. citizen prospective adoptive parent files the Form I-600-A with the U.S. Citizenship and Immigration Services (USCIS) office having jurisdiction over his or her place of residence. For U.S. citizens currently residing overseas, Form I-600-A may be filed with either the USCIS regional office having jurisdiction over their proposed place of residence in the United States or with the USCIS office overseas having jurisdiction over their current place of residence.

b. You may not adjudicate an Form I-600-A. However, with the concurrence of the regional USCIS office having jurisdiction over the consular district, you may accept a completed Form I-600-A and fees from a U.S. citizen resident of the consular district for transmittal to the regional USCIS office. In such a case, the U.S. citizen should be advised to communicate directly with the regional USCIS office regarding requirements and status of the adjudication of the Form I-600-A.

c. Form I-600-A is available on USCIS's Web site. Form I-600-A must be signed by the petitioner and their spouse (if the petitioner is married). The application must be submitted with the following documentation:

   (1) Proof of U.S. citizenship of the adoptive parent;

   (2) Proof of marriage of petitioner and spouse (if married);

   (3) Home study (see 9 FAM 42.21 N13.3-2 d);

   (4) Proof of compliance with state pre-adoption requirements; and

   (5) Fees.

d. The home study is used to evaluate prospective parent(s)' financial ability to rear and educate the child, describe the living accommodations where the prospective parent(s) resides and where the child will reside, and to provide a factual evaluation of the physical, mental, and moral capabilities of the prospective parent(s) to rear and educate the child.

The home study must include a statement recommending or approving the parents for adoption.

(1) 8 CFR 204.3(e) provides specific guidance on who can perform home studies and provide the statement recommending or approving adoption. Generally, any individual or agency may do the actual home study and interview, but the statement can only be made by an official of the state agency or by an agency licensed in the particular state where the child will reside.

(2) The home study must contain specific approval of the prospective adoptive parents for adoption. The preparer of the home study is required to note the number of orphans which the prospective adoptive parents may adopt, as well as whether there are any specific restrictions to the adoption such as nationality, age or gender of the orphan. If the home study preparer has approved the prospective parents for a handicapped or special needs adoption, this fact must also be clearly stated.

e. As part of Form I-600-A suitability application, the petitioner, their spouse (if married), and each additional adult member of the prospective adoptive parent(s)' household must be fingerprinted.

(1) For petitioners residing in the United States, Form I-600-A is filed and then USCIS notifies each person in writing of the time and location where they must go to be fingerprinted (usually done electronically.) Any required updates for these individuals (see 9 FAM 42.21 N13.3-4) would be handled at the same location.

(2) For petitioners residing overseas, USCIS officers, or in countries without a USCIS presence, you will need to complete fingerprint cards Form FD-258, Applicant Fingerprint Card and collect fingerprinting fees for each individual. Any required updates for these individuals (see 9 FAM 42.21 N13.3-4) should be handled by either the USCIS officer at post, or in countries without a USCIS presence, by sending a new Form FD-258 by courier to the appropriate officer in CA/VO/F/P (see paragraph (3) below).

(3) For petitioners whose 15-month fingerprint clearances have expired and who appear in person at posts overseas with invalid fingerprint clearances, CA/VO/F/P can assist with expediting fingerprint clearances. Post should send a completed Form FD-258 by courier to the appropriate officer in CA/VO/F/P. An e-mail response to the clearance request will be forwarded back to post from the Federal Bureau of Investigation (FBI) via CA/VO/F/P. If the FBI record shows no adverse information, you can attach the CA/VO/F/P response to the visas thirty-seven cable or approved Form I-600-A (see 9 FAM 42.21 N13.3-3) and process the case to conclusion.

Should the FBI response contain an IDENT record, then post must stop processing the case and immediately forward Form I-600-A to the originating USCIS office.

9 FAM 42.21 N13.3-3 Approval of Form I-600-A, *Application* for Advance Processing of Orphan Petition

(CT:VISA-1743; 10-19-2011)

a. USCIS approval of Form I-600-A will be noted on the original Form I-600-A, as well as in a Form I-171-H, Notice of Favorable Determination Concerning Application For Advance Processing of Orphan Petition or Form I-797-C, Notice of Action, sent to the petitioner and a visas 37 cable sent to the IV-issuing post with jurisdiction over any country where the petitioner intends to file an Form I-600 for the particular adopted child (if a country is indicated). You may not accept Form I-171-H/I-797-C as proof of Form I-600-A approval, but may accept the original approved Form I-600-A, a visas 37 cable, or faxed or e-mail notice of an approved Form I-600-A if transmitted directly from USCIS or the Department. Upon request by the adopting parents, posts may transfer Form I-600-A approval notices to other immigrant visa-issuing posts by cable, fax, or e-mail. Information on approval of home study updates or updated fingerprint clearances will be provided by USCIS or the Department by cable, fax, or e-mail. Posts should not require applicants to present home studies, background information, or the original Form I-600-A in order to process orphan cases.

b. Because USCIS adjudicators consider other factors besides the home study in reviewing Form I-600-A applications, Form I-600-A approval notice may show different criteria for the children who may be adopted than those listed in the home study originally prepared on the parents. In such cases it is Form I-600-A approval criteria which govern. If no criteria are listed, and if no pre-adoption requirements are noted, you should assume that there are no age- or gender-related restrictions on which children may be adopted, and that no pre-adoption requirements exist. If Form I-600-A approval notice does not specifically mention approval to adopt a special needs or disabled child, you should assume that parents were not approved for such an adoption. If posts encounter cases where two different approval notices for the same case provide differing information (for example, the physical Form I-600-A with its approval stamp doesn’t note restrictions on the age or gender of the adopted child, but the visas 37 cable does), contact CA/VO/F/P for assistance.

c. Form I-600-A approval is valid for 18 months from the date of its approval, and adoptive parents filing a petition for a child to be classified as an orphan must file Form I-600 within the 18-month validity period. If

Form I-600 isn't filed within that period, Form I-600-A is considered to have been abandoned. You may not extend the validity of Form I-600-A approval. If the prospective parent(s) wishes to file an orphan petition after their Form I-600-A expires, they must file a new Form I-600-A and submit required documentation to the appropriate USCIS office (or include additional information with the Form I-600 filed with a USCIS office, see 9 FAM 42.21 N13.3-6). Further action on the case must be put on hold until the new Form I-600-A is approved.

d. Separately, the fingerprint clearance obtained during the Form I-600-A process has a 15-month validity period. Dates of fingerprint clearances should be provided in the Form I-600-A approval documentation (if they are not, request assistance from CA/VO/F/P.) If an orphan petition is not approved within the 15-month clearance period, adoptive parents must request updated fingerprint clearance per procedures outlined in 9 FAM 42.21 N13.3-2 e. You may not extend the validity of the fingerprint clearance, and must wait for updated clearance information, either by notice from the appropriate USCIS office or by e-mail from CA/VO/F/P.

e. Adopting parents are urged to contact USCIS if there are major changes in their circumstances subsequent to the Form I-600-A approval. Such changes include significant changes in the petitioner's household (birth of a child, divorce of the petitioner, etc.), a change in jurisdiction (petitioner moves across state or country border, etc.), or a change in financial circumstances (petitioner loses his or her job, etc.). USCIS will generally then request an updated home study if necessary, and send notice of an updated Form I-600-A approval. You have no authority to review updated home studies. If you learn of changes in the petitioner(s)' circumstance and the petitioner has not requested and obtained an updated Form I-600-A approval, then you should consult with the original approving USCIS office regarding the case (see 9 FAM 42.21 N13.3-5 on fraud or misrepresentation issues with the Form I-600-A).

9 FAM 42.21 N13.3-4 Consular Officer use of Form I-600-A, Application for Advance Processing of Orphan Petition Information

(CT:VISA-878; 04-25-2007)

Since suitability issues are solely the responsibility of USCIS, you are not involved in Form I-600-A adjudication and have no authority to review USCIS' determinations regarding adoptive parent(s)' suitability or ability to provide a proper home environment. However, you will need to review Form I-600-A approvals for the following:

(1) Form I-600 filing – as noted in 9 FAM 42.21 N13.4, you are only permitted to accept Form I-600 petitions if they have acceptable

evidence of a valid Form I-600-A approval (and fingerprint clearance) for the petitioner(s).

(2) Form I-600 and visa adjudication – you may only approve Form I-600 petitions and/or visas for children who meet the conditions noted in the Form I-600-A approval. For example, if the Form I-600-A approval was only for one child under the age of two, or was made without noting special approval to adopt a special needs child, you could not approve an Form I-600 petition or visa for a 10-year old or a special needs child respectively. Similarly, if state pre-adoption requirements were identified and have not been met, you cannot approve the Form I-600 petition or visa for the child in question.

(3) Fraud concerns – you may encounter fraud in orphan cases, and information from the Form I-600-A may occasionally be used to corroborate requests for DHS review or revocation of orphan petitions. (See 9 FAM 42.21 N13.4-3 and 9 FAM 42.21 N13.6-2 provide additional information on dealing with such cases.)

9 FAM 42.21 N13.3-5 Fraud or Misrepresentation in the Form I-600-A, Application for Advance Processing of Orphan Petition

(CT:VISA-1178; 04-03-2009)

In cases where you have a well-founded and substantive reason to believe that Form I-600-A approval was obtained on the basis of fraud or misrepresentation, or have knowledge of a change in material fact subsequent to the approval of Form I-600-A, you should consult with its regional USCIS office on disposition of the case.

9 FAM 42.21 N13.3-6 Using the Form I-600, Petition to Classify Orphan as an Immediate Relative to Demonstrate Suitability

(CT:VISA-878; 04-25-2007)

a. Adoptive parents who already know which child they intend to adopt and who intend to file their paperwork with a USCIS office in the United States may submit proof of their suitability to adopt (per guidelines in 9 FAM 42.21 N13.3-2) at the same time that they file Form I-600 petition for orphan classification for the child. In such cases, notice of USCIS approval of Form I-600 petition should be considered as approval of the parents' suitability to adopt.

b. Parents are not obligated to use the Form I-600 petition in such cases. Under current USCIS regulations, parents can choose to demonstrate

their suitability to adopt overseas by filing the Form I-600-A "pre-clearance" application (and then subsequently filing Form I-600), or by filing the Form I-600 alone. While filing both suitability- and classification-related documentation on an already identified child using Form I-600 alone may be more convenient for some adoptive parents, many prospective adoptive parents may find that doing so would unnecessarily delay or even prevent processing on their case. In particular, if the parents intend to file Form I-600 overseas, overseas USCIS officers and consular officers will be unable to accept Form I-600 petition unless Form I-600-A has already been approved. Also, for parents who have not yet identified their adoptive child, filing Form I-600-A application first will result in faster processing of an immigrant visa (IV) for their child once identified.

9 FAM 42.21 N13.4 The Orphan Petition (Form I-600, Petition to Classify Orphan as an Immediate Relative)

9 FAM 42.21 N13.4-1 Purpose of the Form I-600, Petition to Classify Orphan as an Immediate Relative

(CT:VISA-1178; 04-03-2009)

Form I-600 is used to document a particular child's classification as an orphan under INA 101(b)(1)(F). A separate Form I-600 must be filed for each child, even though the associated Form I-600-A approval may have been for multiple children. An orphan can only be issued an immigrant visa (IV) if he or she is the beneficiary of an approved Form I-600.

9 FAM 42.21 N13.4-2 Filing the Form I-600, Petition to Classify Orphan as an Immediate Relative

(CT:VISA-1743; 10-19-2011)

a. Prospective adoptive parents may file Form I-600 on behalf of the adoptive child with the USCIS office having jurisdiction over their place of residence, or with a USCIS or consular officer overseas, per the guidelines noted below:

    (1) Prospective adoptive parents residing in the United States should file Form I-600 with the USCIS District or Sub-Office with jurisdiction over their place of residence. Adoptive parents involved in proxy adoptions (see 9 FAM 42.21 N13.2-3 (1)(b)) will need to file petitions in this way;

    (2) Prospective adoptive parents currently residing overseas should file

Form I-600 petitions with the USCIS office in that country, or, in countries without a USCIS presence, with consular officers covering that consular district;

NOTE: However, per 9 FAM 42.21 N13.1 b, adoptive parents who intend to continue residing overseas should generally not be pursuing IV processing for the child.

(3) Petitioners not resident in the consular district should verify local USCIS or consular offices practices regarding Form I-600 filing overseas. In general, both USCIS and consular officers may at their discretion accept Form I-600 from a physically present non-resident petitioner in humanitarian or emergent circumstances if an Form I-600-A has already been approved for the petitioners. For consular officers, it is anticipated that petitions for orphan cases should generally be considered humanitarian cases, and therefore accepted (see 9 FAM 42.41 N4.2-5); and

(4) Prospective adoptive parents adopting children who will soon turn 16 may wish to file Form I-600 petitions on behalf of the children with USCIS offices in the United States or overseas, since USCIS will accept and consider as properly filed Form I-600 without all of the documents listed in 9 FAM 42.21 N13.4-2 *paragraph b(4)(e)* (although the documents will ultimately be required for petition approval.) You, however, should not accept (or consider to have been properly filed) petitions submitted without all required documentation as listed in 9 FAM *42.21 N13.4-2 paragraph b(4)(e).*

b. You may only accept Form I-600 (permit them to be filed) under the following circumstances:

(1) Post has notice of Form I-600-A approval and both the approval and fingerprint clearances are still valid (see 9 FAM 42.21 N13.3-3 c and d);

(2) There is no USCIS petition-adjudicating office in-country;

(3) The U.S. citizen petitioner does not already have Form I-600 pending for the same beneficiary; and

(4) The U.S. citizen petitioner is physically present before you, presents required documents and fees, and swears to (or affirms) the truth of the information presented (see 9 FAM 42.21 N13.4-2 c):

(a) Oath: You must administer an oath (or affirmation) to the U.S. citizen petitioner, asking them to swear (or affirm) that all of the information presented is true and correct to the best of their belief and knowledge.

(b) Completing and signing the petition: You must ensure that the Form I-600 has been completely filled out, and signed by

the petitioner (and spouse, if applicable) after having been completed. A third party may not sign or file the petition on behalf of the petitioner and/or spouse, even with a power of attorney. Because the petitioner must be physically present before you, petitions may not be submitted to you by mail or other indirect means.

(c) Spouses: If the petitioner is married, his or her spouse must sign the petition, although he or she does not have to sign before you. In the event that only one spouse travels abroad to file Form I-600 at post, you should verify that the non-traveling spouse did not sign the petition before all of the information relating to the child had been entered onto the form. If Form I-600-A has been approved for a married couple, either spouse may sign Form I-600 as the "prospective petitioner" with the other signing as the "spouse" (unless the married couple consists of one U.S. citizen and one alien, in which case the U.S. citizen must be the "prospective petitioner" on both documents.)

(d) Fees: A prospective adoptive parent who filed Form I-600-A with USCIS may file Form I-600 for one child without any additional fee. If more than one Form I-600 is being filed based on Form I-600-A, the petitioner must pay Form I-600 filing fee for each child beyond the first unless the children involved are siblings (in which case no additional fees would be collected.)

(e) Documents: The petitioner must present the following documents with Form I-600 in order for the petition to be considered to have been properly filed:

(i) Child's original birth certificate, or if such certificate is not available, a written explanation together with secondary evidence of identity and age (example: a re-issued birth certificate showing adoptive parents);

(ii) Evidence that the child either has no parents or a sole/surviving parent unable to provide proper care who has irrevocably released the child for emigration and adoption, per guidelines in 9 FAM 42.21 N13.2-5 or 9 FAM 42.21 N13.2-6; and

(iii) Evidence of adoption or intent to adopt, per guidelines in 9 FAM 42.21 N13.2-3.

(f) Any foreign language documents submitted with the Form I-600 petition must be accompanied by a full English translation, which the translator has certified as complete and

correct, and by the translator's certification that he or she is competent to translate the foreign language into English.

(g) For Form I-600 filed with consular officers, originals of required documents must be submitted for review with Form I-600. You should make copies of relevant documents for the immigrant visa (IV) packet, noting that originals were seen and returned in the case notes field in the Immigrant Visa Overseas system.

NOTE: USCIS permits petitioners to submit copies of some documents when accepting Form I-600; petitioners should be directed to the Form I-600 instructions for rules regarding copies of required documents when filing the petition with USCIS.

(h) 8 CFR 204.3 requires that documents used in the filing of an orphan petition must have been obtained in accordance with the laws of the foreign-sending country. A foreign-sending country is defined as the country of the orphan's citizenship, or, if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to or in conjunction with his or her adoption and/or immigration to the United States.

c. You should be particularly sensitive to legal requirements that Form I-600 be filed before an orphan reaches the age of 16. Posts should ensure that prospective parents are aware of age-related concerns and, whenever possible and subject to the guidelines above, should provide a reasonable opportunity for parents to file Form I-600 and accompanying documentation prior to the child's 16th birthday.

9 FAM 42.21 N13.4-3 Consular Officer Adjudication of Form I-600, Petition to Classify Orphan as an Immediate Relative

(CT:VISA-1178; 04-03-2009)

a. Once Form I-600 has been properly filed, you should review Form I-600 and accompanying documentation. Based on that review and completion of the Form I-604, Determination on Child for Adoption (see 9 FAM 42.21 N13.5), you will determine whether the child is eligible for immigrant classification as an orphan.

b. Consular officers have been given authority to approve Form I-600 that are found to be clearly approvable. Clearly approvable in this context

means that:

(1) To your satisfaction Form I-600 and accompanying documentation, as well as the review of Form I-604 (see 9 FAM 42.21 N13.5), clearly establish that the child in question is an orphan according to INA 101(b)(1)(F) per criteria outlined in 9 FAM 42.21 N13.2;

(2) No unresolved issues of fraud, child-buying, or other inappropriate practices are associated with the case (see 9 FAM 42.21 N13.2-7 and 9 FAM 42.21 N13.2-8); and

(3) The child fits all criteria identified in the Form I-600-A approval (i.e., age, gender, special needs, etc., if any), and any state pre-adoption requirements have been met.

c. If you find Form I-600 clearly approvable, per 9 FAM Appendix N 202(a), you must document the approval in the top block on the first page of Form I-600. The approval annotation should include the "approved" notation, classification of the petition and section of law under which petition was approved (see 9 FAM 42.21 N13.2-9), petition filing date, petition approval date, and the signature and title (including post) of the approving officer.

d. If a petition does not appear to be "clearly approvable", you should give the petitioner the opportunity to respond to questions or issues that can be quickly or easily resolved. In cases involving Form I-600 or visa application where state pre-adoption requirements have not yet been met, prospective adoptive parents should be given the opportunity to demonstrate that they have satisfied any unmet requirements. If the problem with the case is that evidence presented varies from or contradicts that originally submitted with the petition, but does not contradict the fact that the child qualifies under INA 101(b)(1)(F), the case should be processed to conclusion. For example, a late registered birth certificate may be irregular, but if other evidence clearly shows that the child should be considered an orphan, the petition should be approved.

e. In some cases, further investigation may be merited due to doubts related to the documents (or absence of documents) presented, contradictory information, or indications of child-buying, fraud, and other inappropriate practices. You should work with post's anti-fraud unit, regional security officer (RSO), and, if appropriate, local officials and contacts to further investigate if necessary. Investigation procedures vary from post to post, since the best means of collecting necessary information regarding the child's status and history often depend on local conditions. Some possible elements of an investigation could include interviews with the child (if of sufficient age), social workers, orphanage representatives, the prospective adopting parents, or biological parent(s).

When fraud is detected or indicated, a full field investigation may be warranted. Fraud investigations should be conducted as expeditiously as possible.

f. If further response from the petitioner or post investigation does not lead to a determination that the petition is clearly approvable, Form I-600 and accompanying documentation (including Form I-604) should be expeditiously forwarded to the regional USCIS office for adjudication (for overseas offices, see the USCIS Overseas Office locator) with an explanation of the facts of the case and actions taken to try to resolve any outstanding issues. In addition, you should notify the petitioner in writing of this action, including a brief explanation of the decision and the name and address of the USCIS office to which the petition has been forwarded. You do not have the authority to deny an Form I-600 under any circumstances.

9 FAM 42.21 N13.4-4 Approval of Form I-600, Petition to Classify Orphan as an Immediate Relative

(CT:VISA-878; 04-25-2007)

a. Depending on where Form I-600 was filed and adjudicated, you will encounter various types of proof that Form I-600 was approved. Any of the following should be considered sufficient evidence of Form I-600 approval:

   (1) Original Form I-600 with approval notations from a USCIS or consular officer;

   (2) Faxed or e-mail notification from USCIS or the Department of petition approval; or

   (3) Visas 38 or 39 cable from USCIS (visas 38 indicates IR3 classification approval, visas 39 indicates IR4 classification approval)

b. You may not issue an IR3 or IR4 visa unless they have evidence of Form I-600 approval. As with other visa-related petitions, you should consider a USCIS or consular officer notice of petition approval as prima facie evidence of the child’s entitlement to classification as an orphan.

9 FAM 42.21 N13.4-5 Orphan First Pilot Program

(CT:VISA-1178; 04-03-2009)

a. In July 2003, USCIS created the “Adjudicate Orphan Status First” Pilot Program in order to explore means of addressing situations in which a parent completes an adoption or custody arrangement overseas and then discovers that the adopted child does not qualify for immigrant visa

classification. Currently this pilot program is available only for children in Haiti, Honduras, or Vietnam. Prospective adoptive parents intending to adopt a child from one of these countries may opt to have USCIS or State officers evaluate the child's ability to be classified as an orphan, prior to completion of the adoption or grant of custody.

b. For such cases, prospective parents filing Form I-600 submit all required documentation except the adoption decree or custody document, and, in addition, provide a written statement indicating that they want to participate in the Orphan First program and have not yet adopted the child or obtained custody of the child for purposes of adoption. As with any Form I-600, USCIS or State officers examine the documentation submitted and complete the Form I-604, Determination on Child for Adoption (see 9 FAM 42.21 N13.5). If the child otherwise appears to be an orphan, the adoptive parents are then informed that they may complete the adoption or custody arrangements. Upon provision of the final adoption decree or custody document, Form I-600 may then be approved. Subsequent processing follows normal case guidelines.

c. At Orphan First Pilot posts without USCIS representation (currently only Poland), you should immediately report to CA/VO/F/P on any case in which a prospective adoptive parent opts to participate in the program.

9 FAM 42.21 N13.5 Overseas Orphan Investigations

9 FAM 42.21 N13.5-1 Purpose of Form I-604, Determination on Child for Adoption

(CT:VISA-878; 04-25-2007)

a. Form I-604 is primarily used to document consular officer or overseas USCIS officer determinations that a child should be properly classified as an orphan. The form was created as a checklist for officers to ensure that key criteria for the orphan classification have been reviewed, as elaborated in 9 FAM 42.21 N13.2-1. A copy of Form I-604 (10/30/06) is in 9 FAM 42.21 Exhibit I.

b. In rare cases, Form I-604 may also be used by domestic USCIS offices to request that posts conduct an inquiry or investigation into a case prior to USCIS adjudication of an orphan petition. In such cases, the USCIS office should provide posts with a copy of all pertinent documents in the case and a memorandum explaining the reason for requesting the inquiry.

9 FAM 42.21 N13.5-2 Responsibility for Completion of Form I-604

(CT:VISA-946;   04-11-2008)

a. Form I-604, Determination on Child for Adoption, must be completed for all orphan cases. Responsibility for completion of the Form I-604 varies depending on how the Form I-600 is filed:

   (1) If Form I-600 is filed and approved in the United States, Form I-604 should be completed by you prior to approval of the visa application.

   (2) If Form I-600 is filed overseas in a country with a USCIS presence, USCIS officers should complete Form I-604 prior to petition approval.

   (3) If Form I-600 is filed overseas in a country with no USCIS presence, Form I-604 is completed by you prior to petition approval.

   (4) When used by USCIS offices to request that posts verify orphan status of an individual prior to domestic adjudication of the orphan petition, Form I-604 should be completed by USCIS officers if there is a USCIS presence in-country, or by you in a country with no USCIS presence.

b. In its current form, Form I-604 is designed as an internal worksheet to ensure proper processing of orphan cases. The form is not available to the public on the USCIS Web site, and adopting parents and other entities should not be requested to directly assist in completion of the form.

9 FAM 42.21 N13.5-3 Completion and Disposition of Form I-604 by Consular Officers

(CT:VISA-878;   04-25-2007)

a. Consular officers completing Form I-604 based on Form I-600 approved in the United States or on Form I-600 filed overseas (see 9 FAM 42.21 N13.5-2 a(1) and (3)) should complete all sections of Form I-604 except question 2. The completed Form I-604 should then be attached to Form I-600, and remain with the petition regardless of the outcome of the case.

b. Consular officers completing Form I-604 based on the request for an inquiry by a domestic USCIS office prior to their adjudication of the petition (see 9 FAM 42.21 N13.5-2 a(4)) should complete items 1 and 5 through 15 of Form I-604, as applicable. If any item does not apply at the time of the inquiry, you should note in block 15 why it is inapplicable. You should sign and date, page 4, under "Officer Performing Inquiry." The completed Form I-604 should be returned with any relevant documentary evidence directly to the requesting USCIS office.

c. Approval of Form I-600 or orphan visa requires a favorable Form I-604

determination that the child should be properly classified as an orphan. Negative responses on most worksheet items clearly indicate cases in which the orphan classification is not appropriate. In such cases you should follow guidance in 9 FAM 42.21 N13.4-3 d-f and 9 FAM 42.21 N13.6-2 b, and 9 FAM 42.43 N1-3 for returning petitions to USCIS and not clearly approvable or for possible revocation.

d. Completion of Form I-604 should not be the basis for delays in processing cases. Form I-604 from itself does not trigger a requirement that investigations or field visits be done on each case, although it provides a mechanism for documenting any such reviews deemed necessary by the adjudicating officer to address potential classification of fraud issues.

9 FAM 42.21 N13.6 Orphan Visa Applications

9 FAM 42.21 N13.6-1 Submitting Orphan Immigrant Visa Applications

(CT:VISA-1743; 10-19-2011)

a. Immigrant visa (IV) applications on behalf of orphans may be submitted to IV-issuing posts once Form I-600 has been approved and post has received notification of such approval per 9 FAM 42.21 N13.4-4. Whenever possible, petitioners should be permitted to file visa applications for orphans the same day that Form I-600 are filed at post. However, in such cases orphan visa applications should only be accepted once Form I-600 is approved. Also, parents should be given realistic expectations as to when the visa will be available if approved (same-day issuance is not the norm).

b. Orphan IV applications should include Form DS-230, Application for Immigrant Visa and Alien Registration (with part II signed in the presence of a consular officer by the adopting parent or individual with custody of the child), evidence of orphan classification (see 9 FAM 42.21 N13.2), and all standard IV supporting documentation, (see 9 FAM 42.65, 9 FAM 42.66 *N2.4*, *9 FAM 42.66 N5, 9 FAM 42.66 N10*, and 9 FAM 40.41 N3.2):

   (1) Birth certificate;

   (2) Passport or other appropriate travel document;

   (3) Photographs (three full frontal photographs);

   (4) Police, military, or prison records, if required (rare);

   (5) Form I-864, Affidavit of Support under Section 213A of the Act, or other financial support documents (see 9 FAM 42.21 N13.6-3 c); and

   (6) Medical exams (see 9 FAM 42.21 N13.6-3 b).

c. You must also ensure that the IV processing fee has been collected prior to adjudicating the visa application.

9 FAM 42.21 N13.6-2 Reviewing Documentation and Classification

(CT:VISA-878; 04-25-2007)

a. When reviewing orphan visa applications you must confirm that the applicant may be considered an "orphan." Approval of Form I-600 should be considered prima facie evidence of orphan status, but you must briefly review Form I-600, completed Form I-604 and originals of documentation supporting orphan status to confirm that the classification is appropriate. This is particularly important in cases where Form I-600 was adjudicated in the United States, without the possible benefit of physically seeing the parties involved and having more in-depth knowledge of the documents and fraud patterns in the local country.

b. If the petition appears to have been approved in error, or if you develop substantive evidence of fraud or misrepresentation in Form I-600, then the petition should be returned to the approving office with a request for revocation, per instructions in 9 FAM 42.43 N1-3. However, if the evidence is at variance with that originally submitted with the petition, but does not contradict the fact that the child qualifies under INA 101(b)(1)(F), the case should be processed to conclusion.

9 FAM 42.21 N13.6-3 Reviewing Ineligibilities

(CT:VISA-1743; 10-19-2011)

a. Orphan visa applicants are subject to all of the standard INA Section 212 ineligibilities, although in practice almost all adopted (or to-be-adopted) children will not be affected by criminal, security, immigration violation and other ineligibilities due to their age. The two areas where orphans are treated somewhat differently deal with medical issues (in particular, INA 212(a)(1)(A)(ii) as amended on vaccination requirements), and INA 212(a)(4) (public charge), both discussed below.

b. Medical issues: As with any other IV case, if a child is found to have a Class A medical condition, the child will be ineligible for a visa under INA 212(a)(1) until and/or unless that condition is waived or otherwise overcome. The two key medical issues that are treated somewhat differently with orphan cases are vaccinations and evidence of significant medical conditions revealed in the panel physician's medical exam.

    (1) Vaccinations: IR3 and IR4 applicants under 10 years of age are exempt from INA 212(a)(1)(A)(ii) vaccination requirements provided that the adoptive parent(s) signs an affidavit attesting

that the child will receive the required vaccination within 30 days of the child's admission to the United States or at the earliest time that is medically appropriate. The affidavit is Form DS-1981, and once completed, it should be attached to the medical exam form and included in the IV packet. Only children whose adoptive parents have signed such an affidavit will be exempt from the vaccination requirement. In situations where the adopting parent(s) objects to the child receiving vaccinations on religious or moral grounds, the applicant will still require an individual INA 212(g)(2)(C) waiver from USCIS (see 9 FAM 40.11 *N10.6*).

(2) Significant medical conditions.

(a) You should ensure that adoptive parents understand that the orphan petition and visa application are not meant to provide comprehensive evaluations of an adoptive child's health. Parents should be encouraged to arrange private evaluations by qualified medical professionals, preferably ones versed in childhood development if they have health-related concerns about the child. However, if a significant medical condition is revealed through the panel physician's medical exam, you must furnish the adoptive parents with available information concerning the affliction or disability. This is especially important in cases where the parents have not physically observed the child.

(b) If a serious medical condition is discovered, and in particular one which is a physical, mental, or emotional condition that would affect the child's normal development, processing should be suspended until you receive a notarized statement from the adoptive parent, or parents if married, indicating awareness of the child's affliction and willingness to proceed with orphan processing. An abstract of a home investigation made by a social service agency, countersigned by the adoptive parent(s), is acceptable if it notes the parent(s) are aware of the child's condition and nevertheless willing to adopt the child. An appropriate entry in item 20 of the Form I-600 initialed by the adoptive parent(s) is also acceptable. If the adoptive parents choose not to pursue the petition, you should forward it, along with an explanation and all other pertinent information, to the appropriate USCIS overseas office.

(c) Note also that a child with a serious medical condition or disability may sometimes be considered a special needs child, and therefore subject to the requirement that the adoptive parents' Form I-600-A approval includes reference to parents'

ability to adopt a special needs child. In cases where a child is later determined to be a special needs child and parents' suitability approvals do not note approval to adopt a special needs child, the petition and related documentation should be forwarded to the regional USCIS office overseas for possible revocation or reconsideration of suitability determinations. You should notify the prospective parents of the action.

c. Public charge: USCIS has determined that Form I-864, Affidavit of Support under Section 213A of the Act, is not required for IR3 applicants who will automatically acquire U.S. citizenship upon admission to the United States as legal permanent residents (see 9 FAM 42.21 N13.2-9). However, IR4 applicants (as well as IR3 applicants not eligible for U.S. citizenship, e.g., those over age 18 at the time of admission, etc.) must have a properly completed and signed Form I-864 with all required supporting documents submitted on their behalf by the petitioner. In general, the adoptive parents' ability to care for a child is evaluated during Form I-600-A adjudication, such that an IR3 or IR4 applicant is unlikely to become a public charge. Except where Form I-864 is required, the Form I-600-A serves as proof that the underlying requirements of INA 212(a)(4) have been met. Additional financial evidence should only be required if the child has an illness or defect not addressed by the approved Form I-600-A which would entail significant financial outlay or if other unusual circumstances prevail.

d. Waivers: Should you determine that an ineligibility exists for an orphan and that the petitioner wishes to apply for an available waiver of ineligibility, you should expedite submission of a waiver application to USCIS.

9 FAM 42.21 N13.6-4 Adjudication of the Visa Application, Issuance of the Visa

(CT:VISA-1178; 04-03-2009)

a. If you confirm that the child may be classified as an orphan, that all required documentation to produce the immigrant visa have been submitted, and that no ineligibilities exist (or those that exist have been waived), you should approve the visa application. If the application cannot be approved, you must explain orally and in writing the reason for the refusal and any possible remedies available.

b. If the application is approved, the immigrant visa (IV) should be produced per standard IV procedures (see 9 FAM 42.72, 9 FAM 42.21, and 9 FAM 42.73). Form I-604 should be included as part of the IV package, immediately following Form I-600 in the packet. Particular care should be paid to ensuring proper classification of the visa as an IR3 or IR4 (see 9

FAM 42.21 N13.2-9).

c. See 9 FAM 42.72 Related Statutory Provision, IVs for orphans should generally be issued with a six-month validity period. However, a child legally adopted by a U.S. citizen and spouse while they are serving abroad in the U.S. armed forces, employed abroad by the U.S. Government, or temporarily abroad on business, may be issued an IV for a longer period (not to exceed three years) to accommodate adoptive parents' intended return to the United States upon completion of the military service, employment, or business.

d. Upon receipt of the issued visa, adopting parents (or those traveling with the child) should be informed of Child Citizenship Act implications of the type of visa issued (see 9 FAM 42.21 N13.2-9) and refer to Department and USCIS Web sites for additional information.

9 FAM 42.21 N14 CHILDREN ADOPTED FROM HAGUE CONVENTION COUNTRIES

9 FAM 42.21 N14.1 Convention Adoptee Processing - Introduction

(CT:VISA-946; 04-11-2008)

a. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) is a multilateral treaty that establishes international legal standards for the adoption of children habitually resident in one country party to the Convention by persons habitually resident in another party to the Convention. It establishes procedures to be followed in such adoption cases and imposes safeguards to protect the best interests of the children at issue. It also provides for international recognition of adoptions that occur in accordance with the Convention. In the United States, the implementing legislation for the Convention is the Intercountry Adoption Act of 2000 (IAA). To implement the Convention, the IAA made two significant changes to the Immigration and Nationality Act (INA):

(1) It created a new definition of "child," found at INA 101(b)(1)(G), applicable only to children being adopted from Convention countries. (Note that the definition of "child" in INA 101(b)(1)(F) continues to apply to orphans being adopted from any country that is not a party to the Convention; (see 9 FAM 42.21 N14.1-1 regarding the applicability of INA 101(b)(1)(F) to children from Convention countries in cases in which the Form I-600-A or Form I-600 was filed before the Convention effective date of April 1, 2008);

and

(2) It incorporated Convention procedures into the immigration process for children covered by INA 101(b)(1)(G), most directly by precluding approval of an immigration petition under this classification until the Department has certified that the child was adopted or legal custody of the child was granted in accordance with the Convention and the IAA. Separately, pursuant to the IAA, adoptions or grants of custody that have been so certified by the Department are to be recognized as such for purposes of all Federal, State, and local laws in the United States. For more background information on the Convention, the IAA, and U.S. obligations under the Convention, consult 7 FAM 1796.

b. In accordance with the United States' Convention obligations, you must treat Convention adoptee cases with considerable sensitivity and process them as quickly as is reasonably possible to avoid hardship for the child or prospective adoptive parents (PAPs).

c. In order to adjudicate Convention Adoptions, it is essential that you are thoroughly familiar with the Convention adoptee classification. For a detailed explanation of the Convention adoptee classification, (see 9 FAM 42.21 N14.13).

d. Things to keep in mind to ensure correct adoption-related visa classification:

(1) Depending upon whether the country of habitual residence has a treaty relationship with the United States under the Convention and the circumstances of the case, adopted children could receive immigrant visas (IVs) based on the Convention adoptee (IH3 or IH4, per INA 101(b)(1)(G)), orphan (IR3 or IR4, per INA 101(b)(1)(F)—see 9 FAM 42.21 N13), or child (IR2, per INA 101(b)(1)(E)—see 9 FAM 42.21 N12) classifications. For purposes of this document, a "Convention country" is a country that has a treaty relationship with the United States under the Convention.

(2) An adopted child immigrating to the United States and habitually resident in a Convention country cannot be classified as an orphan under INA 101(b)(1)(F), unless the PAP(s) filed an Form I-600 or Form I-600-A before the date of the Convention's entry into force for the United States, April 1, 2008, provided that the Form I-600-A has not expired. (Such cases are not Convention cases and should be processed under the orphan classification based on 9 FAM 42.21 N13 guidelines—See 9 FAM 42.21 N14.1-1.)

(3) An adopted child immigrating to the United States and habitually resident in a non-Convention country cannot be classified as a Convention adoptee under INA 101(b)(1)(G).

(4) Adopted children who meet the requirements of INA 101(b)(1)(E) may, under certain circumstances, be classified as IR2 children, even if they are habitually resident in a Convention country (see 9 FAM 42.21 N12).

(5) An adopted child whose parents do not intend to return immediately to the United States may qualify for NIV issuance in order to come to the United States for naturalization under section 322 of the Act. Under 8 CFR 322.3(b)(1)(xii), a Form I-800 Petition to Classify Convention Adoptee as an Immediate Relative must be approved for the child in order for the child to seek naturalization under section 322. (See 9 FAM 41.31 N14.6 and 8 CFR 322.2).

(6) In rare cases, some adopted children qualify for NIVs family members of other NIV holders (see 9 FAM 41.31 N14.3 and 9 FAM 42.21 N11), or as short-term tourists or participants in a naturalization hearing under section 322 of the INA (see 9 FAM 41.31 N14.3 and 9 FAM 41.31 14.6). However, you should not issue a nonimmigrant visa to an adopted child who is immigrating to the United States to reside there with his or her adoptive parents as a result of this trip or to a child who will be adopted in the United States. Moreover, if a petitioner is a United States citizen who is domiciled in the United States but posted abroad temporarily under official orders as a member of the Uniformed Services, as defined in 5 U.S.C. 2101, or as a civilian officer or employee of the United States Government, you must deem the child to be coming to the United States to reside there with that petitioner and therefore not to be entitled to a NIV. (See 9 FAM 42.21 N11 for additional details on appropriate options for documenting adopted children.)

e. Under the Convention, the IAA, and the implementing regulations, only certain entities may perform particular functions in Convention adoptions. For further information, consult 7 FAM 1796 and 22 CFR Part 96.

(1) The Department is the United States Central Authority under the Convention. Within the Department, CA/OCS/CI has the lead in coordinating the day-to-day work of the Central Authority. In accordance with the IAA and the Convention, some of the Central Authority's case-specific Convention responsibilities have been delegated to Adoption Service Providers (ASPs) accredited or approved by Department-designated Accrediting Entities. Other Central Authority duties will be performed by other government bodies. In each case, there will be a "primary provider" who has overall responsibility for the case.

(2) Either public bodies or authorized ASPs must be used for the following Convention adoptee visa processing-related activities:

(a) Completion and approval of home study (accredited or temporarily accredited ASPs only) (Note, however, that approved, exempted, or supervised ASPs may complete a home study, provided the study is approved by an accredited or temporarily accredited ASP—see 9 FAM 42.21 N14.4 and 22 CFR Part 96);

(b) Transmission of report on parents (i.e., home study, USCIS approval notice, and other evidence) to Convention country Central Authority (see 9 FAM 42.21 N14.4);

(c) Receipt of Convention country's Central Authority report on the child for transmission to the PAP(s) (see 9 FAM 42.21 N14.5 c);

(3) Like the United States, other Convention countries may also delegate their Central Authority functions to accredited or approved ASPs or other government entities. Other Convention countries may also choose to work with only certain U.S. accredited or approved ASPs, or they may require United States ASPs to be accredited under the laws and standards of that country. (See 7 FAM 1796.3 for information on U.S. accreditation/approval requirements, relationships between accredited/approved ASPs and other providers, and U.S. regulatory requirements for ASPs.)

(4) You can verify accredited or approved status of U.S. ASPs by checking the list on CA/OCS/CI's Web site at the State Department Web site. Take note, also, that the primary ASP should already be entered into the "Adoption Service Provider" field of the IVO system before the case comes to Post. Questions or concerns related to an adoption service provider's accreditation or approval status should be directed to CA/OCS/CI.

9 FAM 42.21 N14.1-1 Inapplicability to Cases Pending Prior to April 1, 2008

(CT:VISA-946; 04-11-2008)

If, prior to April 1, 2008, the date the Convention enters into force for the United States, the PAP(s) filed on behalf of a child habitually resident in a Convention country either a Form I-600 Petition to Classify Orphan as an Immediate Relative or a Form I-600-A Application for Advance Processing of Orphan Petition, then the child's case is not processed as a Convention case—provided the Form I-600-A remains valid at the time the Form I-600 is filed. Instead, such a case must be processed to completion as a non-Convention (orphan) case (see 9 FAM 42.21 N13). As stated in 9 FAM 42.21 N13.4-2 b (1), you may not accept the Form I-600 for filing if the Form I-600-A is no longer valid.

9 FAM 42.21 N14.2 Definitions

(CT:VISA-1178; 04-03-2009)

Definitions used throughout 9 FAM 42.21 N14 for Convention adoptee processing are shown below. Some useful definitions of terms found in 22 CFR, particularly 22 CFR Part 96, are included here for ease of use, in some cases with explanations particular to these notes. Additional terms used throughout 9 FAM 42.21 N14 are also defined here. In addition, DHS and State definitions used for "adoption" and "custody" are included in 9 FAM 42.21 N14.13-3, and definitions for use in evaluating parents' status ("abandonment," "sole parent," etc.) are included in 9 FAM 42.21 N14.13-5. "Adoption record," is defined and discussed in 9 FAM 42.21 N14.14. (See 7 FAM 1796.3 for a full discussion of adoption service providers.) **Direct any questions related to definitions to CA/VO/L/A and CA/OCS/CI, with a copy to CA/VO/F/P**.

Accrediting Entity (AE): An entity that has been designated by the Secretary to accredit agencies (including to temporarily accredit) and/or to approve persons for purposes of providing adoption services in the United States in cases subject to the Convention.

Adoption Service Provider (ASP): An agency (private, nonprofit organization licensed to provide adoption services in at least one state) or a person (an individual or a private, for-profit entity, including a corporation, company, association, firm, partnership, society, or joint stock company, but not including public authorities, providing adoption services). The one provider responsible for ensuring all six adoption services are provided and being responsible for supervised providers where used is called the primary provider. (See 7 FAM 1796.3 for additional information on provider status and limitations on the types of services each provider may perform.)

Adoption services: Any one of the following six services:

- Identifying a child for adoption and arranging an adoption
- Securing the necessary consent to termination of parental rights and to adoption
- Performing a background study on a child or a home study on PAP(s) and reporting on such a study
- Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child
- Monitoring a case after a child has been placed with PAP(s) until final adoption
- When necessary because of a disruption before final adoption, assuming custody and providing (including facilitating the provision of) child care or any other social service pending an alternative

placement

Adoptions Tracking System (ATS): The computer system developed by the Department to track the process of both incoming and outgoing adoption cases (i.e., cases of children both immigrating to, and emigrating from, the United States), support the functions of the Central Authority, and aggregate data for mandatory reporting to Congress. This system is sometimes referred to as the "case registry."

Article 5 Letter: Pursuant to Article 5 of the Convention, the notification provided by the United States to the Central Authority of the adoptive child's country of origin that the PAP(s) have been found suitable to adopt and have been counseled as necessary, and that the child is or will be authorized to enter and reside in the United States.

Article 16 Report: The report on the child required under Article 16 of the Convention, prepared by the Central Authority of the child's country of origin. 9 FAM 42.21 N14.6-2 e (3) and (4) describe the required contents of the report and the documents that must accompany it.

Article 23 Certificate: A certificate from the competent authority of the Convention country, certifying that an adoption has occurred in accordance with the Convention. Some countries may call this a "certificate of conformity."

Authorized ASP: An ASP that is authorized to provide adoption services in connection with an adoption under the Hague Convention, including both accredited agencies (nonprofit agencies accredited by an AE to provide adoption services in Convention cases in the United States) and approved persons (for-profit entities and individual service providers approved by an AE to provide adoption services in Hague cases in the United States), as well as other providers authorized under 22 CFR Part 96 to perform the relevant function on their behalf (supervised, exempted or other).

Central Authority: The entity designated by each member country under Article 6(1) of the Convention, among other things, to serve as the central point of contact for Convention adoptions. For the United States, the Central Authority is the Department of State.

NOTE: For purposes of these FAM notes, any reference to a Central Authority should be understood to include any individual or entity (such as a public authority or a body duly accredited in that country) that is performing a function delegated to it by the designated Central Authority in accordance with the Convention and local law. Questions related to identification of the Central Authority in other Convention countries or regarding entities authorized to perform Central Authority responsibilities should be directed to CA/OCS/CI.

Competent authority: A court or governmental authority of a foreign country that has jurisdiction and authority to make decisions in matters of

child welfare, including adoption.

Convention: The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

NOTE: The numbered articles of the Convention are sometimes referred to in correspondence regarding Convention adoption cases, such as the Article 5 Letters and Article 23 Certificates.

Convention adoption: In the context of these notes only, which focus on the processing of petitions and visa applications, the adoption of a child habitually resident in a Convention country by a U.S. citizen habitually resident in the United States (as defined in DHS regulations), when the child has moved or will move from that Convention country to the United States. However, note that Convention provisions also cover cases where parents habitually resident in another Convention country adopt a child habitually resident in the United States when the child has moved or will move to that other Convention country (see 7 FAM 1796.3).

Convention country: A country that is a party to the Convention and with which the Convention is in force for the United States. (For a list of Convention countries, see the State Department Web site.)

Country of origin: The country in which a child is resident and from which the child is emigrating in connection with his or her adoption.

Hague Convention Certificate: A certificate issued by a consular officer overseas to the adoptive parent(s) or PAP(s) certifying that the foreign adoption or grant of legal custody in the country of origin was granted pursuant to the Convention and IAA. A Hague Convention Certificate will be either a Hague Adoption Certificate (IHAC) (in the case of a final adoption overseas) or a Hague Custody Certificate (IHCC) (in the case of custody granted overseas for the purpose of adoption in the United States). (See 9 FAM 42.21 N14.10 regarding verification of compliance with the Convention and IAA.)

Intercountry Adoption Act of 2000 (IAA): The United States implementing legislation for the Convention (Public Law 106-279 (2000) (42 U.S.C. 14901 - 14954))

Receiving country: The country to which a child adopted abroad is brought by the child's adoptive family. For Hague visa cases, the receiving country is the United States.

9 FAM 42.21 N14.3 Summary of the Convention Adoption Process

(CT:VISA-1178;   04-03-2009)

a. The Convention adoptee visa process differs from standard IV or orphan

processing primarily in that the PAP(s) must work with an accredited or approved Adoption Service Provider (ASP) (see 9 FAM 42.21 N14.1 e) and in that a Convention adoptee's eligibility for the visa classification and visa must be reviewed before the adoption or grant of legal custody takes place. Final approval of the petition and visa application only takes place after the adoption or grant of legal custody is complete and a Hague Convention Certificate indicating the adoption's or grant of legal custody's compliance with the Convention and IAA has been issued.

b. A summary of the Convention adoption process is provided below. For ease of navigation through this FAM Note, each point is linked to an expanded and more detailed section.

(1) **Form I-800-A: Application for Determination of Suitability to Adopt a Child from a Convention Country** (see 9 FAM 42.21 N14.4): The PAP(s) must file the Form I-800-A with USCIS, which determines whether the PAP(s) satisfy criteria for eligibility and suitability to adopt. If USCIS approves the Form I-800-A, the PAP(s) may arrange for the relevant accredited, approved, temporarily accredited, or supervised ASP to submit the approval notice, the accompanying home study, and other supporting evidence to the Central Authority in the Convention country in which the PAP(s) plan to adopt.

(2) **Convention country matches PAP(s) with child** (see 9 FAM 42.21 N14.5): Working through an accredited, approved, temporarily accredited, or supervised ASP and in accordance with procedures established by the Convention country, PAP(s) obtain from the Convention country's Central Authority an Article 16 report on a child with the Central Authority's determination that the child is adoptable, proof that necessary consents have been obtained, and its reasons why the envisaged placement is in the best interests of the child. PAP(s) agree to adopt the child.

(3) **Form I-800 Provisional Adjudication: Petition to Classify Convention Adoptee as an Immediate Relative** (see 9 FAM 42.21 N14.6): PAP(s) file a Form I-800 petition with USCIS per USCIS instructions, including the Article 16 report on the child. The Form I-800 is used to determine whether the child will qualify as a Convention adoptee. This step must occur before the PAPs have adopted or obtained legal custody of the child. (If the PAPs have already adopted the child, that adoption will have to be voided and the process redone in accordance with the Convention in order for the child to immigrate as a Convention adoptee.) (See 8 CFR 204.309(b)(1)). At this stage, the adjudicating USCIS officer will determine whether to provisionally approve the Form I-800 petition in accordance with USCIS regulations. This includes USCIS

adjudication of any waiver applications filed with the Form I-800 petition to cover any known or suspected ineligibilities.

(4) **Visa Application** (see 9 FAM 42.21 N14.7): After the petition has been provisionally approved by USCIS, the PAP(s) (in person only if practicable) or an ASP then file a Form DS-230, Immigrant Visa Application (or, in certain cases, a Form DS-156, Nonimmigrant Visa Application—See 9 FAM 42.21 N14.13-9) on behalf of the child with a consular officer, who will review the application and determine whether the child appears to meet the criteria for visa eligibility based on the evidence available. If the consular officer decides that the child appears not to be ineligible to receive a visa, the officer will annotate the application to reflect this conclusion. This stage includes the first of two ineligibility reviews for the child.

(5) **Article 5 Letter** (see 9 FAM 42.21 N14.8): Provisional approval of the petition and favorable annotation of the visa application result in the consular officer's issuance of an Article 5 Letter to the Convention country's Central Authority stating that the PAP(s) have been counseled (including child specific counseling) and found suitable for the adoption, and that the child will be authorized to enter and reside in the United States; PAP(s) then adopt the child or obtain legal custody of the child for purposes of emigration and adoption.

(6) **Appropriate Notification from Country of Origin** (see 9 FAM 42.21 N14.9): In the case of an adoption, the Central Authority of the Convention country will issue an Article 23 Certificate certifying that the adoption has occurred in accordance with the Convention. In the case of a grant of legal custody, posts should work with host country to determine whether, in the particular country, a document comparable to the Article 23 Certificate exists with respect to custody cases (i.e., a document certifying Convention compliance) and, if so, should request this document. If such a document does not exist, proof that the grant of legal custody occurred, as described in 9 FAM 42.21 N14.9 b (1), will in these cases be sufficient to constitute appropriate notification.

(7) **Hague Convention Certificate (Hague Adoption Certificate or Hague Custody Certificate)** (see 9 FAM 42.21 N14.10): After verifying compliance with the Convention and IAA, consular officers provide either (1) a Hague Adoption Certificate to the adoptive parent(s), certifying that the requirements of the Convention and the IAA have been met with respect to the adoption, or (2) a Hague Custody Certificate to the PAP(s), certifying that the requirements of the Convention and the IAA have been met with respect to the grant of legal custody.

(8) **Form I-800 Final Adjudication** (see 9 FAM 42.21 N14.11): USCIS has delegated to consular officers the authority to grant final approval of the Form I-800. You may not, however, deny a Form I-800. If the Form I-800 is not clearly approvable, forward the Form I-800 and accompanying evidence to the appropriate USCIS office for adjudication.

(9) **Visa Issuance** (see 9 FAM 42.21 N14.12): Adjudicate the visa application and, if there are no ineligibilities found upon a second review, issue the visa.

c. Direct questions related to processing of Convention adoptee cases to CA/VO/F/P and classification questions to CA/VO/L/A, with a copy to CA/VO/F/P. Direct reporting on countries' adoption practices to CA/OCS/CI, with a copy to CA/VO/F/P.

9 FAM 42.21 N14.4 Consular Officer use of Form I-800-A information (Step 1 of 9)

(CT:VISA-1178; 04-03-2009)

Summary of 9 FAM 42.21 N14.4:

- 9 FAM 42.21 N14.4-1 Use of Form I-800-A
- 9 FAM 42.21 N14.4-2 Fraud or misrepresentation in the Form I-800-A

9 FAM 42.21 N14.4-1 Use of Form I-800-A

(CT:VISA-1743; 10-19-2011)

a. The Department of Homeland Security's Citizenship and Immigration Services (USCIS) has responsibility for determining eligibility and suitability of PAP(s). The Form I-800-A application allows the PAP(s) to demonstrate that they are both eligible to adopt and capable of providing proper care to a Convention adoptee.

b. You may grant final approval of Form I-800 petitions only if you have acceptable evidence of a valid Form I-800-A approval for the petitioner(s) and of provisional approval of the Form I-800.

c. The Form I-800-A approval and the fingerprint clearances obtained during the Form I-800-A process have a 15-month validity period from the date the fingerprints were cleared (although the Form I-800-A can be extended—see below). Validity dates will be clearly indicated on the Form I-800-A approval. PAP(s) filing a petition for a child to be classified as a Convention adoptee must file the Form I-800 petition within the validity period of the Form I-800-A. If the Form I-800 isn't filed within the validity period, the Form I-800-A approval has expired and will no

longer support the filing of the Form I-800 (See 9 FAM 42.21 N14.6-2 c (*2*)).

d. Before the Form I-800-A expires, PAP(s) may request an extension of the Form I-800-A validity period by filing an Form I-800-A Supplement 3 Request for Action on Approved Form I-800-A with USCIS. Only USCIS can extend the validity of the Form I-800-A approval. If the PAP(s) wish to file a Convention adoptee petition after the Form I-800-A expires, they must file a new Form I-800-A and submit required documentation to the appropriate USCIS office. Further action on the case must be put on hold until the new Form I-800-A is approved (See 9 FAM 42.21 N14.6-2 c (*2*)).

e. You may approve Form I-800 petitions and/or Convention adoptee visas only for children who meet the conditions noted in the Form I-800-A approval. For example, if the Form I-800-A approval was for only a child under the age of two or did not note special approval to adopt a special needs child, you may not approve a Form I-800 petition or a visa for a 10-year old or a special needs child, respectively. Similarly, if state preadoption requirements were identified in the Form I-800-A and have not yet been met, you cannot approve the Form I-800 petition or visa for the child in question, unless those requirements cannot be met until the PAPs acquire legal custody of the child or the child is physically in the United States (see 9 FAM 42.21 N14.6-3 a).

f. Although you are not involved in Form I-800-A adjudication and have no authority to review USCIS' determinations regarding PAP(s)' ability to provide a proper home environment, you may assist in the suitability determination process by providing information or necessary forms to prospective petitioners, taking their fingerscans, and/or forwarding paperwork on behalf of such individuals under certain limited circumstances, where authorized by USCIS.

g. The PAP(s) must file the Form I-800-A with USCIS in accordance with instructions associated with the Form I-800-A form.

h. You cannot adjudicate Form I-800-A applications and may only accept a Form I-800-A on behalf of USCIS upon instructions from USCIS or CA/VO.

9 FAM 42.21 N14.4-2 Fraud or Misrepresentation in the Form I-800-A

(CT:VISA-1178; 04-03-2009)

a. You may encounter fraud in Convention adoptee cases, and information from the Form I-800-A may occasionally be used to corroborate requests for USCIS review or revocation of Form I-800-A applications, as well as of Form I-800 petitions. 9 FAM 42.21 N14.6-3 b and 9 FAM 42.21 N14.7-2 b provide additional information on dealing with such cases.

b. In cases where you have a well-founded and substantive reason to believe that the Form I-800-A approval was obtained on the basis of fraud or misrepresentation, or have knowledge of a change in material fact subsequent to the approval of the Form I-800-A, consult with the appropriate USCIS office on disposition of the case.

c. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.5 Country of Origin Identification of a Convention Adoptee for Adoption (Step 2 of 9)

(CT:VISA-1178; 04-03-2009)

a. Once USCIS has approved the Form I-800-A, the accredited, approved, temporarily accredited, or supervised ASP must transmit the USCIS determination to the Central Authority of the Convention country where the PAP(s) wish to adopt a Convention adoptee. The documentation on the parents (i.e., the home study and other supporting evidence) provided to the Convention country Central Authority must be identical to that submitted to and approved by USCIS.

b. In accordance with Articles 4 and 16 of the Convention, the Central Authority of the Convention country then identifies a child as a prospective match for the parents. The Central Authority of the Convention country must fulfill several Convention obligations at this point, including preparing a report on the child.

c. The Central Authority of the Convention country must transmit its report on the child, including proof that the necessary consents have been obtained and the reasons for its determination on the placement directly to the authorized ASP, which has been delegated authority to receive such a report. Formats for this report will vary; send questions related to the report to CA/VO/F/P and CA/OCS/CI.

d. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.6 Form I-800 Provisional Adjudication (Step 3 of 9)

(CT:VISA-1178; 04-03-2009)

Summary of 9 FAM 42.21 N14.6:

- Introduction
- 9 FAM 42.21 N14.6-1 Purpose of the Form I-800 Convention Adoptee Petition

- 9 FAM 42.21 N14.6-2 Filing the Form I-800 Convention Adoptee Petition
- 9 FAM 42.21 N14.6-3 Post investigation during USCIS review of the Form I-800 Convention adoptee petition

Most of the analysis of the child's eligibility for the Convention adoptee classification will take place at the provisional adjudication stage; the final adjudication of the petition will be based on a rebuttable presumption that the child is eligible for the Convention adoptee classification. The section below discusses USCIS's review, provisional adjudication, and approval of a Convention adoptee petition. (See 9 FAM 42.21 N14.11 for instructions related to final approval of the petition.)

9 FAM 42.21 N14.6-1 Purpose of the Form I-800 Convention Adoptee Petition

(CT:VISA-946; 04-11-2008)

a. The Form I-800 petition form is used to document a child's classification under INA 101(b)(1)(G) and eligibility to immigrate as a Convention adoptee. Separate Form I-800 petitions must be filed for each child, even though the associated Form I-800-A approval may have been for multiple children. A Convention adoptee can be issued an immigrant visa (IV) only if he or she is the beneficiary of an approved Form I-800 petition.

b. In rare cases, the Form I-800 petition may also be used to demonstrate Convention adoptee classification for a child who will continue to live abroad with his or her PAP(s) in the near term, but whose parents plan to seek naturalization under INA Section 322. In such cases, approval of the petition will become the basis for a USCIS appointment for a naturalization hearing in the United States, and a request for a nonimmigrant visa to attend that hearing. (See 9 FAM 42.21 N11 for additional details.)

9 FAM 42.21 N14.6-2 Filing the Form I-800 Convention Adoptee Petition

(CT:VISA-1743; 10-19-2011)

a. Once U.S. citizen PAP(s) have accepted the referral of a child from the Central Authority of the country of origin, the PAP(s) file the Form I-800 petition. The petition must be filed in accordance with instructions associated with the Form I-800. Consular officers should consult Form I-800 and the instructions to familiarize themselves with current filing requirements; although USCIS officers will provisionally approve Form I-800s, consular officers will be responsible for final approval and will have

to verify Convention and IAA compliance based in large measure on the Form I-800. A description of key requirements for filing follows in this note.

b. **Where PAPs must file:** PAP(s) must file the Form I-800 petitions with the USCIS office that approved, or granted the most recent extension of, the PAP(s) Form I-800-A.

c. **Who can file:** In order to file an Form I-800 petition, the petitioner must meet the following requirements:

(1) The PAP is habitually resident in the United States, as defined in applicable DHS regulations (see 9 FAM 42.21 N14.13-2 b(2));

(2) The PAP is an unmarried U.S. citizen who is at least 25 years old or a married U.S. citizen whose spouse will also adopt the child the citizen seeks to adopt. (The spouse must be either a U.S. citizen, a non-citizen U.S. national, or an alien who, if living in the United States, holds a lawful status under U.S. immigration law);

(a) The PAP has an approved and unexpired Form I-800-A; and

(b) Within the last year, USCIS has not denied the PAP's:

- Form I-800-A under 8 CFR 204.309(a)
- Form I-600-A under 8 CFR 204.3(h)(4)
- Form I-800 under 8 CFR 204.309(b)(3)
- Form I-600 under 8 CFR 204.3(i)

NOTE: These 8 CFR provisions relate to failure to disclose a history of abuse and/or violence, failure to disclose a criminal history, failure to disclose prior adoption home studies, failure to cooperate in checking child abuse registries, and child-buying.

d. **When to file:** PAP(s) must generally file the Form I-800 before the child's 16th birthday. (See 9 FAM 42.21 N14.13-2 a (1)(a) for special rules concerning children between the ages of 15 and 16.)

e. **What to file with the Form I-800:** PAP(s) generally must present the following with the Form I-800 petition. (See 9 FAM 42.21 N14.13-2 regarding an exception to documentary filing requirements for children approaching the age of 16):

(1) The Form I-800-A approval notice and, if applicable, proof that the approval period has been extended (if the approval notice is not included, it would be necessary to request it only if post does not have a copy; cases in which post is not in possession of the USCIS approval for the Form I-800-A will be rare);

(2) A statement from the primary provider signed under penalty of perjury under U.S. law, indicating that all of the pre-placement

preparation and training provided for in the accreditation standards (22 CFR 96.48) has been completed;

(3) The report required under Article 16 of the Convention, specifying the child's name and date of birth, the reasons for making the adoption placement, and establishing that the competent authority has, as required under Article 4 of the Convention*:*

(a) Established that the child is eligible for adoption;

(b) Determined, after having given due consideration to the possibility of placing the child for adoption within the Convention country, that intercountry adoption is in the child's best interests;

(c) Ensured that the legal custodian, after having been counseled as required concerning the effect of the child's adoption on the legal custodian's relationship to the child and on the child's legal relationship to his or her family of origin, has freely consented in writing to the child's adoption, in the required legal form;

(d) Ensured that if any individual or entity other than the legal custodian must consent to the child's adoption, this individual or entity, after having been counseled as required concerning the effect of the child's adoption, has freely consented in writing, in the required legal form, to the child's adoption;

(e) Ensured that the child, after having been counseled as appropriate concerning the effects of the adoption, has freely consented in writing, in the required legal form, to the adoption, if the child is of an age that, under the law of the country of the child's habitual residence, makes the child's consent necessary, and that consideration was given to the child's wishes and opinions; and

(f) Ensured that no payment or inducement of any kind has been given to obtain the consents necessary for the adoption to be completed.

(4) The report referenced in 9 FAM 42.21 N14.6-2 e (4)*(d)*(iii) of this section must be accompanied by:

(a) A copy of the child's birth certificate, or secondary evidence of the child's age;

(b) A copy of the irrevocable consent(s) signed by the legal custodian(s) and any other individual or entity who must consent to the child's adoption unless, as permitted under Article 16 of the Convention, the law of the country of the child's habitual residence provides that their identities may

not be disclosed, so long as the Central Authority of the country of the child's habitual residence certifies in its report that the required documents exist and that they establish the child's age and availability for adoption. (See 9 FAM 42.21 N14.13-5 k(5) on obtaining such a certification);

(c) A statement, signed under penalty of perjury by the primary provider (or an authorized representative if the primary provider is an agency or other juridical person), certifying that the report is a true, correct, and complete copy of the report obtained from the Central Authority of the Convention country;

(d) A summary of the information provided to the PAP under 22 CFR 96.49(d) and (f) concerning the child's medical and social history. This summary, or a separate document, must include:

(i) A statement concerning whether, from any examination as described in 22 CFR 96.49(e) or for any other reason, there is reason to believe that the child has any medical condition that makes the child inadmissible; if the medical information that is available at the provisional approval stage is not sufficient to assess whether the child may be inadmissible under section 212(a)(1) of the INA, the submission of this information may be deferred until the PAP seeks final approval of the Form I-800;

(ii) If both of the child's birth parents were the child's legal custodians and signed the irrevocable consent, the factual basis for determining that they are incapable of providing proper care for the child;

(iii) Information about the circumstances of the other birth parent's death, if applicable, supported by a copy of the death certificate, unless the Central Authority has made the certification referenced in 9 FAM 42.21 N14.6-2 e(4)(b);

(iv) If a sole birth parent was the legal custodian, the circumstances leading to the determination that the other parent abandoned or deserted the child, or disappeared from the child's life; and

(v) If the legal custodian was the child's prior adoptive parent(s) or any individual or entity other than the child's birth parent(s), the circumstances leading to the custodian's acquisition of custody of the child and the legal basis of that custody.

(e) If the child will be adopted in the United States, the primary provider's written report, signed under penalty of perjury by the primary provider (or an authorized representative if the primary provider is an agency or other juridical person) detailing the primary adoption service provider's plan for post-placement duties, as specified in 22 CFR 96.50; and

(5) If the child may be inadmissible under any provision of section 212(a) of the INA for which a waiver is available, a properly completed waiver application for each such ground;

(6) Either a Form I-864-W, Intending Immigrant's Form I-864 Exemption, or a Form I-864, Affidavit of Support (see 9 FAM 42.21 N14.7-3 c (2));

(7) Any other information required by Form I-800 (for example, a statement of expenses paid in connection with the adoption and evidence of compliance with pre-adoption requirements); and

(8) Required Fees. Note that a PAP who filed an Form I-800-A with USCIS may file an Form I-800 petition for one Convention adoptee without any additional fee. If more than one Form I-800 petition is being filed based on the Form I-800-A, the PAP must pay an Form I-800 filing fee for each Convention adoptee beyond the first, unless the children involved are already siblings before the proposed adoption (in which case no additional fees would be collected). USCIS Form I-800 filing fees are established in 8 CFR 103.7(b)(1).

NOTE: See 9 FAM 42.21 N14.13-2 for special rules regarding determining the Form I-800 filing date for children between the ages of 15 and 16.

NOTE: Any foreign language documents submitted with the Form I-800 petition must be accompanied by a full English translation, which the translator has certified as complete and correct, and by the translator’s certification that he or she is competent to translate the foreign language into English. If questions arise regarding the adequacy of the submitted statements or certifications outlined in 9 FAM 42.21 N14.6-2 e (4)(e), consult with USCIS officer at post or, if USCIS is not at post, contact CA/VO/F/P, CA/OCS/CI, and CA/VO/L/A for assistance.

9 FAM 42.21 N14.6-3 Post Investigation During USCIS Review of the Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative

(CT:VISA-1178; 04-03-2009)

a. USCIS review of the Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, and accompanying documentation will

generally focus on the following:

(1) Whether the Form I-800 petition and accompanying documents clearly establish that the child meets the criteria outlined in 9 FAM 42.21 N14.13-1 a. Note that parents will not have completed the adoption or acquired legal custody of the child at this point, and therefore proof of adoption or legal custody is not required for provisional adjudication of the Form I-800 petition.

(2) Whether the child fits all criteria identified in the Form I-800-A approval (e.g., age, gender, special needs, if any).

(3) If the child will be adopted in the United States, rather than abroad, whether all applicable state preadoption requirements have been met (except those that cannot legally be met without the child's presence in the United States).

b. If the USCIS officer reviewing the Form I-800 petition finds that the Form I-800 petition and accompanying documentation raise questions about whether the child is a Convention adoptee or concerns about possible improper inducement, prohibited contact, or fraud or misrepresentation, the USCIS officer may request post assistance with investigating the case prior to provisional adjudication of the petition. Upon receipt of a request for an investigation and the accompanying documentation (copies of the filed petition and supporting documents), you should work with post's anti-fraud unit, the RSO, and local officials and contacts to investigate the issues identified by the USCIS officer and return the documentation and a written report of the results of your investigation to the USCIS office. Investigation procedures vary from post to post, since the best means of collecting necessary information regarding the child's status and history often depends on local conditions. In the vast majority of Convention adoption cases that raise concerns of this nature, liaison with the Central Authority and competent authorities will be required. In some cases, interviews with the petitioner and/or caregiver will be helpful. An investigation can also include document or phone checks, or interviews with the child (if of sufficient age), social workers, orphanage representatives, or birth parent(s), if available. In some cases, a full field investigation, DNA tests or other measures may be warranted (see 9 FAM 42.21 N14.13-8(d)).

c. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.7 Convention Adoptee Visa Application (Step 4 of 9)

(CT:VISA-1178; 04-03-2009)

Summary of 9 FAM 42.21 N14.7:

- Introduction
- 9 FAM 42.21 N14.7-1 Submitting Convention adoptee visa application
- 9 FAM 42.21 N14.7-2 Visa application - Reviewing Convention adoptee classification
- 9 FAM 42.21 N14.7-3 Visa application - Reviewing ineligibilities
- 9 FAM 42.21 N14.7-4 Documenting results of initial visa application review

a. Once the Form I-800 petition has been provisionally approved, USCIS will send notification to the National Visa Center (NVC), which will notify post of the provisional approval and inform the PAP(s) that they, or an ASP acting on their behalf, should submit a visa application to post for the child.

b. Your consideration of a Convention adoptee Form DS-230 (or Form DS-156, see below) will take place in two stages. Based on the information initially available on the child and not including evidence on the completed adoption or grant of legal custody, an initial review takes place upon filing of the Form DS-230. Later, once the adoption is complete or custody is granted, the formal adjudication of the visa application is done.

c. Generally speaking, most of the analysis of the child's eligibility for a visa will take place at the initial review stage; the adjudication of the application will generally consider additional information obtained after the initial review. The section below provides instructions for the initial review of the Convention adoptee visa application. (See 9 FAM 42.21 N14.12 for instructions related to formal adjudication of the visa application.)

d. Note that a Form DS-156 Nonimmigrant Visa Application would be filed for a child who seeks a nonimmigrant visa (NIV) to travel to the United States to obtain naturalization under section 322 of the INA (see 9 FAM 42.21 N14.13-9). The review process, however, is the same except where noted below.

9 FAM 42.21 N14.7-1 Submitting Convention Adoptee Visa Applications

(CT:VISA-946; 04-11-2008)

a. Visa applications on behalf of Convention adoptees may be submitted to an IV-issuing post once post has received notification of USCIS' provisional approval.

b. For Convention adoptee visa applications, the application packet must include:

   (1) Form DS-230 parts I and II (but see paragraph d below regarding signatures and execution of the form) (IV cases) or Form DS-156 (NIV cases);

   (2) Birth certificate;

   (3) Photographs (three full frontal photographs);

   (4) Police, military, or prison records, if required (very rare); and

   (5) If necessary, visa processing fees (some fees are collected by NVC, but others will be paid at post—see 9 FAM 42.71 N2).

c. In addition, to the extent practicable, the visa application packet must also include the following documents. Submission of these documents is not absolutely required at this stage of the process, although they will be required by the time of adjudication of the visa application.

   (1) Passport of the Convention adoptee; and

   (2) Results of panel physician's medical exam (required in NIV cases only if you suspect a medical ineligibility).

d. The following are also required, to the extent practicable, at the time of application for a visa:

   (1) The personal presence of the Convention adoptee. (*I*f personal appearance is impracticable, visa applications may be submitted by PAP(s) or authorized ASPs on behalf of the child);

   (2) Signature on Part II of Form DS-230 (IV cases) or Form DS-156 (NIV cases); and

   (3) Biovisa fingerscanning (applicants age 14 and over).

9 FAM 42.21 N14.7-2 Visa application - Reviewing Convention Adoptee Classification

(CT:VISA-946; 04-11-2008)

a. You must confirm that the applicant may be considered a Convention adoptee. Provisional approval of the Form I-800 petition should be considered prima facie evidence of Convention adoptee status, but you must briefly review the Form I-800 and documentation supporting Convention adoptee status to confirm that the classification is appropriate. The documentation may include IVO scans of the documents submitted to USCIS to obtain provisional approval, but may also include the actual paper record submitted to USCIS. Keep in mind that the Form I-800 was provisionally adjudicated in the United States without the benefit of physically seeing the parties involved and having more in-depth

knowledge of the documents and fraud patterns in the local country.

b. If, during the provisional visa eligibility review, you come to know or have reason to believe that the petition is not clearly approvable, expeditiously forward the Form I-800 petition and accompanying documentation to the appropriate USCIS office having jurisdiction over the place of the child's habitual residence for action (see 9 FAM 42.43 N3 and 9 FAM Appendix N Exhibit I) with an explanation of the facts of the case. You are not authorized to deny petitions. Also provide written notification to the ASP and/or PAPs of this action, including a brief explanation of the decision and the name and address of the USCIS office to which the petition has been forwarded. If the petition's provisional approval is subsequently upheld, resume processing of the Convention adoptee case.

9 FAM 42.21 N14.7-3 Visa application - Reviewing ineligibilities

(CT:VISA-1178; 04-03-2009)

a. Based on the information available at the time the application is submitted, review the visa application to identify any possible ineligibilities which might affect final approval of the visa. Convention adoptee visa applicants are subject to all of the standard INA Section 212 ineligibilities, although in practice almost no adoptive children will be affected by criminal, security, immigration violation and other ineligibilities due to their age. Instructions for handling possible ineligibilities at the initial visa application review stage of Convention adoptee processing are provided in 9 FAM 42.21 N14.7-3 d.

b. Unique to Convention adoptee cases, ineligibility-related information may be a factor in the approvability of an Form I-800 petition. While Form I-800 provisional adjudication does not include a review of ineligibilities, PAP(s) are permitted to apply, at the time of the Form I-800 filing, for a waiver of any known or suspected ineligibilities of the child (see 9 FAM 42.21 N14.6-2 e (5)). Those potential ineligibilities, if identified by the PAP(s), are addressed during the Form I-800 provisional adjudication stage through the filing, and USCIS review, of a request for a waiver of ineligibilities. Provisional approval of the Form I-800 in such cases will include approval of the waiver. (In the event that the Form I-800 is finally denied, or the IV or NIV application is refused on grounds other than 221(g), after the granting of a waiver of an ineligibility, the waiver will be void.) During both the initial review and the final adjudication of the visa application, however, you still must carefully review the visa application and supporting documents for evidence of any other ineligibilities.

c. Convention adoptee-specific 212(a) issues:

(1) Medical issues: It is likely that the panel physician's medical exam results will not be part of the Convention adoptee visa application packet at this provisional stage of processing. However, based on any available exam results and the summary of medical information provided on the child with the Form I-800, including vaccination records, you should identify any possible medical ineligibilities in the case.

(a) Keep in mind that, unlike orphan IR3 and IR4 applicants, Convention adoptee are not exempt from 212(a)(1)(A)(ii) vaccination requirements.

(b) Significant medical conditions:

If the results of the panel physician's medical exam are available during this initial review of the visa application and a significant medical condition is revealed in them that was not revealed in the Convention country's report on the child (9 FAM 42.21 N14.5 c), you must ensure that the adoptive parents are aware of the condition identified. Processing should be suspended until you receive a notarized statement from the adoptive parent(s) or PAP(s) indicating awareness of the child's medical condition and willingness to proceed with case processing. If the adoptive parents choose not to pursue the petition, forward it, along with an explanation and all other pertinent information, to the appropriate USCIS office. Inform CA/OCS/CI and CA/VO/F/P of the circumstances of the case, such that any necessary notification to the Convention country's Central Authority may be arranged.

Note also that a child with a serious medical condition or disability may sometimes be considered a special needs child, and therefore be subject to the requirement that the adoptive parents' or PAP(s)' Form I-800-A approval include a reference to parents' ability to adopt a special needs child. In cases where a child is later determined to be a special needs child and the parents' Form I-800-A suitability approvals do not note approval to adopt a special needs child, you should consult with the appropriate USCIS office overseas on whether processing on the case should continue.

You should ensure that adoptive parent(s) or PAP(s) understand that the medical exam that is part of the visa application process is not meant to provide a comprehensive evaluation of an adoptive child's health. Encourage parents to arrange private evaluations by qualified medical professionals, preferably ones versed in childhood development and who specialize in adoption medicine and have experience reviewing Convention country medical information.

(2) Public charge: In general, the adoptive parents' ability to care for a child is evaluated during the Form I-800-A adjudication, such that

an IH3 or IH4 applicant is unlikely to become a public charge. Although Form I-864 forms are filed with the Form I-800 petition, briefly review them as part of the Convention adoptee visa application review. The following forms should be used:

(a) For IH3 applicants eligible for citizenship upon admission to the United States, (see 9 FAM 42.21 N14.13-9 d and 9 FAM 40.41 N3.4-1) and for IH4 applicants whose PAP(s) have at least 40 quarters of coverage under the Social Security Act, (see 9 FAM 42.21 N14.13-9 d (2) and 9 FAM 40.41 N3.4-2), review the Form I-864-W that was submitted with the Form I-800 petition.

(b) For all other Convention adoptee visa applicants, including those applying for B-2 NIV classification as children adopted abroad who seek to enter the United States for the acquisition of U.S. citizenship under INA 322 (see 9 FAM 42.21 N14.13-9 d (3) and 9 FAM 40.41 N3.4-1 d), review the Form I-864 or Form I-864-EZ that was submitted with the Form I-800.

(c) If, in a given case, the adoptive parents did not submit the Form I-864, Form I-864-EZ, or Form I-864-W with the Form I-800 petition, they must submit the appropriate form with the visa application.

(d) In a rare case where the child has an illness or medical condition not addressed by the approved Form I-800-A that would entail significant financial outlay, or where other unusual circumstances prevail, you should consult with the appropriate USCIS overseas regional office before determining whether the case requires an updated Form I-800-A.

(3) Watchlist checks: At the initial visa application review stage, in accordance with standard guidance for handling visa cases, you must review and properly adjudicate CLASS and FR hits possibly matching Convention adoptee applicants' data. Adjudication of IDENT results is required only in the rare cases where the child is personally present at the time of the initial visa application filing. (see 9 FAM 42.21 N14.7-1 d). You will need to check or re-check CLASS, IDENT, and/or FR results at final visa adjudication as well (see 9 FAM 42.21 N14.12).

d. If a possible ineligibility is found during the initial review of the Convention adoptee visa application and that ineligibility has not already been resolved through the issuance of a waiver:

(1) 212(a)(1) - You should ensure that the PAP(s) are aware of the issue and determine whether the parents will seek treatment and/or

a waiver of the ineligibility. If the PAP(s) indicate that they do intend to seek treatment and/or a waiver on behalf of the Convention adoptee, inform them that post cannot provide an Article 5 Letter (see 9 FAM 42.21 N14.8) unless USCIS approves the waiver request and/or the medical condition is successfully treated and there appear to be no other grounds of ineligibility (unless these are overcome or waived). The Department and USCIS anticipate that approval of waivers and treatment of medical conditions will be successful in the vast majority of cases in resolving 212(a)(1) ineligibilities, such that a 212(a)(1) finding will not generally be a permanent obstacle to admission and residence in the United States. Posts with questions on handling 212(a)(1) ineligibilities may request assistance from CA/VO/L/A and CA/VO/F/P.

(2) Other 212(a) or 212(f) ineligibilities where a waiver is available - Submit an advisory opinion request on the case to CA/VO/L/A, with a copy to CA/VO/F/P and CA/OCS/CI. We will consult with USCIS on the ineligibility and the likelihood of approval of the waiver, and provide appropriate instructions to post.

(3) Other 212(a) ineligibilities where no waiver is available (very rare) – After consultation with CA/OCS/CI, CA/VO/L/A, and CA/VO/F/P, refuse the visa application in accordance with 9 FAM 42.81 and inform the applicant, adoption service provider (ASP), and/or prospective adoptive parents (PAPs) of the bases for the refusal. In accordance with CA instructions, post should then inform the Central Authority of the Convention country of the inability to determine that the child would be authorized to enter and reside permanently in the United States.

9 FAM 42.21 N14.7-4 Documenting Results of Initial Visa Application Review

(CT:VISA-1178; 04-03-2009)

a. If you confirm that the adoptive child is eligible for Convention adoptee classification, and you either identify no potential ineligibilities in the case based on available information, or any such potential ineligibilities have been waived or overcome (per 9 FAM 42.21 N14.7-3 c (1) and 9 FAM 42.21 N14.7-3 c (2)), annotate the visa application to reflect a positive initial review. You should annotate the case in IVO or (in B-2 cases) NIV, noting that no obstacles were identified to the applicant’s admission or residence in the United States.

b. Inform the ASP and/or PAP(s) that, based on the currently available information, the United States will notify the Central Authority of the

Convention country that the Convention adoptee will be authorized to enter and reside permanently in the United States, and that, once that notification is provided, the Convention provides that the adoption or grant of legal custody may proceed. Caution PAP(s), however, that if derogatory information develops prior to final processing of the case, it may delay or, in extremely rare cases, prevent visa processing.

c. In the rare cases covered by 9 FAM 42.21 N14.7-3 d (3) or where instructed by CA/VO for cases under 9 FAM 42.21 N14.7-3 d (2), you should refuse the visa application in the IVO or NIV system, as applicable, under the relevant legal ground. For cases covered by 9 FAM 42.21 N14.7-3 c (1) or where instructed by CA/VO for cases under 9 FAM 42.21 N14.7-3 d (2), note the potential ineligibility in the IVO or NIV case notes, but favorably annotate the case once USCIS has granted the waiver.

d. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.8 Article 5 Letter (Step 5 of 9)

9 FAM 42.21 N14.8-1 Processing Article 5 Letter

(CT:VISA-1743; 10-19-2011)

a. The Convention requires that in order for an adoption or grant of legal custody to be completed, the receiving country's Central Authority must determine that the PAP(s) are eligible and suitable to adopt, ensure that the PAP(s) have been counseled as necessary, determine that the child is or will be authorized to enter and reside permanently in the receiving country (here, the United States), and agree that the adoption or grant of legal custody may proceed. Confirmation that these steps have been taken is conveyed to the country of origin's Central Authority via an "Article 5 letter" (the name refers to the relevant article of the Convention). This letter will also constitute our agreement, under Article 17 of the Convention, for the adoption to proceed.

b. Provisional approval of the Form I-800 petition and a favorable initial review of the visa application are the critical factors in determining whether the child will be eligible to enter and reside in United States, and that the adoption or grant of legal custody may proceed.

c. Once post enters both Form I-800 provisional approval and visa application annotation into the IVO system, the Article 5 Letter will be generated by the IVO system for sending to the Convention country's Central Authority. A copy of the text of the letter is provided in 42.21 Exhibit VIII. Post should scan the signed Article 5 Letter into IVO. There is no standard means of delivering Article 5 Letters to the Central

Authorities. Posts handling Convention adoptee cases will need to contact the Central Authority in their respective countries to determine the best way to forward the Article 5 Letter to the Central Authority. Transmission through an authorized ASP may be a possibility. For any questions concerning Article 5 Letter forwarding, post should contact CA/OCS/CI and CA/VO/F/P.

d. Once the Convention country's Central Authority receives the Article 5 Letter, the adoption or grant of legal custody may proceed. If issues arise with the Central Authority of the Convention country regarding the Article 5 Letter, post should consult with CA/OCS/CI and CA/VO/F/P.

e. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.8-2 Adoption or Custody Order Issued Before Issuance of Article 5/17 Letter

(CT:VISA-1743; 10-19-2011)

a. If it becomes apparent to you that, prior to your sending an Article 5/17 Letter (see 9 FAM 42.21 N14.8-1) but after provisional approval of the Form I-800 petition, the PAP(s) adopted the child or obtained custody for purposes of emigration and adoption, then you should notify CA/OCS/CI and CA/VO/F/P of the case and present the options outlined below to the now adoptive parent(s) and/or custody holder(s) (AP(s)). If the AP(s) is unwilling or unable to take one of the corrective measures identified, you may request an advisory opinion from CA/VO/L/A. Keep CA/OCS/CI and CA/VO/F/P informed of your request and subsequent developments.

(1) Option 1: The AP(s) may return to the local court and void, vacate, annul, or otherwise terminate the existing adoption or grant of custody for the purpose of adoption. Following one of the above listed actions and upon receipt of a new court order as evidence of the court's action, post may continue to process the case. If your review of the provisionally approved Form I-800 Petition and initial review of the visa application are favorable, and all other Convention requirements have been met, post may proceed with the IVO entries that will generate the Article 5/17 Letter (see 9 FAM 42.21 N14.8-1 b).

(2) Option 2: Some countries' laws, regulations, customs, or practices may not allow a local court to void, vacate, annul, or otherwise terminate an adoption or grant of custody. In this situation, post should consult CA/VO/F/P and CA/OCS/CI, and, if warranted, request an advisory opinion from CA/VO/L/A. If the reviews of the provisionally approved Form I-800 Petition and initial review of the visa application are favorable, and post has established that local

laws, customs, or practice prevent an adoptive family from pursuing Option 1, then post may proceed with the IVO entries that will generate the Article 5/17 Letter (see 9 FAM 42.21 N14.8-1 b). A statement from a judge or competent administrative body should be kept on file with Post explaining that a family may not successfully void, vacate, annul, or terminate the adoption and then re-adopt the child. This statement should be scanned into applicable IVO cases and should be considered sufficient for post to establish that local laws, customs, or practice prevent a family from pursuing Option 1.

b. *Exception to these procedures:*

   (1) *For situations where a U.S. service member has been living overseas in one Convention country and completed an adoption from a second Convention country, if a service member intends to pursue the immediate relative process under INA § 101(b)(1)(E) for the adopted child to immigrate to the United States, but the Department of Defense orders the family to return to the United States prior to the two years being completed, then post should consult with CA/VO/F/P and CA/OCS/CI. In general these cases may then be processed as Form I-800 cases in the service member's country of residence.*

   (2) *If an adoption was finalized prior to April 1, 2008, the adoptive family does not need to void, vacate, annul or otherwise terminate the adoption because 8 CFR 204.309(b)(1) was not in effect before April 1, 2008. Instead, if the adoption was finalized prior to April 1, 2008, the adoptive family may pursue the Form I-600A/600 process. 8 CFR 204.309(b)(1) does, however, apply if an adoption was finalized prior to provisional approval of the Form I-800 but after April 1, 2008. In this instance, the adoptive family would need to pursue Option 1 or 2 outlined above.*

9 FAM 42.21 N14.9 Appropriate Notification from the Country of Origin (Step 6 of 9)

(CT:VISA-1178; 04-03-2009)

a. The next step in the process for PAP(s) and the child is the adoption or grant of legal custody by the child's Convention country. The adoption or grant of legal custody for the Convention adoptee must be completed based on the laws and regulations of the Convention country and in accordance with the Convention.

b. The Intercountry Adoption Act of 2000 (IAA) requires that the Department certify that the adoption or grant of legal custody has been done in accordance with the Convention and IAA provisions.

(1) PAP(s) and/or the ASP must provide you with valid proof that the adoption or grant of legal custody for purposes of emigration and adoption has been completed (see 9 FAM 42.21 N14.13-3 a (2)).

(2) In cases involving an adoption in the country of origin (as opposed to grant of legal custody), the competent authority of the Convention country must certify that the adoption was done in accordance with the Convention. This certificate, known as the Article 23 Certificate, should be included in or affixed to the Convention country's final adoption decree. Upon receiving the Article 23 Certificate, you must scan the Certificate into the IVO system as well as noting it in the proper field in the IVO system. The Article 23 Certificate will identify the Central Authority and the date it agreed to the adoption.

(3) In cases involving only a grant of legal custody for purposes of emigration and adoption, the Convention does not require competent authorities of the country of origin to certify to compliance with the Convention. Proof that the grant of legal custody occurred, as described in 9 FAM 42.21 N14.9 b (1), will in these cases be sufficient to constitute appropriate notification. Generally, this will be evidenced by a judicial or administrative act expressly authorizing the PAP(s) or those acting on their behalf to take the child out of the country and bring the child to the United States for adoption in the United States by the PAP(s). Post may consider any credible record in the case that shows that the country of origin Central Authority agrees that the granting of custody was for this purpose. However, post should work with host country to determine whether, in the particular country, a document comparable to the Article 23 Certificate exists with respect to custody cases (i.e., a document certifying to Convention compliance) and, if so, should request this document. In addition, post should note in the IVO system the foreign Central Authority that agreed to allow the adoption to go forward and the date of that agreement. (Consistent with the definition of Central Authority for purposes of these notes, this agreement may be made by any entity to whom authority to perform this function has been delegated by the designated Central Authority in accordance with the Convention and local law.) Post may need to coordinate with country of origin authorities to determine how to obtain this information.

c. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.10 Issuance of Hague Adoption

Certificate or Hague Custody Certificate (Step 7 of 9)

(CT:VISA-1178;   04-03-2009)

a. Before issuing the Certificate you must verify that the adoption or grant of legal custody was done in accordance with the Convention and IAA. Issuance of the Article 5 letter constitutes prima facie evidence that the adoption or grant of legal custody was done in accordance with the Convention and IAA. Verification entails taking the following steps:

   (1) Verify that the notification from the country of origin meets the conditions set forth in 9 FAM 42.21 N14.9 b); and

   (2) Verify that there is no new derogatory information since issuance of the Article 5 letter that brings into question either the applicant's Convention adoptee classification (see 9 FAM 42.21 N14.6 and 9 FAM 42.21 N14.13-1 a for factors associated with classification) or compliance with Convention adoption procedures (particularly Convention adoptee processing guidelines summarized in 9 FAM 42.21 N14.3).

b. In rare cases where new information arises after the issuance of the Article 5 Letter (e.g., post investigation based on poison pen letter provides credible evidence of fraud or misrepresentation, etc.), immediately notify and consult with CA/VO/L/A, CA/VO/F/P, and CA/OCS/CI regarding the circumstances of the case. Quick action in such cases is essential, especially when the foreign adoption proceeding has not yet occurred and the information may be relevant to the foreign court.

   (1) If CA/VO concurs, you should expeditiously forward the Form I-800 petition and accompanying documentation to the appropriate USCIS office for action (see 9 FAM 42.43 N3 and 9 FAM Appendix N Exhibit I) with an explanation of the facts of the case and detailing the suspected non-compliance. Although you may decline to issue a Hague Adoption Certificate (IHAC) or Hague Custody Certificate (IHCC), you are not authorized to deny Form I-800 petitions. In such cases, you should notify the PAP(s) in writing of the return of the petition to USCIS, including a brief explanation of the decision and the name and address of the USCIS office to which the petition has been forwarded.

   (2) Except in cases in which post believes it to be contrary to the interests of the United States or the parties involved to do so, when new adverse information is discovered after the putative adoption or grant of custody has taken place, and CA/VO has concurred that the new information may warrant denial of the IHAC or IHCC, post

should consult with the Central Authority of the country of origin concerning whether the Central Authority is willing to rescind the Article 23 certification (for adoption cases) or other notice (for custody cases). Even if the Central Authority is not willing to do so, post may still decline to issue the IHAC or IHCC, if, with CA/VO concurrence, post concludes that the adoption or grant of custody does not comply with the Convention and the IAA.

(3) Post should notify USCIS if the suspected non-compliance is overcome after the forwarding of the Form I-800 petition. If on further review the derogatory information is resolved such that you are able to issue the IHAC or IHCC, you should inform USCIS that the petition now appears clearly approvable and should therefore be returned to post, and you should continue processing the Convention adoptee case.

c. If you are able to verify Convention and IAA compliance as described in 9 FAM 42.21 N14.10 a you should then produce a Hague Adoption Certificate (IHAC) or Hague Custody Certificate (IHCC), as appropriate.

d. Care must be taken to ensure that the appropriate document is issued. If the adoption occurred in the convention country, you will issue a Hague Adoption Certificate (IHAC). If there was a grant of legal custody for purposes of emigration and adoption, you should issue a Hague Custody Certificate (IHCC). Both certificates will be generated by the IVO system only after receipt of appropriate notification from the country of origin. A copy of these documents is provided in 9 FAM 42.21 Exhibit IX.

e. In the rare case when the child has been adopted in the Convention country by only one spouse of a married couple, you should produce an IHAC but you must include the following annotation: "One spouse of a married couple adopted the child named above. This child must be adopted by both spouses before he or she will be considered to be an adopted child under 101(b)(1)(G) of the Immigration and Nationality Act, for purposes of naturalization under sections 320 or 322 of that Act." As provided in the DHS rule, the adoption decree or order is sufficient to show release and custody to bring the child to the United States for adoption by the other spouse. Therefore, since you have issued the special IHAC that notes the child does not yet qualify as an adopted child under INA 101(b)(1)(G), the case should otherwise be treated as a custody case, and proper visa classification would be IH4.

f. After reviewing the printed IHAC or IHCC for accuracy, you should sign and dry seal the document. Then you should attach the IHAC or IHCC to the original adoption decree or custody document, as appropriate. The signed IHAC or IHCC must be scanned into the IVO system, and a copy of IHAC or IHCC and adoption decree or custody document should be made for the visa package.

g. Adoptive parents and their ASP(s) may request and receive several copies of the IHAC or IHCC, as the document may be required for many administrative tasks in the United States. For any questions concerning the issuance of copies of the Hague Certificate, contact CA/OCS/CI and CA/VO/F/P.

h. For cases in which the Convention country granted the adoptive parent(s) legal custody for the purposes of emigration and adoption, the adoptive parent(s) will have to present the Hague Custody Certificate to the State court in the U.S. to obtain a final adoption decree in the United States. Once the adoption in the U.S. is completed, the adoptive parent(s) may request a certification from the Secretary of State that the adoption was completed in accordance with the Convention and the IAA if they need it to obtain recognition of the adoption in other Convention states. Adoptive parents may request this certification by following the instructions on the State Department Web site (see 22 CFR 97.5 for additional details on this process). It is not anticipated, however, that there will be any need for this certification in most cases, since the state court adoption certificate will be recognized throughout the United States and the Department has no specific information to indicate that United States adoption orders are not normally recognized abroad.

i. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.11 Final Adjudication of Form I-800 Petition (Step 8 of 9)

(CT:VISA-946; 04-11-2008)

a. Before adjudication of the visa application, you must complete final adjudication of the Form I-800 petition. Note that consular officers will always do final approval of Form I-800 petitions handled overseas; only if the Form I-800 is found to be not clearly approvable would the petition be returned to USCIS for action.

b. Final adjudication of the Form I-800 cannot take place until the adoptive parent(s) or guardian(s) of the child have complied with all remaining Form I-800 petition requirements. A copy of the adoption or custody decree must be submitted. In addition, if the child will be adopted in the United States, the PAP(s) must submit the following, if not already provided before the provisional approval (because, for example, the PAP(s) thought the child would be adopted abroad, but that plan has changed so that the child will now be adopted in the United States):

    (1) A statement from the primary provider, signed under penalty of perjury under U.S. law, summarizing the plan under 22 CFR 96.50 for monitoring of the placement until the adoption is finalized in the

United States; and

(2) A written description of the preadoption requirements that apply to adoptions in the State of the child's proposed residence, evidence of compliance with those requirements that can be met before the child arrives in the United States, and a description of when and how the PAP(s) intend to complete the child's adoption, including a citation to the relevant State statutes or regulations and the details of how the PAP(s) intend to comply with any preadoption requirements that can be satisfied only after the child arrives in the United States.

c. Since issuance of the Hague Adoption Certificate (IHAC) or Hague Custody Certificate (IHCC) entails verification and certification of compliance with the IAA, and, correspondingly, its amendments to the INA 101(b)(1)(G) and the Convention, no further review of Convention adoptee classification is required before granting final approval of the Form I-800. Annotate approved Form I-800 petitions at this final stage "Final approval," with the date and your name, title, and post.

d. In the rare instances where you could not issue a Hague Convention Certificate due to previously unknown reasons—e.g., fraud, invalid consent, illicit payment—discovered after issuance of the Article 5 letter, you must send the petition to USCIS as not clearly approvable. In so doing, you should base this decision on the underlying flaw in the adoption (i.e., invalid consent), instead of the lack of a Hague Convention Certificate.

9 FAM 42.21 N14.12 Adjudication of Visa Application (Step 9 of 9)

(CT:VISA-1178; 04-03-2009)

a. Visa application: Adjudication of the Convention adoptee Form DS-230, Immigrant Visa Application, or Form DS-156, Nonimmigrant Visa Application, for a child who is the beneficiary of an Form I-800 petition may not take place until final approval of the Form I-800 petition has occurred and CLASS and biometric checks have been completed.

b. Before the adjudication of the visa, the adoptive parents or guardians of the child must comply with all remaining visa application requirements:

(1) If not previously provided, the Convention adoptee's passport and results of the medical exam with a panel physician must be presented to the consular officer (a medical exam is not required in NIV cases unless the consular officer has reason to believe the child has a medical ineligibility);

(2) The Convention adoptee must appear in person before a consular

officer, and, if applicable, have biovisa fingerscanning done; and

(3) The Form DS-230 part II or Form DS-156 must be executed by the Convention adoptee or his/her legal guardian, if not executed at the initial review stage.

c. As soon as all visa application materials and information outlined above in paragraph a and paragraph b above have been provided, final adjudication of the Convention adoptee petition and adjudication of the visa application should be completed. Approval of the Convention adoptee visa application and issuance of the visa should take place if:

(1) Namecheck and biovisa results reveal no ineligibilities;

(2) Any ineligibilities that were identified in the initial review of the visa application have been overcome; and

(3) No new derogatory information with regard to ineligibilities has developed since the Article 5 Letter was done.

d. If you find that the Convention adoptee is ineligible for a visa, the case should be handled according to the following:

(1) If the ineligibility was identified when the Form I-800 petition was filed or during the provisional adjudication of the visa application, and a waiver request was submitted to USCIS and subsequently approved (see 9 FAM 42.21 N14.7-3 d), refuse the case under the appropriate ground of ineligibility and then note the waiver in IVO (or NIV, as appropriate). Issue a visa that contains an annotation indicating the waiver.

(2) If the ineligibility is identified during final adjudication of the visa application, you should refuse the case under INA 221(g) and seek an advisory opinion from CA/VO/L/A, which will consult with CA/OCS/CI and L/CA. If, after receiving the advisory opinion, you refuse the case on substantive ineligibility grounds, you must explain to the applicant, adoptive parent(s), or guardian(s) orally and in writing the reason for the refusal and possible remedies. Post should immediately consult with and notify CA/VO/F/P and CA/OCS/CI about such cases in order to ensure appropriate follow-up on the case (coordination with USCIS, notification of the Central Authority, etc.).

(3) In cases described in 9 FAM 42.21 N14.12 d (2) where a waiver is possible, the adoptive parent(s) or guardian(s) should be instructed to submit a waiver request to USCIS. If the waiver is subsequently granted, issue a visa that contains an annotation indicating the waiver.

e. Visa issuance:

(1) Post should produce the Convention adoptee immigrant visa per standard procedures (see 9 FAM 42.73 Procedural Notes). Include a copy of the Hague Adoption Certificate (IHAC) or Hague Custody Certificate (IHCC), and a copy of the adoption decree or custody order as part of the packet, immediately following the Form I-800 petition. Per 9 FAM 42.21 N14.14 c, copy and retain packet documents until scanned into IVO. If the adopted child will be traveling to the United States in B-2 NIV classification (see 9 FAM 42.21 N14.13-9 d (3)), post should similarly provide such documents with the visa. Particular care should be paid to ensuring proper classification of the visa as an IH3, IH4, or B-2, per 9 FAM 42.21 N14.13-9.

(2) Per standard IV validity guidelines noted in 9 FAM 42.72, you should generally issue IVs for Convention adoptees with a six-month validity period. However, you may issue an IV for a longer period (not to exceed three years) to a child legally adopted by a U.S. citizen and spouse while they are serving abroad in the U.S. armed forces or employed abroad by the U.S. Government to accommodate adoptive parents' intended return to the United States upon completion of the military service or U.S. Government employment.

(3) When issuing a visa to adoptive parent(s) (or those traveling with the child), inform them of Child Citizenship Act implications of the type of visa issued per 9 FAM 42.2 N14.13-9 and refer them to the Department and USCIS Web sites for additional information.

f. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.13 Convention Adoptee Classification

(CT:VISA-1178; 04-03-2009)

Summary of 9 FAM 42.21 N14.13:

- 9 FAM 42.21 N14.13-1 Convention Adoptee Classification Summary
- 9 FAM 42.21 N14.13-2 Age, Citizenship And Residency Requirements
- 9 FAM 42.21 N14.13-3 Adoption Or Intent To Adopt
- 9 FAM 42.21 N14.13-4 Legal Parent-Child Relationship
- 9 FAM 42.21 N14.13-5 Consent To Adoption
- 9 FAM 42.21 N14.13-6 Inability To Provide Proper Care

- 9 FAM 42.21 N14.13-7 Compliance with Convention Requirements
- 9 FAM 42.21 N14.13-8 Improper Inducement, Fraud, Misrepresentation and Prohibited Contact
- 9 FAM 42.21 N14.13-9 IH3 and IH4 Classifications and the Child Citizenship Act

9 FAM 42.21 N14.13-1 Convention Adoptee Classification Summary

(CT:VISA-946; 04-11-2008)

a. There are five key elements to the Convention adoptee classification. All of the following must be true for a child to be eligible for the Convention adoptee classification:

(1) The child is under the age of 16 at the time a petition is filed on his or her behalf (taking into account special rules on filing dates for children aged 15-16), is unmarried, and is habitually resident in a country that has a treaty relationship with the United States under the Convention (see 9 FAM 42.21 N14.13-2 a);

NOTE: A person must be under the age of 21 to be considered a “child.” Section 201(f) of the Immigration and Nationality Act, as amended by the Child Status Protection Act, provides, however, that a child who is over 21 will be deemed to be under 21, if certain requirements are met. Since a Form I-800 must be filed before the child’s 16th birthday, a Convention adoptee will almost always meet the requirements of section 201(f) and so will generally be eligible to immigrate even if over 21.

(2) The child has been adopted or will be adopted by a married U.S. citizen and spouse jointly, or by an unmarried U.S. citizen at least 25 years of age, habitually resident in the United States, whom USCIS has found suitable and eligible to adopt, with the intent of creating a legal parent-child relationship. (See 9 FAM 42.21 N14.13-2 b, 9 FAM 42.21 N14.13-3, and 9 FAM 42.21 N14.13-4). Note, however, that at the provisional approval stage, the child must not have been adopted yet, unless that adoption has been voided by the country of origin (see 8 CFR 204.309(b)(1));

(3) The child’s birth parents (or parent if the child has a sole or surviving parent), or other legal custodian, individuals, or entities whose consent is necessary for adoption, freely gave their written irrevocable consent to the termination of their legal relationship with the child and to the child’s emigration and adoption (see 9 FAM 42.21 N14.13-5);

NOTE: Unlike for orphan cases, both parents are not required to

see the child prior to the adoption in order for the IH3 classification to be appropriate.

(4) If the child has two living birthparents who were the last legal custodian who signed the irrevocable consent to adoption, they are determined to be incapable of providing proper care for the child (see 9 FAM 42.21 N14.13-6);

(5) The child has been adopted or will be adopted in the United States or in the Convention country in accordance with the rules and procedures elaborated in the Hague Convention and the Intercountry Adoption Act of 2000, including that proper adoption service providers were used where required, and there is no indication of improper inducement, fraud or misrepresentation, or prohibited contact associated with the case (see 9 FAM 42.21 N14.13-7 and 9 FAM 42.21 N14.13-8). Again, at the provisional approval stage, the child must not have been adopted yet, unless that adoption has been voided by the country of origin (see 8 CFR 204.309(b)(1)).

b. A child who is determined to be a Convention adoptee must be classified as an IH3 or IH4. Proper classification is very important—the Child Citizenship Act of 2000 confers citizenship on children adopted abroad who meet certain requirements, and the child's immigrant classification is an important factor in determining whether, as a result of the Act, a child will be eligible for U.S. citizenship immediately upon immigration. 9 FAM 42.21 N14.13-9 provides guidance on proper classification as a Convention adoptee.

9 FAM 42.21 N14.13-2 Age, Citizenship and Residency Requirements

(CT:VISA-1178; 04-03-2009)

a. Requirements for child:

(1) Age-related requirements

(a) To be considered a Convention adoptee, the child must generally have an Form I-800 petition filed on his or her behalf before his or her 16th birthday; the Form I-800 petition does not, however, have to be approved before the beneficiary's 16th birthday.

(b) The USCIS regulation, at 8 CFR 204.313(c)(2) and (3), provides two special rules for determining whether this filing deadline has been met, in cases involving children who are between the ages of 15 and 16:

(i) FIRST: If the Central Authority matches the child with

the PAP(s) more than 6 months after the child's 15th birthday but before the child's 16th birthday, and the evidence required for Form I-800 petition filing in 9 FAM 42.21 N14.6-2 e is not yet available, the PAP must still file the I-800 before the child's 16th birthday. If the Central Authority report and accompanying documents are not available at that time, the PAP(s) may, instead of that evidence, submit a statement from the primary provider, signed under penalty of perjury under U.S. law, confirming that the Central Authority has, in fact, made the adoption placement on the date specified. The Form I-800 petition in such cases cannot be adjudicated until the required documents are submitted.

(ii) SECOND: If the Form I-800-A was filed after the child's 15th birthday, but before the child's 16th birthday, AND the Form I-800 is filed no more than 180 days after approval of the Form I-800-A, then the filing date for the Form I-800-A will be deemed also to be the filing date for the Form I-800.

(c) Because a Convention adoptee must meet the general definition of a child in INA Section 101(b)(1), the beneficiary must be unmarried and must be under the age of 21 (or deemed by section 201(f) of the INA to be under 21) at all stages of petition adjudication, visa processing, and travel to the United States.

(2) The child must meet all criteria specified in the Form I-800-A approval (age, gender, special needs, if any) (see 9 FAM 42.21 N14.4-1 e).

(3) A child must be habitually resident in a Convention country to be considered a Convention adoptee. USCIS has determined that a Convention adoptee is "habitually resident" in the country of the child's citizenship, or in the country in which the child actually resides if the Central Authority (or another competent authority of the country in which the child has his or her actual residence) has determined that the child's status in that country is sufficiently stable for that country properly to exercise jurisdiction over the child's adoption or custody. This determination must be made by the Central Authority itself, or by another competent authority of the country of the child's habitual residence, but may not be made by a nongovernmental individual or entity authorized by delegation to perform Central Authority functions.

b. Requirements for PAPs:

(1) PAPs' ability to meet age- and citizenship-related requirements is generally evaluated as part of USCIS's suitability determination.

(a) Only a U.S. citizen may file an Form I-800 petition for a Convention adoptee.

(b) If the petitioner is legally married, the spouse does not have to be a U.S. citizen, but, if the spouse is not a U.S. citizen, s/he must be a non-citizen U.S. national, or, if an alien, must be in lawful immigration status if residing in the United States. There are no age requirements for a married petitioner and spouse. The spouse must sign the Form I-800 petition and be party to the adoption or grant of legal custody even if a legal separation agreement exists.

(c) If the petitioner is unmarried, he or she must be at least 24 years old at the time he or she submits a Form I-800-A, and at least 25 years old at the time he or she files the Form I-800 petition.

(d) Some countries of origin also have age or other restrictions for adoptive parents. Although these and other foreign country requirements must be addressed in the home study, USCIS will not deny a Form I-800-A based solely on the country of origin's requirements.

(2) PAPs must be habitually resident in the United States to adopt a Convention adoptee using these procedures. A U.S. citizen will be deemed to be "habitually resident" in the United Sates if the individual has his or her domicile in the United States (even if living abroad temporarily), will have established such a domicile in the United States on or before the Convention adoptee is admitted to the United States or the citizen indicates on the Form I-800 that the citizen intends to bring the child to the United States after adopting the child abroad, and before the child's 18th birthday, to apply for naturalization under INA 322.

9 FAM 42.21 N14.13-3 Adoption or Custody for Purposes of Emigration and Adoption

(CT:VISA-946; 04-11-2008)

a. The petitioner(s) must adopt the Convention adoptee abroad or intend to adopt the Convention adoptee in the United States, as provided in the notes below. (Note, however, that at the provisional approval stage, the child must not have been adopted yet, unless that adoption has been voided by the country of origin (see 8 CFR 204.309(b)(1)). The petitioner(s) must not have actually adopted or obtained custody of the

child yet when the Form I-800 is filed, unless that adoption has been voided by the country of origin. Final adoption is required at the time of petition approval for IH3 and B-2 cases.

(1) Definitions of adoption and custody for purposes of emigration and adoption:

(a) Adoption is defined as a judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the legal parent, and which terminates any prior legal parent-child relationship with any former parents. Generally speaking, to qualify as an adoption for immigration purposes, the adopted child should have the same rights and privileges which are accorded to a birth child (such as inheritance rights, etc.). Simple, conditional, or limited adoptions, such as those conducted under Islamic Family Law in some countries, are more accurately described as guardianship and are not considered adoptions for U.S. immigration purposes.

(b) Custody for purposes of emigration and adoption exists when the competent authority of the country of origin has by judicial or administrative act (which may be either the act granting custody of the child or a separate judicial or administrative act), expressly authorized the petitioner, or an individual or entity acting on the petitioner's behalf, to take the child out of the country of the child's habitual residence and to bring the child to the United States for adoption in the United States. If the custody order was given to an individual or entity acting on the petitioner's behalf, the custody order must indicate that the child is to be adopted in the United States by the petitioner.

NOTE: A foreign judicial or administrative act that is called an adoption but that does not terminate the legal parent-child relationship between the former parent(s) and the adopted child and create a permanent legal parent-child relationship between the petitioner and the adopted child is considered a grant of legal custody if the act expressly authorizes the custodian to take the child out of the country of the child's habitual residence and to bring the child to the United States for adoption in the United States by the petitioner.

(2) Evidence of adoption and custody of the child for purposes of emigration and adoption:

(a) Adoption: Evidence of a full and final adoption would usually be in the form of an adoption decree or administrative order

granted by a Convention country's competent authority. If the petitioners are married, the adoption decree or order must show that both parties adopted the child. (If both spouses are not included in the decree or order, see 9 FAM 42.21 N14.10 e and 9 FAM 42.21 N14.13-3 a(2)(b)(i).) The adoption decree must be accompanied by or include a certification from the Central Authority of the Convention country stating that the adoption was done in accordance with the Convention. The certification must include the names of the parties from the Convention country's Central Authority and the receiving country's Central Authority that agreed that the adoption could proceed, and the date that such agreements were made.

(b) Custody of the child for purposes of emigration and adoption:

(i) Proof of custody of the child for purposes of emigration and adoption will vary depending on local laws and regulations governing child custody. Generally, this evidence will consist of a judicial or administrative act expressly authorizing the PAP(s) or those acting on their behalf to take the child out of the country and bring the child to the United States for adoption in the United States by the PAP(s). For married petitioners whose adoption decree is in the name of only one of the spouses, that decree or order is sufficient to show release and custody to bring the child to the United States for adoption by the other spouse. Under these circumstances, a child will have a Hague Adoption Certificate annotated to show that the child will have to be adopted by the other spouse before meeting the definition of adopted child under INA 101(b)(1)(G) for purposes of naturalization under section 320 or 322 (see 9 FAM 42.21 N14.10 e).

(ii) Petitioners who have custody of the child for purposes of emigration and adoption must also demonstrate that they have met or will meet any preadoption requirements of the state of the child's proposed residence. Some of these may have been met at the Form I-800-A stage, and some may not be capable of being met until the child is in the United States. The PAP(s) should provide a written statement describing the pre-adoption requirements, specifying which have already been met, and indicating the plan for meeting remaining

requirements, if any. You should be as flexible as possible in evaluating evidence presented by parents to satisfy such requirements, opting for the minimum level of proof acceptable in each case and keeping in mind that compliance with only those requirements that can be met before the child's arrival in the United States need be proven. If questions arise regarding preadoption requirements, you can consult with CA/OCS/CI and CA/VO/F/P.

b. You need to be well versed in the host country's adoption, custody, and guardianship laws and procedures, but you should rely on competent local authorities to make responsible decisions about the facts surrounding child custody and adoptions, not second-guessing whether such authorities are correctly implementing their own laws or regulations or whether the adoption is in the best interests of the child. At the same time, you must keep in mind that terms used by such local authorities (such as "adoption") may not always be equivalent to definitions for such terms in U.S. immigration law. In all Convention adoptee cases, the requirements of U.S. immigration law must be met.

9 FAM 42.21 N14.13-4 Legal Parent-Child Relationship

(CT:VISA-946; 04-11-2008)

a. Petitioners seeking to bring a Convention adoptee to the United States must intend to enter into a legal parent-child relationship with that Convention adoptee. The intent to create a legal parent-child relationship requires the intent to raise the child as their own child, with the same mutual rights and obligations that exist between a birth parent and birth child. Intent in this case implies the provision of care, support, and direction to the Convention adoptee, without the intent to profit financially or otherwise from the presence of the child. The adoptive parents must seek to adopt the child not solely to facilitate the child's immigration to the United States.

b. An adoption is intended to sever previous parental ties. Therefore, a caretaker relationship in which the PAP(s) intend to return the child (or legal custody of the child) to their birth parents or former guardians in the future would not constitute a legal parent-child relationship.

c. As provided in INA 101(b)(1)(G), no birth parent or prior adoptive parent of an Convention adoptee may obtain any immigration benefit as a result of his or her previous relationship with the Convention adoptee.

9 FAM 42.21 N14.13-5 Consent to Adoption

(CT:VISA-1178; 04-03-2009)

a. For a child to be eligible for the Convention adoptee classification, a Convention adoptee’s legal custodian and any other individual or entity who must consent to the child’s adoption must have freely given his or her written irrevocable consent to the adoption.

b. It is important to note that consent issues, and in particular the terms used and their definitions, are treated differently in Convention adoptee and orphan cases. Department of Homeland Security (DHS) regulations establish very specific meanings for each of the terms related to consent in a Convention Adoption. For Convention adoptee cases, the guidance and definitions in paragraphs c-j below must be used.

c. Birth parents or parent:

    (1) Birth parent means a “natural parent” as used in the INA.

    (2) A sole parent is a child’s mother or father, when a Convention country’s competent authority has determined that the child’s other parent has abandoned or deserted the child, or has disappeared from the child’s life, as long as the child has not acquired another parent.

    NOTE: Use of the term “sole parent” is quite different from that used in orphan cases.

d. Abandonment means:

    (1) That a child’s parent has willfully forsaken all parental rights, obligations, and claims to the child, as well as all custody of the child without intending to transfer, or without transferring, these rights to any specific individual(s) or entity.

    (2) The child’s parent must have actually surrendered such rights, obligations, claims, control, and possession.

    (3) That a parent's knowledge that a specific person or persons may adopt a child does not void an abandonment; however, a purported act of abandonment cannot be conditioned on the child's adoption by that specific person or persons.

    (4) That if the parent(s) entrusted the child to a third party for custodial care in anticipation of, or preparation for, adoption, the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) must have been authorized under the Convention country’s child welfare laws to act in such a capacity.

    (5) That, if the parent(s) entrusted the child to an orphanage, the parent(s) did not intend the placement to be merely temporary, with the intention of retaining the parent-child relationship, but entrusted the child permanently and unconditionally to an

orphanage.

(6) That, although a written document from the parent(s) is not necessary to prove abandonment, if any written document signed by the parent(s) is presented to prove abandonment, the document must specify whether the parent(s) who signed the document were able to read and understand the language in which the document is written. If the parent(s) are not able to read or understand the language in which the document is written, then the document is not valid unless the document is accompanied by a declaration by an identified individual, establishing that that identified individual is competent to translate the language in the document into a language that the parent(s) understand and that the individual, on the date and at the place specified in the declaration, did in fact read and explain the document to the parent(s) in a language that the parent(s) understand. The declaration must also indicate the language used to provide this explanation (see paragraph g below).

e. Deserted or desertion means that a child's parent has willfully forsaken the child and has refused to carry out parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the Convention country (see paragraph g below).

f. Disappeared or disappearance means that a child's parent has unaccountably or inexplicably passed out of the child's life so that the parent's whereabouts are unknown, there is no reasonable expectation of the parent's reappearance, and there has been a reasonable effort to locate the parent as determined by a competent authority in accordance with the laws of the Convention country. However, a stepparent who is deemed to be a child's legal parent (see paragraph h below) may be found to have disappeared if it is established that the stepparent never knew (1) of the child's existence, or (2) of the stepparent's legal relationship to the child (see paragraph g below).

g. **NOTE:** Because the report required under Article 16 should include information about the child's identity, adoptability, background, social environment, family history, medical history (including that of the child's family), and any special needs, and be accompanied by proof that the necessary consents have been obtained, the report should provide information regarding the abandonment, desertion, or disappearance.

h. Acquisition of another parent – A parent is a person who is related to a child based on a relationship described in INA 101(b)(1)(A) - (G) (see 9 FAM 40.1 definitions of parent). Note, however, that a stepparent described in section 101(b)(1)(B) of the Act is not considered a child's parent, solely for purposes of classification of the child as a Convention adoptee, if the petitioner establishes that, under the law of the

Convention country, there is no legal parent-child relationship between a stepparent and stepchild. However, if the stepparent adopted the child, or if the stepparent, under the law of the Convention country, became the child's legal parent by marrying the other legal parent, he or she would be considered a parent. A stepparent who is a legal parent may consent to the child's adoption, or may be found to have abandoned or deserted the child, or to have disappeared from the child's life, in the same manner as would apply to any other legal parent.

i. A surviving parent is the child's living parent when the child's other parent is dead, and the child has not acquired another parent. (See paragraph h above for a discussion on acquisition of another parent.)

j. Legal custodian:

(1) Legal custodian means the individual who, or entity that, has legal custody of a child. Legal custody means having legal responsibility for a child under the order of a court of law, a public domestic authority, competent authority, public foreign authority, or by operation of law. (A public foreign authority is an authority operated by a national or sub-national government of a Convention country.)

(2) In Convention adoptee cases, the legal custodian could be the state, a child welfare organization, or other body appointed by a competent authority. The legal custodian could also include birth parent(s), a non-birth parent (i.e., a step-parent or adoptive parent), or other individual who has legal custody in accordance with the law of the Convention country.

(3) Generally speaking, the reason behind a legal custodian's having legal custody of the child (abandonment, desertion, etc.) is not relevant to a determination of eligibility for the Convention adoptee classification. As long as the legal custodian is able to establish that it has legal custody of the child and all other aspects of the consent meet the requirements described below, his, her, or its consent to the adoption is considered valid.

k. Written irrevocable consent:

(1) A written irrevocable consent is a document in which the legal custodian freely consents to the termination of the legal custodian's legal relationship with the child. If more than one individual or entity is the child's legal custodian, the consent of each legal custodian may be recorded in one document, or in an additional document, but all documents, taken together, must show that each legal custodian has given the necessary irrevocable consent.

(2) To be valid, the written irrevocable consent must indicate the place and date the document was signed by a child's legal custodian. The

document must specify whether the legal custodian is able to read and understand the language in which the consent is written. If the legal custodian is not able to read or understand the language in which the document is written, then the document does not qualify as an irrevocable consent unless it is accompanied by a declaration, signed by an identified individual, establishing that that individual is competent to translate the language in the irrevocable consent into a language that the legal custodian understands, and that the individual, on the date and at the place specified in the declaration, did in fact read and explain the consent to the legal custodian in a language that the legal custodian understands. The declaration must also indicate the language used to provide the explanation.

(3) If the Central Authority specifies in its report (see 9 FAM 42.21 N14.5) that all necessary consents have been obtained, that should normally be considered sufficient to establish that both the consent to the child's adoption and the consent to the child's emigration have been obtained from the relevant custodian, regardless of whether the consent document specifically refers to consent to the child's emigration.

(4) Timing of consent: A consent signed by the birth mother or any legal custodian other than the birth father may not be given before the child's birth.

(5) Evidence of consent: A copy of the irrevocable consent(s) signed by the legal custodian(s) and any other individual or entity who must consent to the child's adoption will generally be required with the filing of the Form I-800 petition. However, an exception to this requirement is permitted if the law of the country of the child's habitual residence provides that their identities may not be disclosed, so long as the Central Authority of the country of the child's habitual residence certifies in its report that the required documents exist and that they establish the child's age and availability for adoption.

NOTE: If the host country prohibits disclosure of identity of birthparents, post should work with Central Authority to ensure that the Central Authority uses a certification of this nature to meet its Article 16 obligation of proving that necessary consents have been obtained. Because the Convention does not explicitly refer to a "certification," it may be necessary for posts to raise this issue with the host country Central Authority so that a document meeting this DHS requirement can be produced in United States cases.

9 FAM 42.21 N14.13-6 Inability to Provide Proper Care

(CT:VISA-946;   04-11-2008)

a. In the case of a child placed for adoption by both of his or her birth parents, for the child to be eligible for the Convention adoptee classification, the factual basis for determining that they are incapable of providing proper care for the child must be submitted with the Form I-800. This requirement does not apply to cases involving the consent of a sole or surviving parent. Nor does it apply if the irrevocable consent for the child's adoption is given by a legal custodian other than the two birth parents, such as an institution or other non-birth parent.

b. Incapable of providing proper care means that, in light of all the relevant circumstances including but not limited to economic or financial concerns, extreme poverty, medical, mental, or emotional difficulties, or long term-incarceration, the child's two living birth parents are not able to provide for the child's basic needs, consistent with the local standards of the Convention country.

9 FAM 42.21 N14.13-7 Compliance with Convention Requirements

(CT:VISA-946;   04-11-2008)

a. An adoption or grant of legal custody for purposes of adoption of a Convention adoptee must be done in accordance with the provisions of the Convention and IAA. Most of the visa processing provisions detailed in 9 FAM 42.21 N14 are designed to ensure compliance with such provisions. You may assume that if procedures and guidelines outlined in 9 FAM 42.21 N14.1 d and 9 FAM 42.21 N14.3 and discussed throughout 9 FAM 42.21 N14 are followed, the case will be in compliance with Convention requirements.

b. As background, several of the key Convention requirements can be summarized by the following:

    (1) As the receiving country, the United States is required to notify a Convention country's Central Authority of its determination that PAP(s) are eligible and suitable to adopt, that they have been counseled as necessary regarding the intercountry adoption, that, if adopted, the child would be eligible to enter and reside in the United States, and that the United States agrees that the adoption should proceed. The United States is required to provide to the Convention country a detailed report on the PAP(s) eligibility and suitability to adopt.

    (2) The Central Authority of the Convention country where the child is habitually resident is required to notify the U.S. Central Authority of its determination that the child is adoptable, that the adoption

would be in the child's best interests, that appropriate counseling has been done in the case, that appropriate consents have been obtained, and that the Convention country agrees that the adoption should proceed. The Central Authority of the Convention country is required to provide to the U.S. Central Authority a report on the background of the child being adopted. The Central Authorities of both countries must agree in advance that the adoption may proceed.

(3) Both the United States and other Convention country Central Authorities are required to ensure that Convention cases do not involve improper financial gain or prohibited contact between the parties, and that the transfer of the child and any possible post-placement monitoring and disruptions be handled as spelled out in the Convention. Convention countries are required to certify that adoptions take place in accordance with the Convention, and to recognize the effects of such adoptions so certified. Convention countries also agree to cooperate on achieving the objectives of the Convention and keeping each other informed of local adoption laws and practices and Convention implementation.

(4) The Convention also establishes the concept of accredited and approved ASPs and permits them to perform certain Central Authority tasks.

c. The IAA establishes the system for accrediting and approving ASPs in the United States. Among the requirements of the IAA is that ASPs must be authorized to provide adoption services as set forth in 22 CFR 96.12 through 96.17. (See 9 FAM 42.21 N14.1 e and 7 FAM 1796.3). Any questions regarding an ASP's authorization to act should be addressed at the time the Form I-800 is filed (see 9 FAM 42.21 N14.1 e(4)).

9 FAM 42.21 N14.13-8 Improper Inducement, Prohibited Contact, Fraud, and Misrepresentation

(CT:VISA-946; 04-11-2008)

a. The Convention prohibits improper financial or other gain in an intercountry adoption; under Article 32 of the Convention, only costs and expenses may be charged or paid. The Convention also prohibits certain contact with the child. The Convention adoptee classification is not available for intercountry adoption cases involving improper inducement, prohibited contacts between PAP(s) or members of their household and the child's parents and legal custodian(s), or fraud or misrepresentation.

b. Improper inducement:

(1) PAPs are required to disclose in Part 4 of the Form I-800 petition all

payments, including in kind contributions, made in relation to the adoption of the child. Such payments include all fees, expenses, in kind contributions, and other compensation that the PAP(s) made, either directly or indirectly, to any individual, agency, entity, governmental authority, or other payee or recipient.

(2) A child should not be considered a Convention adoptee if the PAP(s), or any person or entity working on their behalf, including their ASP, paid, gave, or offered to pay or give money or other consideration (including in-kind gifts of items) either directly or indirectly to the child's birth parent(s), agent, or other individual as payment for the child, or as an inducement to give consent, to relinquish the child for adoption, or to have the child's birthparents perform any act that would make the child a Convention adoptee.

(3) However, the prohibition on such payments does not preclude payment of reasonable costs incurred for the services listed below. A payment for the following services would not be considered improper inducement if the payment is not prohibited under the law of the country in which the payment is made and the amount involved is commensurate with reasonable costs for such services in the country in which the service is provided.

(a) Services of an adoption service provider in connection with an adoption;

(b) Expenses incurred in locating a child for adoption;

(c) Medical, hospital, nursing, pharmaceutical, travel, or other similar expenses incurred by a mother or her child in connection with the birth or any illness of the child;

(d) Counseling services for a parent or a child for a reasonable time before and after the child's placement for adoption;

(e) Expenses commensurate with the living standards of the Convention country for the care of the birth mother while pregnant and immediately following the birth of the child;

(f) Expenses incurred in obtaining the home study;

(g) Expenses incurred in obtaining the report and other information on the child to comply with Form I-800 evidence requirements;

(h) Legal services, court costs, and travel or other administrative expenses connected with an adoption, including any legal services performed for a parent who consents to the adoption of a child or relinquishes the child to an agency;

(i) Other services which a USCIS or consular officer reviewing

the case finds reasonably necessary; and

(j) Costs for such services must be disclosed on Form I-800.

(4) Allegations of improper inducement must be carefully reviewed, analyzing the evidence available to substantiate such claims. Investigations into such allegations should generally focus on concrete evidence or an admission of guilt. As noted in 9 FAM 42.21 N14.6-2 e (3)(f), a Convention country's Central Authority is required to ensure that no payment or inducement of any kind has been given to obtain the consents necessary for the adoption to be completed. Statements regarding whether there was any payment or inducement, as well as any other concrete evidence or discussion from the PAP(s) or ASPs, should be used to assist in determination of whether improper inducement occurred in the case.

c. Limitations on contact:

(1) Except as noted in 9 FAM 42.21 N14.13-8 c (2) below, PAP(s) and/or any additional adult member of their household must not meet or have any other form of contact with the child's birthparent(s), legal custodian(s), or other individual or entity who is responsible for the child's care. If prohibited contact has occurred, the child can not be considered a Convention adoptee and the Form I-800 must be denied. Note that an authorized ASP's sharing of general information about a possible adoption placement is not considered "contact."

(2) Contact is permitted only if:

(a) The first such contact took place only after USCIS had approved the Form I-800-A and after the competent authority of the Convention country had determined that the child was eligible for intercountry adoption and that the required consents had been given;

(b) The competent authority of the Convention country permitted earlier contact, either in the particular instance or through laws or rules of general application, and the contact occurred only in compliance with the particular authorization or generally applicable laws or rules. If the PAP(s) first adopted the child without complying with the Convention, the competent authority's decision to permit the adoption to be vacated and to allow the PAP(s) to adopt the child again after complying with the Convention will also constitute approval of any prior contact; or

(c) The PAP(s) were already related to the child's birthparent(s), which means that the petitioner was, before the adoption, the father, mother, son, daughter, brother, sister, uncle, aunt,

first cousin (i.e., the petitioner, or either spouse, in the case of a married petitioner had at least one grandparent in common with the child's parent), second cousin (i.e., the petitioner, or either spouse, in the case of a married petitioner, had at least one great-grandparent in common with the child's parent) nephew, niece, husband, former husband, wife, former wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister of the child's birthparent(s).

d. Fraud or misrepresentation:

(1) A child should not be considered a Convention adoptee if there is evidence of fraud or misrepresentation with the purpose of using deception to obtain visas for children who do not qualify. In particular, material misrepresentation in the Form I-800 petition or its supporting documents (see 9 FAM 42.21 N14.6-2 e) would result in denial of Convention adoptee classification. (See also discussion of other grounds for possible USCIS denial of Form I-800 petitions in 9 FAM 42.21 N14.6-3 b, and 9 FAM 42.21 N14.4-2 notes on fraud and misrepresentation issues with the Form I-800-A and home study.)

(2) In such cases, U.S. citizen PAP(s) and adoptive children may all be unwitting victims of a fraud which was actually perpetrated upon them by unscrupulous agents misrepresenting important facts about these children. If the fraud involves stolen or kidnapped children, birth parents may also be victims. In some cases, birth parents may also have been misled about the permanent nature of their separation from the child.

(3) The Convention and its provisions were created to help prevent such abuses. However, documentation presented in support of a Convention adoptee case must still be carefully scrutinized. Occasionally, it may be necessary to conduct field investigations, DNA tests, or additional interviews in order to investigate possible adoption fraud. Because adoption cases are multi-faceted, a successful anti-fraud program should engage the entire adoption community, including agents, lawyers, orphanages, foster care providers, medical personnel, judges, local officials, and law enforcement personnel.

(4) You should keep in mind, however, that the responsibility for enforcing local laws and for protecting the rights of children and birth parents rests primarily with the country of origin Central Authority and other local authorities. Also, anti-fraud efforts must

be balanced with the mandate to provide service to U.S. citizens and the need to be sensitive to the victims of fraud. Whenever possible, posts should use anti-fraud techniques that do not unnecessarily delay processing or create further hardship for fraud victims.

9 FAM 42.21 N14.13-9 IH3, IH4, or B-2 Classifications and the Child Citizenship Act

(CT:VISA-1178; 04-03-2009)

a. A Convention adoptee may be classified as either an IH3 or IH4 immigrant or, in the case of a child who will reside abroad with the PAP(s) after the adoption but will travel to the United States for the purpose of acquiring U.S. citizenship based on an application under INA 322, a B-2 nonimmigrant. The correct classification of a visa issued to a Convention adoptee is particularly important due to the passage of the Child Citizenship Act of 2000 (Public Law 106-395). As a result of that Act, a Convention adoptee properly admitted to the United States based on the IH3 classification while under the age of 18 will automatically acquire U.S. citizenship, while those admitted as a result of an IH4 IV or a B-2 NIV classification will not immediately acquire citizenship (see 9 FAM 42.21 N14.13-9 d). You should take particular care to classify Convention adoptee petitions and visas correctly and to inform prospective parents of the significance of the visa classification their child receives. (See also 9 FAM 42.21 N11 d on adopted children who should be issued other types of visas, and 9 FAM 42.21 N13.2-9 g on treatment of other adopted children under the Child Citizenship Act of 2000.)

b. Although proper classifications should be noted on Form I-800 petitions or petition approval notices, the final determination of proper classification for the visa rests with the adjudicating consular officer.

c. Classification criteria:

    (1) The IH3 classification is appropriate for a Convention adoptee who was the subject of a full, final, and legal adoption abroad by the petitioner (and spouse, if married) and who will reside in the United States with the PAP(s). (Note that, unlike for orphan cases, both parents are not required to see the child prior to the adoption in order for the IH3 classification to be appropriate.)

    (2) The IH4 classification is appropriate for a Convention adoptee who will be adopted by the petitioner (and spouse, if applicable) after being admitted to the United States (requires both petitioner intent to adopt and satisfaction of any applicable preadoption requirements of the home state). The petitioner must have legal custody of the Convention adoptee and authorization for the

emigration and adoption of the child. (Note that adoption by one spouse in a married couple is not considered sufficient to obtain IH3 status, even though the petitioner will be issued an IHAC (with annotation). This should be treated as a custody case for purposes of visa issuance, and an IH4 is appropriate.)

(3) The B-2 NIV classification is appropriate for a Convention adoptee who was the subject of a full, final, and legal adoption abroad by the PAP(s) and the PAP(s) and the child will continue to live abroad immediately following the adoption, but the child seeks a nonimmigrant visa in order to travel to the United States to obtain naturalization under section 322 of the Act and 8 CFR part 322 (see 9 FAM 41.31 N14.6). Note that, for a child seeking B-2 classification for this purpose, Steps 4 and 9, respectively, would involve the review and adjudication of a Form DS-156 Nonimmigrant Visa Application, rather than a Form DS-230, and that, as an NIV applicant, such a child would not require a medical examination unless you have reason to believe that the applicant may be ineligible for a visa under INA 212(a)(1) (see 9 FAM 40.11 N3.2).

(4) Transition Cases: If the PAP(s) filed an Form I-600 or Form I-600-A before April 1, 2008, the date the Convention enters into force for the United States, and the Form I-600-A is still valid at the time of Form I-600 filing, then the case must be processed as a non-Hague (orphan) case pursuant to 9 FAM 42.21 N13 (see 9 FAM 42.21 N14.1-1).

d. Citizenship determination based on proper classification of the Convention adoptee:

(1) IH3: Upon residing in the United States with the citizen parent, after having been lawfully admitted into the United States for permanent residence, and assuming the IH3 classification was appropriate and the Convention adoptee is under the age of 18, the child will automatically acquire U.S. citizenship as of the date of admission to the United States. The USCIS Buffalo office processes newly entering IH3 visa packets, automatically sending Certificates of Citizenship to eligible children without requiring additional forms or fees. Adoptive parents may also request a U.S. passport for the child.

(2) IH4: IH4 Convention adoptees become Legal Permanent Residents upon admission to the United States, but do not automatically acquire U.S. citizenship. A Convention adoptee who enters the United States on an IH4 visa acquires U.S. citizenship as of the date of a full and final adoption decree in the United States as long as the child is under age 18 at the time of adoption and is residing in

the United States with the citizen parent. While citizenship is acquired as of the date of the adoption in such cases, beneficiaries will need to file Form N-600, Application for Certificate of Citizenship and submit it to the local USCIS District Office or Sub-Office that holds jurisdiction over their permanent residence to receive a Certificate of Citizenship. Alternatively, adoptive parents may request U.S. passports for the child as evidence of citizenship.

(3) B-2: A child temporarily residing abroad with the PAP(s), who seeks to enter the United States for the acquisition of U.S. citizenship under INA 322 would be entitled to B-2 nonimmigrant classification, provided the child demonstrates an intent to return abroad after a temporary stay in the United States, the child has filed Form N-600-K, Application for Citizenship and Issuance of Certificate Under Section 322 with USCIS, and has been scheduled for an interview on the Form N-600-K. (As discussed in 9 FAM 42.22 N5, a child under the age of 16 is not considered to possess a will or intent separate from that of the parents with regard to residence in the United States or abroad.) U.S. citizen parents of children adopted overseas who reside overseas and do not intend to reside in the United States in the immediate future may apply for naturalization on behalf of the child by filing Form N-600-K, at any USCIS District Office or Sub-Office in the United States. The naturalization process for such a child cannot take place overseas. The child would need to be in the United States temporarily to complete naturalization processing and take the oath of allegiance. You are encouraged to give positive consideration to such cases whenever possible.

e. Many adoptive parents have questions related to the Child Citizenship Act. They can be referred to the State Department Web site or USCIS Web site for additional information and important details on the legislation's impact on adopted children.

f. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N14.14 Disposition of Convention Adoptee Case Documents

(CT:VISA-1743; 10-19-2011)

a. In accordance with the IAA, the Department or DHS must preserve for 75 years all Convention adoptee visa documents or data that are Convention records. As a result, instructions for proper handling of supporting documents in Convention adoptee cases vary somewhat from standard IV case file procedures. 9 FAM 42.21 N14.14 b provides definitions related

to recordkeeping requirements, and 9 FAM 42.21 14.14 c provides instructions for handling Convention adoptee issued and refused case files. Handling inquiries and requests for access to Convention adoptee records is addressed in 9 FAM 42.21 14.14 d.

b. Definitions:

Adoption record means any record, information, or item related to a specific Convention adoption of a child received or maintained by an agency, person, or public domestic authority, including, but not limited to, photographs, videos, correspondence, personal effects, medical and social information, and any other information about the child. An adoption record does not include a record generated by an agency, person, or a public domestic authority to comply with the requirement to file information with ATS on adoptions not subject to the Convention pursuant to section 303(d) of the IAA (42 U.S.C. 14932(d)).

Convention record means any item, collection, or grouping of information contained in an electronic or physical document, an electronic collection of data (including the information contained in IVO, NIV, or ATS), a photograph, an audio or video tape, or any other information storage medium of any type whatever that contains information about a specific past, current, or prospective adoption covered by the Convention (regardless of whether the adoption was made final) that the Department of State or the Department of Homeland Security has generated or received.

(1) Convention records do not include adoption records that are held by States or countries of origin, but only those records which the Department or DHS has created or received.

(2) In accordance with 9 FAM Appendix F, as with other visa records, a Convention record is considered to include only information or documents pertaining to an individual visa applicant, not material from general instructions, visa manuals or other similar documents that make no reference to individual named applicants. As per 9 FAM Appendix F, a Convention record could include (but is not limited to) correspondence with other posts about a visa, correspondence with the applicant, investigative reports, immigrant visa refusal worksheets, post's requests for advisory opinions from the Department, and Department responses.

(3) Unless the original (or a scanned, electronic, copy) is retained by post, a document or other data which an applicant presents in connection with his or her visa application should not be considered a Convention record.

(4) The 75-year period for retention of Convention records starts as of the date that the Department or DHS receives the first Convention

record for that particular Convention adoptee case.

c. Handling Convention adoptee case files:

(1) Issued case files: In the great majority of issued Convention adoptee cases, Convention records generated or received by consular officers or the Department that are not already in electronic form will all be scanned into IVO or NIV, as appropriate. The Department will need to retain these electronic Convention adoptee case files for 75 years. Examples of such case file contents could include emails with case-related guidance, or case-specific cables. Any classified documents would be retained separate from IVO records, in paper or electronic form. In general, posts should retain any paper classified files at post; posts with limited space may contact CA/VO/F/P regarding alternative storage options.

(2) Refused case files: The same retention requirements apply to refused case files as to issued case files, for no less than 75 years since the first record in the file was obtained or created; posts with limited space may contact CA/VO/F/P regarding alternative storage options.

(a) In very rare cases where the grounds for refusal would require a non-Convention adoptee IV Visa Refusal File to be kept for more than 75 years (refusal grounds 1A1, 1A3, 1A4, 2, 3, 6C, 6E, 6F, 8, 9A if the individual was convicted of an aggravated felony, 9C, 10D, 10E, 222g, 212f if the presidential proclamation is not rescinded before 75 years pass, or Title IV of the Helms-Burton Act—see Record Disposition Schedule), retain the Convention adoptee case file for the period specified in the Record Disposition Schedule.

(b) For example, if a Convention adoptee case were refused under 212(a)(3) grounds, the file would be retained until the applicant reaches 100 years of age; a Convention adoptee case refused under 221(g) grounds would be retained until 75 years have passed since the first record in the file was obtained or created.

(3) Automated systems: IVO, NIV and ATS records on Convention adoptee cases will automatically be retained for 75 years; no consular officer action is required to preserve these Convention records once any paper documents have been scanned into IVO or NIV.

d. Requests for Convention adoptee records: These disposition instructions for Convention records are not intended to change procedures for accessing such records. As with other records retained by the Department or DHS, access to Convention records is governed by the

Freedom of Information Act and the Privacy Act (see 9 FAM 40.4 for additional information). State laws continue to govern access to adoption records held by adoption service providers or state government entities.

e. For further information, (see 9 FAM 42.21 N14.3 Convention Adoption Process).

9 FAM 42.21 N15 CLASSIFICATION OF AMERASIAN CHILDREN UNDER PUBLIC LAW 97-359

9 FAM 42.21 N15.1 Classification Under INA 204(f)(1)

(CT:VISA-878; 04-25-2007)

a. Public Law 97-359 of October 22, 1982, added section 204(g) (now 204(f)(2)) to the INA to provide preferential treatment in the immigration of certain illegitimate Amerasian children of U.S. citizen fathers who are unable to immigrate under any other section of the INA. Prior to enactment of Public Law 97-359, these children were unable to gain any benefits from their relationship to their father. The provisions of INA 204(f)(1) enable them to do so without requiring their father to file a petition on their behalf.

b. To qualify for benefits under INA 204(f)(1) the beneficiary must have been:

   (1) Born in Korea, Vietnam, Laos, Cambodia, or Thailand after December 31, 1950, and before October 22, 1982; and

   (2) Fathered by an U.S. citizen.

c. Beneficiaries under age 21 and unmarried are entitled to classification as immediate relatives; unmarried sons and daughters over the age of 21 to classification as family first preference; and married sons and daughters to family third preference.

9 FAM 42.21 N15.2 Alternative Classification

(CT:VISA-728; 04-07-2005)

An Amerasian child may, of course, immigrate under another provision of the INA, if so qualified. For example, an alien may be classified as an orphan under INA 101(b)(1)(F) (see 9 FAM 42.24) or may qualify as an Vietnamese Amerasian under Public Law 100-102, as amended by Public Law 101-167 and Public Law 101-513, for whom no petition is required.

9 FAM 42.21 N15.3 Petition Procedures for Amerasian Child

(CT:VISA-878; 04-25-2007)

You may not approve petitions for Amerasian children who are beneficiaries under Public Law 97-359. (See 8 CFR 204.4.)

9 FAM 42.21 N15.4 Revocation of Petition for Amerasian Child

(TL:VISA-170; 10-01-1997)

Department of Homeland Security (DHS) regulations for the revocation of petitions for Amerasian beneficiaries under Public Law 97-359 are provided in 8 CFR 205.1(a)(ii).