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USCIS LIBERALIZES CRITERIA FOR DETERMINING HABITUAL RESIDENCE IN SOME HAGUE CONVENTION ADOPTION CASES: A SMALL STEP, BUT AN IMPORTANT ONE

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Under the Immigration and Nationality Act ("INA"), there are three ways that adopted children can qualify as the children of a U.S. citizen parent for purposes of acquiring lawful permanent resident status, and generally derivative U.S. citizen status, through that adoptive parent. Section 101(b)(1)(E) of the INA, perhaps the most familiar, defines an adopted child as a child for immigration purposes where the child was adopted under the age of 16 (or under the age of 18 and is the sibling of a child adopted by the same parents 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." Sections 101(b)(1)(F) and 101(b)(1)(G) of the INA provide different procedures for children sometimes referred to as orphans, depending upon whether the child is from "a foreign state that is a party to the Convention on Protection of Children in Respect of Intercountry Adoptions, done at The Hague on May 29, 1993," commonly referred to as the Hague Adoption Convention. By regulation, according to 8 C.F.R. §204.2(d)(2)(vii)(D), the regular 101(b)(1)(E) procedures based on two years of legal custody and joint residence may not be used to file an I-130 petition for certain children from countries that have subscribed to the Hague Adoption Convention. In an interim memorandum posted by USCIS on January 3, 2014 (although dated December 23, 2013) and designated PM 602-0095, however, USCIS has indicated that it will somewhat narrow the class of children ineligible for regular 101(b)(1)(E) procedures.

To understand PM 602-0095, it is important to understand the background of the problem that it addresses. Pursuant to 8 C.F.R. §204.2(d)(2)(vii)(D), which governs I-130 petitions filed for an adopted child based on INA §101(b)(1)(E),

> On or after the Convention effective date, as defined in 8 CFR part 204.301, a United States citizen who is habitually resident in the United States, as determined under 8 CFR 204.303, may not file a Form I-130 under this section on behalf of child who was habitually resident in a Convention country, as determined under 8 CFR 204.303, unless the adoption was completed before the Convention effective date. In the case of any adoption occurring on or after the Convention effective date, a Form I-130 may be filed and approved only if the United States citizen petitioner was not habitually resident in the United States at the time of the adoption.

That is, for an adoption completed after the April 2008 effective date of the Hague Adoption Convention, USCIS will not approve an I-130 petition for "a child who was habitually resident in a Convention country" unless "the United States citizen petitioner was not habitually resident in the United States at the time of the adoption." A list of Convention countries is available on the State Department website.

The reader may wonder at this point why the unavailability of an I-130 petition under INA §101(b)(1)(E)would be a problem for a child from a Hague Adoption Convention country, if Hague Adoption Convention procedures under INA §101(b)(1)(G) can be used instead. The answer is that the procedures under INA §101(b)(1)(G) are designed for cases in which the petitioner seeks out a child in a foreign country for the specific purposes of adoption and immigration, and are ill-fitted for many cases in which an adoptive relationship already exists before any thought of immigration benefits has entered anyone's mind, or in which the child already resides in the United States. For example, one factor ordinarily requiring the denial of a Form I-800 petition under the Hague procedures, according to 8 C.F.R. §204.301(b)(1), is that "the petitioner completed the adoption of the child, or acquired legal custody of the child for purposes of emigration and adoption, before the provisional approval of the Form I-800," unless "a competent authority in the country of the child's habitual residence voids, vacates, annuls, or terminates the adoption or grant of custody and then, after the provisional approval of the Form I-800 . . . permits a new grant of adoption or custody." Many adoptive parents are understandably horrified at the thought of giving up custody of an adopted child with whom they have had a parental relationship for some time, in order to allow the Hague Adoption Convention procedures to play out. Also, unless the child was already related to the adoptive parent in one of several ways listed in the regulations at 8 C.F.R. §204.301(b)(2)(iii), any contact with the child's biological parents before the Hague process begins can be grounds for denial of the I-800 petition under 8 C.F.R. §204.301(b). Even if these pitfalls are avoided, Form I-800 cannot be approved for a child who is in the United States "unless the petitioner, after compliance with the requirements . . . either adopt(s) the child in the Convention country, or else, after having obtained custody of the child under the law of the Convention country for purposes of emigration and adoption, adopt(s) the child in the United States." 8 C.F.R. 204.309(b)(4). Thus, where there is a pre-existing adoptive relationship or other obstacles to the Hague Adoption Convention process would apply, U.S. citizen adoptive parents may be anxious to

escape the bar of 8 C.F.R. §204.2(d)(2)(vii)(D) and obtain approval of an ordinary I-130 petition based on two years of legal custody and residence with the child under INA §101(b)(1)(E).

The regulations make clear one way in which a U.S. citizen petitioner can escape from the bar of 8 C.F.R. §204.2(d)(2)(vii)(D), by demonstrating that the U.S. citizen petitioner is not habitually resident in the United States. According to 8 C.F.R. §204.2(d)(2)(vii)(E), "or purposes of paragraph (d)(2)(vii)(D) of this section, USCIS will deem a United States citizen . . . to have been habitually resident outside the United States, if the citizen satisfies the 2-year joint residence and custody requirements by residing with the child outside the United States." That is, so long as the two-year joint residence and physical custody requirements are fulfilled by the petitioner residing with the adopted child outside the United States, an ordinary I-130 petition may be approved under INA §101(b)(1)(E). USCIS has also clarified, in a Memorandum dated October 31, 2008, and incorporated in relevant part into Chapter 21.4(d)(5)(F) of the USCIS Adjudicator's Field Manual, that the 8 C.F.R. §204.2(d)(2)(vii)(E) exception is "not the only situation in which the adoptive parent may claim not to have been habitually resident in the United States at the time of the adoption." Rather, "here may be other situations in which the adoptive parent can establish th he or she was not domiciled in the United States, and did not intend to bring the child to the United States as an immediate consequence of the adoption." In such other cases of a non-habitually-resident petitioner, as well, USCIS has recognized that "the Hague Adoption Convention process would not apply."

Where the U.S. citizen petitioner is admittedly a habitual resident of the United States, but it appears that the adopted child may be a habitual resident of the United States as well (in which case the Hague Adoption Convention procedures again should not apply), things get more complicated. At least part of the regulations err on the side of presuming that a child who has come to the United States from a Hague Adoption Convention country is still a habitual resident of that country, so that an I-130 petition for that child by a U.S. citizen parent habitually resident in the United States will not be allowed. Title 8, section 204.2(d)(2)(vii)(F) of the Code of Federal Regulations provides:

> For purposes of paragraph (d)(2)(vii)(D) of this section, USCIS will not approve a Form I-130 under section 101(b)(1)(E) of the Act on behalf of an alien child who is present in the United States based on an adoption that is entered on or after the Convention effective date, but whose habitual residence immediately before the child's arrival in the United States was in a Convention country. However, the U.S. citizen seeking the child's adoption may file a Form I-800A and Form I-800 under 8 CFR part 204, subpart C.

Read in isolation, this might suggest that a child who resided in a Hague Adoption Convention country before coming to the United States could never be the beneficiary of an

I-130 petition by a U.S. citizen adoptive parent habitually resident in the United States. Another portion of the regulations, however, provides for a determination regarding the child's habitual residence:

> If the child's actual residence is outside the country of the child's citizenship, the child will be deemed habitually resident in that other country, rather than in the country of citizenship, 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. The child will not be considered to be habitually resident in any country to which the child 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.

8 C.F.R. §204.303(b). The "Central Authority", as the term is used here, refers to an entity designated under the Hague Adoption Convention by a Convention country to perform functions under the Convention, as explained in the definitional provisions at 8 C.F.R. §204.301.

In its October 31, 2008 Memorandum, USCIS recognized that under certain circumstances, a child resident in the United States should be exempt from the seeming bar of 8 C.F.R. §204.2(d)(2)(vii)(F) to approval of an I-130 petition under INA §101(b)(1)(E), where the Central Authority of the child's country had determined that the child was no longer a habitual resident of that country. As the October 31, 2008 Memorandum explained:

> There may be situations, however, in which the parent is not able to complete a Hague Adoption Convention adoption, because the Central Authority of the child's country has determined that, from its perspective, the Hague Adoption Convention no longer applies to the child. The purpose of 8 CFR 204.2(d)(2)(vii)(F) is to prevent the circumvention of the Hague Adoption Convention process. Thus, USCIS has determined that 8 CFR 204.2(d)(2)(vii)(F) must be read in light of the Hague Adoption Convention regulations in subpart C of 8 CFR part 204. If, under subpart C, there is a sufficient basis for saying that the Hague Adoption Convention and the implementing regulations no longer apply to a child who came to the United States from another Hague Adoption Convention country, then USCIS can conclude that 8 CFR 204.2(d)(2)(vii)(F) no longer applies.
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> The governing regulation, 8 CFR 204.303(b), explains when the child is habitually resident in a country other than the country of citizenship. This regulation does not

> explicitly apply to children in the United States, but USCIS has determined that it can be interpreted to permit a finding that a child who, under 8 CFR 204.2(d)(2)(vii)(F), is presumed to be habitually resident in another Hague Adoption Convention country can be found to be no longer habitually resident that country, but to be habitually resident, now, in the United States. USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) no longer precludes approval of a Form I-130 if the adoption order that is submitted with the Form I-130 expressly states that, the Central Authority of the other Hague Adoption Convention country has filed with the adoption court in the United States a written statement indicating that the Central Authority is aware of the child's presence in the United States, and of the proposed adoption, and that the Central Authority has determined that the child is not habitually resident in that country. A copy of the written statement from the Central Authority must also be submitted with the Form I-130 and the adoption order.
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> If the adoption order shows that the Central Authority of the other Hague Adoption Convention country had determined that the child was no longer habitually resident in that other Hague Adoption Convention country, USCIS will accept that determination and, if all the other requirements of section 101(b)(1)(E) are met, the Form I-130 could be approved.

October 31, 2008 Memorandum at 5. As USCIS explained later in PM 602-0095, summarizing prior guidance, a modified version of this process could also be used even if the adoption had already occurred: "In cases where the written statement from the Central Authority in the child's is not obtained until after the adoption was finalized, petitioners would have to submit an amended order that contains the required language, as well as the written statement." PM 602-0095 at 2.

This process for the recognition by USCIS of a determination by the Central Authority of the child's country of citizenship that the child was no longer habitually resident there was based on the assumption that the Central Authority in the country where the child has been habitually resident (referred to by USCIS as the "Country of Origin," or COO for short) would cooperate in issuing a determination. Practitioners and USCIS subsequently discovered, however, that the Central Authorities of some of the Hague Adoption Convention countries in which children had been habitually resident were not willing to cooperate with the process. As USCIS explained:

> The guidance did not completely resolve the problem it was intended to resolve. In some instances, the Central Authority in the COO either cannot or will not take a position concerning whether the child is still habitually resident in the COO. Thus, the adoptive parent(s) may be unable to establish either that the Hague Adoption Convention did not apply to the adoption, or that the adoption was completed in accordance with the Hague Adoption Convention process.

PM 602-0095 at 2-3. It was "n light of this development" that USCIS provided additional guidance in PM 602-0095, which has been incorporated into Chapter 21.4(d)(5)(G) of the Adjudicator's Field Manual.

Under PM 602-0095, the previous policy regarding instances in which the Central Authority of the COO has given a determination of lack of habitual residence remains intact.

> It remains USCIS policy that USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130 if the adoption order (or amended order) expressly states that the Central Authority in the COO advised the adopting court that the Central Authority was aware of the child's presence in the United States, and of the proposed adoption and did not consider the child habitually resident in the COO. The written statement from the Central Authority must accompany the Form I-130 and the adoption order (or amended order).

PM 602-0095 at 3. However, under certain circumstances, USCIS is now willing to proceed along these same lines without an affirmative statement from the Central Authority of the COO:

> In cases where the COO has a policy of not issuing statements of habitual residence, or where the petitioners show that they have attempted to obtain the statement of habitual residence from the COO for at least 6 months with no response, and the child was not paroled into the United States, USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130 if:
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> 1. At the time the child entered the United States, the purpose of the entry was for reasons other than adoption (intent criteria);
> 2. Prior to the U.S. domestic adoption, the child actually resided in the United States for a substantial period of time, establishing compelling ties in the United States, (actual residence criteria); and
> 3. Any adoption decree issued after February 3, 2014, confirms that the COO Central Authority was notified of the adoption proceeding in a manner satisfactory to the court and that the COO did not object to the proceeding with the court within 120 days after receiving notice or within a longer period of time determined by the court (notice criteria).

PM 602-0095 at 3.

Pages 4 through 6 of PM 602-0095 list in detail the required evidence that should be provided in order to establish these criteria to the satisfaction of USCIS, and the other factors that USCIS may consider in regard to these criteria. In regard to the first criterion, intent at time of entry, one particularly significant requirement is that of an "ffidavit from the

petitioning adoptive parent(s)," or "APs," which USCIS indicates should include:

- · Description of child's circumstances prior to child's entry to the United States (i.e., Where did the child live and/or go to school? Who cared for the child? What events led to the child's travel to the United States? Reason for the child's travel to the United States?).

- · List of individuals who have cared for the child since his or her entry into the United States and the relationship to the child.

- · Description of any contact the adoptive parents had with the child, or any contact with the child's birth parents, or any adoption or child welfare agency or NGO (in the United States or abroad) related to the child that took place:

(a) before the child came to the United States; or,
(b) after the child's arrival but before a court placed the child with the AP(s).

- · Sworn statement from AP(s) stating under penalty of perjury that on the date of the child's entry into the United States the AP(s) did not intend to adopt the child nor intend to circumvent the Hague Adoption Convention procedures.

PM 602-0095 at 4.

Other "vidence establishing the timeline and course of events that led to the child's availability for adoption by the adoptive parents" is also important. USCIS will consider a "court order containing findings related to the child's purpose for entering the United States, if available", as well as the results of checks of U.S. government systems regarding entry on a visa or by the Visa Waiver Program. PM 602-0095 at 4. "Evidence that the child was a ward of a U.S. State or State court prior to the adoption" will be considered, and "should establish that the child was a ward of a U.S. State or State court prior to the adoption." *Id.* at 4-5. USCIS will also consider as favorable certain factors which would normally be of relevance in a Hague Adoption Convention process, specifically:

- Evidence of birth parent's inability to provide proper care for the child.

- Evidence to establish one or both birth parents are deceased.

- · Evidence to establish any living birth parents freely consented to the proposed adoption OR the birth parents' parental rights were fully and properly terminated.

Id. at 5. On the other hand, "ny evidence that suggests that the entry was for the purpose of adoption" will be considered as an adverse favor, and " prior adoption in the COO by AP(s) in United States is a heavily weighted adverse factor, but not a bar." *Id.*

With respect to the Actual Residence criterion, PM 602-0095 presumes that this criterion has been satisfied "if the child was physically present in the United States for two years or more prior to the adoption." *Id.* at 5. Otherwise, a variety of evidence will be considered:

> Absent such presumption, adjudicators must consider the length of time that the child has spent in the United States prior to the adoption and supporting evidence establishing the child's actual residence and compelling ties in the United States prior to the adoption.
> O Depending on the child's age, documentation from the time period prior to adoption
> may include:
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> - Evidence of continuous medical care in the United States;
> - Statement from petitioners explaining the child's social interactions, including family and peer relationships;
> - School records;
> - Registration for extra-curricular activities;
> - Affidavits from knowledgeable individuals (such as the child's doctor or teacher, day care provider, landlord, or neighbors) attesting to the child's actual residence in the United States;
>
> and/or
> - Evidence that the child's birth parent, guardian, or caretaker resided in the United States.

Id. at 5. "A Court order finding that the child actually resided in the United States for a substantial period of time, establishing compelling ties in the United States prior to the adoption" will be considered as well, as will "vidence that the child was a ward of the state or court prior to the adoption." *Id.* "Evidence that the child lived outside of the United States shortly before the adoption" will be counted as adverse evidence in the Actual Residence determination.

For the third, Notice criterion, what is required is, as one might expect, evidence that the COO Central Authority has been notified of the objection and has declined to object or has not responded for the required period. The "Required Evidence" according to PM 602-0095 for this purpose is:

> o Evidence of notice to the COO Central Authority of the pending adoption providing the Central Authority 120 days to object. Notification should include the following language:
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> - If you do not intend to object, please notify the court.
> - If you require additional time beyond 120 days, please notify the court.

o Evidence of the COO's non-objection must be incorporated into the language of the adoption order.

- If AP(s) filed the Form I-130 with a court order that lacks the COO non-objection language, USCIS may RFE for an amended order. The petitioner(s) do not need to submit the actual statement from the COO, however USCIS may issue an RFE requesting it if necessary.

PM 602-0095 at 6.

The new process set out in PM 602-0095 is a significant improvement on the former situation of adoptive parents potentially facing a bar to petition approval if the COO's Central Authority chose not to get involved in the case, and for that USCIS should be commended. However, it is not a complete solution, for several reasons. The current version of PM 602-0095 excludes children whom it ought to have helped, and is unavailable to certain adoptive parents who have done nothing wrong and ought to be able to avail themselves of its protections.

One notable anomaly in PM 602-0095 is that it applies only where "the child was not paroled into the United States." The parole exception is presumably designed to avoid the scenario where prospective adoptive parents apply for humanitarian parole for a child with the concealed purpose of adopting that child. If this is the thinking behind the exception, however, then it appears to be seriously overbroad. Consider a scenario where a child may have entered on advance parole in connection with a parent's application for adjustment of status, for example, years before being orphaned by the death of the primary-applicant parent or abandoned by that parent. If that child, years after entry on advance parole, is adopted by a U.S. citizen, and if the Central Authority in that child's country of origin will not cooperate with the determination of habitual residence, refusing to allow approval of an I-130 petition for that child serves no apparent policy purpose and appears pointlessly cruel.

The requirement that "t the time the child entered the United States, the purpose of the entry was for reasons other than adoption," PM 602-0095at 3, also seems overbroad given the lack of an expressed time limitation. Logically, intent to adopt a child at the time of the child's entry into the United States should not be considered problematic if the child's country of origin, or the United States, were not signatories to the Hague Convention at the time of the entry. If a child entered the United States before April 1, 2008, for the purpose of adoption, but the adoption was finalized after that time (thus potentially subjecting the child and adoptive parents to the strictures of the Hague Adoption Convention), what purpose is served by denying an I-130 petition filed for such a child who has established compelling ties in the United States, and to whose adoption the COO Central Authority has not objected after being given notice?

The requirement of a sworn statement from the adoptive parent or parents "stating under penalty of perjury that on the date of the child's entry into the United States did not intend to adopt the child," PM 602-0095 at 4, is also overbroad in another way beyond the underlying substantive criterion: it is in tension with the notion of dual intent which exists elsewhere in immigration law. Earlier in PM 602-0095, as discussed above, the substantive criterion is said to be that "the purpose of the entry was for reasons other than adoption." *Id.* at 3. But just as the law recognizes that an H-1B temporary worker may have both a bona fide intent to enter temporarily as a nonimmigrant, and a latent intent to adjust status if possible later on, USCIS should recognize that adults may have the dual intent to provide shelter and temporary guardianship to, for example, an underage F-1 student, while simultaneously having the latent intent to adopt the child later if circumstances develop in such a way that this seems advisable. (The author thanks Cyrus D. Mehta for inspiration regarding the relevance of the dual-intent notion to this context.) To require adoptive parents to forswear previous adoptive intent, rather than stating under penalty of perjury that some other legitimate intent besides adoption existed on the date of the child's entry into the United States, ignores the possibility of dual intent and is in that sense overbroad.

USCIS has offered PM 602-0095 as an interim memo for comment, with the comment period ending on January 17, 2014, and so there may be time to fix these problems. The author of this blog post will likely submit a comment regarding PM 602-0095 in line with the above observations. Readers who agree with these observations may wish to consider doing so as well.