

Conversely, as long as the adoption is valid where it occurred, it need not be an adoption that would have been legal had it occurred in the United States. Customary adoptions, for example, if valid where recognized, will be sufficient to qualify an adoptee for an adopted child visa.<sup>82</sup> While the USCIS has taken the position that the customary adoption must confer all of the same rights that biological children possess,<sup>83</sup> federal courts are split on this issue<sup>84</sup> and the Ninth Circuit has found them sufficient as long as they confer the same rights that children adopted under a statutory process possess.<sup>85</sup> Even an adoption by proxy could suffice if recognized in place in which the adoption occurred.<sup>86</sup>

## **2. Two years of Legal and Physical Custody**

A petitioner for an adopted child visa must prove that the child has been in the legal custody of at least one of the adoptive parents for at least two years. Where a married couple has adopted a child, the USCIS has said that only one of the adopting parents needs to have complied with the residence and legal custody requirements for the petition to be granted.<sup>87</sup> The spouse who fulfills the custody and residency requirements need not be the petitioner, as long as both the spouse and the petitioner have adopted the child.<sup>88</sup>

Legal custody must be awarded through a legal process involving courts or other recognized governmental entities. Informal guardianships or other custodial arrangements not confirmed by a court or governmental body are insufficient. 8 C.F.R. §204.2(d)(2)(vii)(A). A period of legally-awarded custody (such as in a guardianship) prior to the adoption will count towards the two years of legal custody, but if legal custody was not granted prior to the adoption, the adoption decree will mark the commencement of legal custody. *Id.* Despite this requirement of the involvement of a court or other governmental entity, a period of legal custody through

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<sup>82</sup> *E.g.*, Matter of Ng, 14 I. & N. Dec. 135 (B.I.A. 1972) (Hong Kong); Matter of Kwok, 14 I. & N. Dec. 127 (B.I.A. 1972) (China). *See, e.g.*, Ignatius & Stickney, *supra* note 31 at §11.4.

<sup>83</sup> *See* Ignatius & Stickney, *supra* note 31 at §11.4.

<sup>84</sup> *See* Mila v. District Director of Denver, 678 F.2d 123 (10<sup>th</sup> Cir. 1982) (upholding INS position).

<sup>85</sup> Kaho v. Ilchert, 765 F.2d 877 (9<sup>th</sup> Cir. 1985). *See* Stickney, *supra* note 53, at §13:4.

<sup>86</sup> Matter of Cho, 16 I. & N. Dec. 188, 977 WL 329247 (B.I.A. 1977). *See* Ignatius & Stickney, *supra* note 31 at §11.5.

<sup>87</sup> Matter of Ho, 19 I. & N. Dec. 582, 1988 WL 235447 B.I.A. 1988). *See* Stickney, *supra* note 31, at §13:8.

<sup>88</sup> *See* Matter of Patel, 17 I. & N. Dec. 414 (B.I.A. 1980).