

of a U.S. citizen who has satisfied the two year joint residence and custody requirement by residing with the child outside of the United States as habitually resident outside of the United States. 8 C.F. R. 204.2 (d)(2)(vii)(E).

A child residing in the United States at the time of a proposed adoption by a U.S. citizen, however, is generally not eligible for an adopted child visa if the child is not habitually resident in the United States and the child's habitual residence immediately before arriving in the United States was another Convention nation.¹⁰³ U.S. federal regulations provide in 8 C.F. R. 204.2 (d)(2)(vii)(F) that "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." Subject to a limited exception, a child is deemed to be habitually resident in the country of the child's citizenship, and not 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). Instead of using an adopted child visa, the petitioner must seek a Convention visa, satisfying the criteria of 8 U.S.C. §1101(b)(1)(G.). *Id.*

In *Fingerson v. Dep't of Homeland Security*, 198 F. Supp. 7866 (W.D. Ky. 2016) petitioner challenged the validity of these federal regulations, arguing that his adopted son who traveled to the United States from South Africa, a Convention nation, was not emigrating to be adopted in the United States because he arrived on a nonimmigrant student visa for a purpose

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.

8 C.F. R. 204.2 (d)(2)(vii)(E), however, provides:

(E) For purposes of paragraph (d)(2)(vii)(D) of this section, USCIS will deem a United States citizen, 8 CFR 204.303 notwithstanding, 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.

See also Hollinger, *supra* note 10, at § 11:03[2][b].

¹⁰³ *Id.*; Ignatius & Stickney, *supra* note 31, at §13.41.