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# Step-Up Your Immigration Law Practice

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## Speaker Biographies

## **SEAN DOOLEY**

Sean Dooley is a graduate of the University of Tulsa College of Law and currently serves as the United States Sentencing Guideline Specialist and Senior Probation Officer for the United States Probation Office in the Northern District of Oklahoma. In addition to his role as the Sentencing Guideline Specialist, Sean served as a visiting officer with United States Sentencing Commission Office of Education and Sentencing Practices where he assisted in developing national training programs and materials as well provided support and advice related to the application of the United States Sentencing Guidelines to attorneys and courts across the country.

## **PROFESSOR MARIANNE BLAIR**

Marianne Blair is a Professor Emerita of Law at the University of Tulsa College of Law, where she taught Family Law, International and Comparative Family Law, Civil Procedure, and Conflict of Laws for thirty-two years. She has received several teaching awards at the College of Law, and in 1992 she was one of the recipients of the University of Tulsa Outstanding Teacher Award. Prior to joining the faculty in 1986, she served as a Reginald Heber Smith Fellow and staff attorney for Legal Services of Eastern Oklahoma (now Legal Aid of Oklahoma) in Tulsa.

Professor Blair, Professor Merle Weiner of University of Oregon, Professor Barbara Stark of Hofstra University, and Professor Solangel Maldonado of Seton Hall University are co authors of FAMILY LAW IN THE WORLD COMMUNITY, the first casebook for American law students in the field of comparative and international family law, now in its third edition with Carolina Academic Press. She also co-authors OKLAHOMA FAMILY LAW: STATUTES AND RULES ANNOTATED, an annual publication by Imprimatur Press, with Professor Robert Spector of University of Oklahoma and Carolyn Thompson; and she was a contributing author to the leading treatise on adoption law, ADOPTION LAW AND PRACTICE (ed., Joan Hollinger). Professor Blair has published numerous articles on topics related to adoption law and international and comparative family law in *Family Law Quarterly*, *Notre Dame Law Review*, *North Carolina Law Review*, and other law reviews and publications.

Professor Blair has served as Chair of the Family and Juvenile Law Section of the Association of American Law Schools and as a member of the Oklahoma Adoption Law Reform Committee in the 1990s, through which she participated in the drafting of the Oklahoma Adoption Code. She has been a longstanding member of the International Society of Family Law, the ABA Family Law Section, and the OBA Family Law Section, and she served from 2008 to 2018 on the Board of Legal Aid of Oklahoma.

## Bio for Lambert D. Dunn, Jr.

Lambert Dunn is a practitioner based in Oklahoma City for the past thirteen (13) years. Mr. Dunn and his firm focus on Civil Trial work including Civil Rights Violations, Injury Law, Insurance Bad faith, Immigration Law, and the specific legal problems faced by our immigrant community.

Lambert Dunn and Associates' clients are almost exclusively immigrant and a majority are undocumented.

Mr. Dunn is a founding member of the OK Bar Immigration Section, long time member of the American Immigration Law Association, former roughneck, former fry cook, former auto mechanic, former carpenter, Oklahoma Criminal Defense Law Association member, The Iron Butt Motorcycle Association Member, 21-year member of The LongRider Motorcycle Club, and the white guy at Holy Angels Catholic Church. Mr. Dunn enjoys his faith, family, hunting, and fishing.

Mr. Dunn is an accomplished outdoorsman, who holds the current Lake Hefner Hybrid Striped Bass Record at 17 lbs, 9 oz.

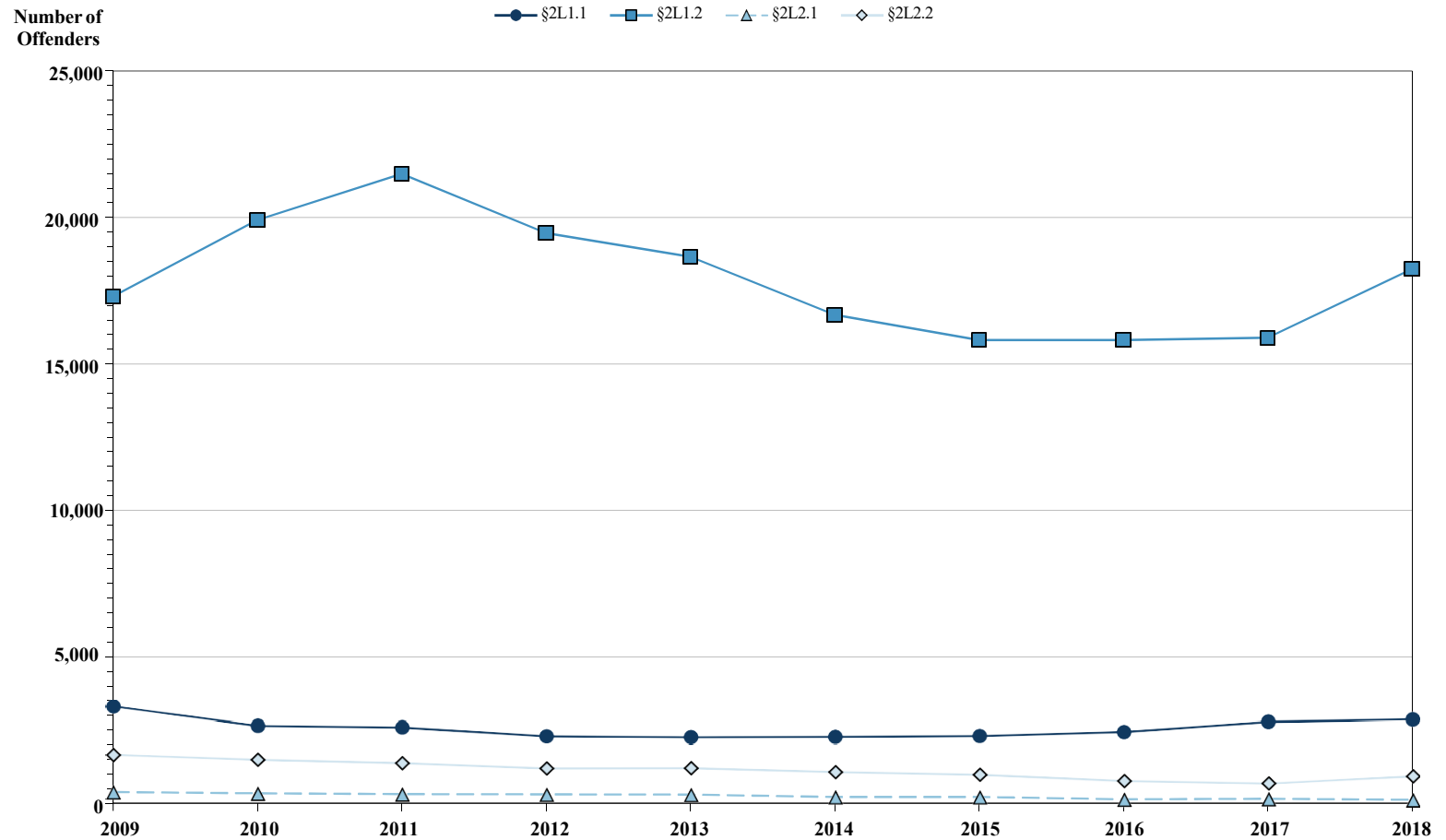
## **MELISSA LUJAN**

Melissa Lujan is a solo practitioner in Oklahoma City, OK. Her practice focuses on removal defense, asylum and family-based immigration. She is a member of the American Immigration Lawyers Association (AILA) where she previously served on the National Liaison Committee for the VAWA/T/U visa Committee. In her advocacy for immigrant communities she has met with members of Congress, provided commentary for local and national media, and presented on numerous panels throughout the region. Melissa was also the 2018 Chair Person of the Oklahoma Bar Association's Immigration Section. She has served as a member of the Board of the Oklahoma American Civil Liberties Union (ACLU) since 2016 serving as Vice President in 2017. She currently sits on the OU Law School's Diversity Committee.

# IMMIGRATION AND THE FEDERAL CRIMINAL COURTS

Sentencing Issues related 8 U.S.C § 1326 and the  
effects of criminal history on Illegal Reentry  
defendants

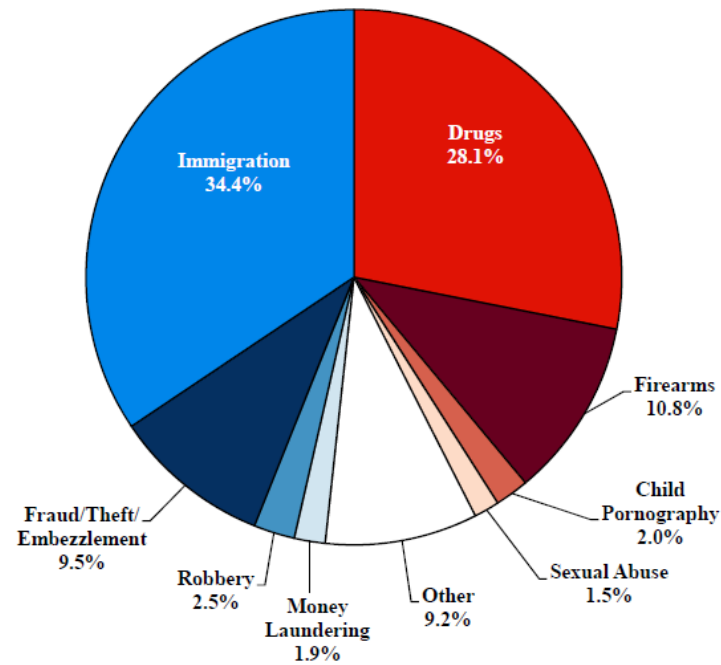
**Figure I-2**  
**NUMBER OF IMMIGRATION OFFENDERS OVER TIME<sup>1</sup>**  
**Fiscal Years 2009 - 2018**



<sup>1</sup>Only offenders sentenced under §§2L1.1 (Alien Smuggling), 2L1.2 (Unlawful Entering or Remaining in the United States), 2L2.1 (Trafficking in Immigration Documents, or Making False or Fraudulent Immigration Statements), or 2L2.2 (Acquiring Fraudulent Immigration Documents) are depicted in this figure. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 - 2018 Datafiles, USSCFY09 - USSCFY18.

**Figure 2**  
**FEDERAL OFFENDERS BY TYPE OF CRIME<sup>1</sup>**  
Fiscal Year 2018

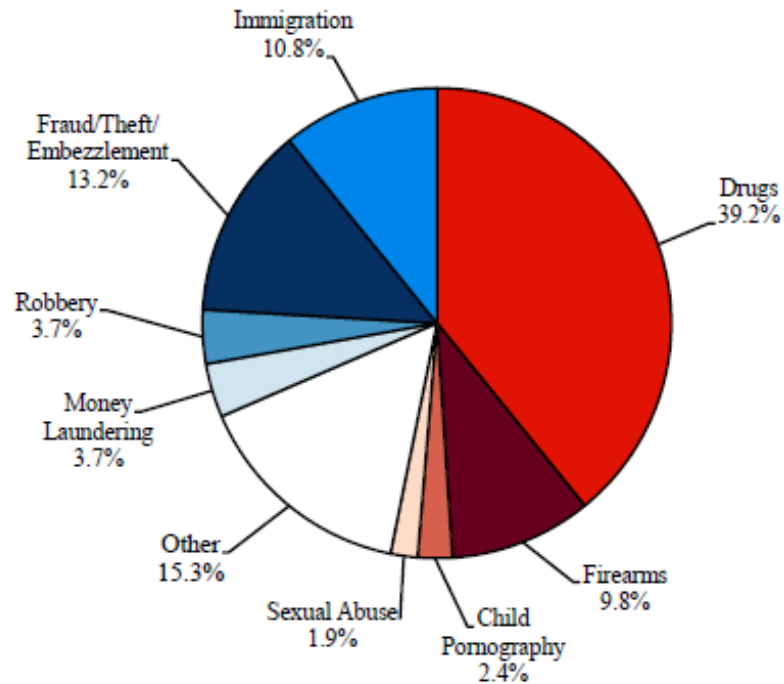


<sup>1</sup> This figure includes the 69,425 cases reported to the Commission. The Drugs category includes trafficking and simple possession. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2018 Datafile, USSCFY18.



### Western Oklahoma

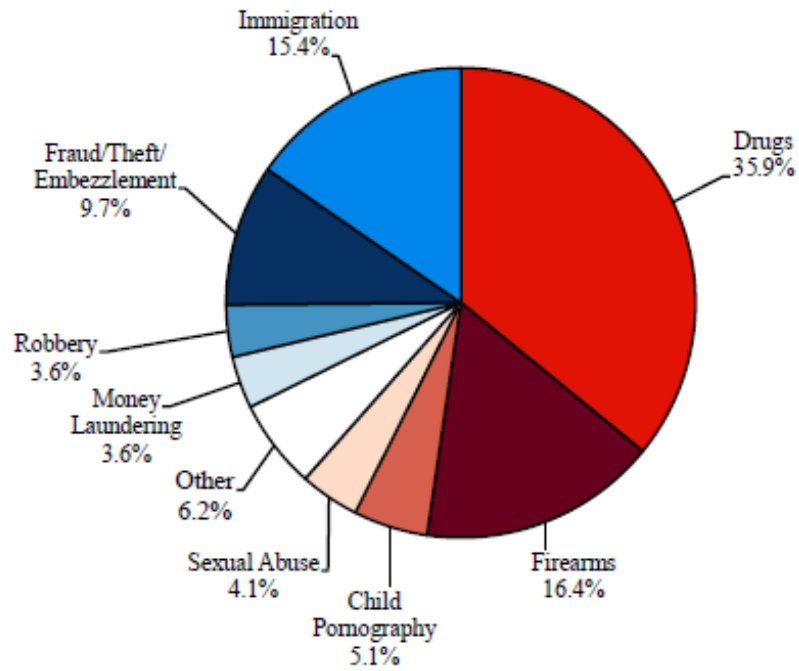


The National figure includes the 69,425 cases reported to the Commission. The Drugs category includes trafficking and simple possession.

The Western District of Oklahoma figure includes the 378 cases reported to the Commission.

SOURCE: U.S. Sentencing Commission, 2018 Datafile, USSCFY18.

### Northern Oklahoma



The National figure includes the 69,425 cases reported to the Commission. The Drugs category includes trafficking and simple possession.

The Northern District of Oklahoma figure includes the 195 cases reported to the Commission.

SOURCE: U.S. Sentencing Commission, 2018 Datafile, USSCFY18.

Table I-5

**CRIMINAL HISTORY CATEGORY AND CITIZENSHIP OF IMMIGRATION  
OFFENDERS<sup>1</sup>  
Fiscal Year 2018**

CHC		Total		§2L1.1		§2L1.2		§2L2.1		§2L2.2	
		N	%	N	%	N	%	N	%	N	%
<b>I</b>	<b>Total</b>	<b>9,255</b>	<b>100</b>	<b>1,658</b>	<b>100</b>	<b>6,731</b>	<b>100</b>	<b>98</b>	<b>100</b>	<b>768</b>	<b>100.0</b>
	U.S. Citizen	942	10.2	845	51.0	1	0.0	47	48.0	49	6.4
	Non-U.S. Citizen	8,313	89.8	813	49.0	6,730	100	51	52.0	719	93.6
<b>II</b>	<b>Total</b>	<b>4,541</b>	<b>100</b>	<b>355</b>	<b>100</b>	<b>4,100</b>	<b>100</b>	<b>9</b>	<b>100</b>	<b>77</b>	<b>100.0</b>
	U.S. Citizen	262	5.8	249	70.1	0	0.0	5	55.6	8	10.4
	Non-U.S. Citizen	4,279	94.2	106	29.9	4,100	100	4	44.4	69	89.6
<b>III</b>	<b>Total</b>	<b>4,435</b>	<b>100</b>	<b>413</b>	<b>100</b>	<b>3,971</b>	<b>100</b>	<b>4</b>	<b>100</b>	<b>47</b>	<b>100.0</b>
	U.S. Citizen	342	7.7	335	81.1	0	0.0	2	50	5	10.6
	Non-U.S. Citizen	4,093	92.3	78	18.9	3,971	100	2	50	42	89.4
<b>IV</b>	<b>Total</b>	<b>2,194</b>	<b>100</b>	<b>194</b>	<b>100</b>	<b>1,967</b>	<b>100</b>	<b>4</b>	<b>100</b>	<b>29</b>	<b>100.0</b>
	U.S. Citizen	175	8.0	166	85.6	0	0.0	3	75.0	6	20.7
	Non-U.S. Citizen	2,019	92.0	28	14.4	1,967	100	1	25.0	23	79.3
<b>V</b>	<b>Total</b>	<b>1,020</b>	<b>100</b>	<b>99</b>	<b>100</b>	<b>912</b>	<b>100</b>	<b>2</b>	<b>100</b>	<b>7</b>	<b>100.0</b>
	U.S. Citizen	84	8.2	82	82.8	0	0.0	2	100	0	0.0
	Non-U.S. Citizen	936	91.8	17	17.2	912	100	0	0.0	7	100.0
<b>VI</b>	<b>Total</b>	<b>685</b>	<b>100</b>	<b>120</b>	<b>100</b>	<b>560</b>	<b>100</b>	<b>0</b>	<b>100</b>	<b>5</b>	<b>100.0</b>
	U.S. Citizen	114	16.6	111	92.5	0	0.0	0	--	3	60.0
	Non-U.S. Citizen	571	83.4	9	7.5	560	100	0	--	2	40.0

<sup>1</sup> Of the 69,425 cases, 22,136 offenders were sentenced under §§2L1.1 (Alien Smuggling), 2L1.2 (Unlawful Entering or Remaining in the United States), 2L2.1 (Trafficking in Immigration Documents, or Making False or Fraudulent Immigration Statements), or 2L2.2 (Acquiring Fraudulent Immigration Documents). Of these 22,136 offenders, six were excluded due to missing information on the offender's citizenship status. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2018 Datafile, USSCFY18.

Table I-7

**SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE FOR IMMIGRATION OFFENDERS<sup>1</sup>**  
**Fiscal Year 2018**

GUIDELINE	TOTAL	WITHIN GUIDELINE RANGE		DEPARTURE								VARIANCE	
		N	%	UPWARD		§5K1.1		§5K3.1		DOWNWARD			
				N	%	N	%	N	%	N	%	N	%
<b>TOTAL</b>	<b>22,135</b>	<b>14,477</b>	<b>65.4</b>	<b>120</b>	<b>0.5</b>	<b>173</b>	<b>0.8</b>	<b>4,388</b>	<b>19.8</b>	<b>758</b>	<b>3.4</b>	<b>2,219</b>	<b>10.0</b>
§2L1.1	2,843	1,114	39.2	16	0.6	108	3.8	1,057	37.2	74	2.6	474	16.7
<b>§2L1.2</b>	<b>18,240</b>	<b>12,641</b>	<b>69.3</b>	<b>99</b>	<b>0.5</b>	<b>36</b>	<b>0.2</b>	<b>3,234</b>	<b>17.7</b>	<b>649</b>	<b>3.6</b>	<b>1,581</b>	<b>8.7</b>
§2L2.1	117	56	47.9	0	0.0	24	20.5	0	0.0	8	6.8	29	24.8
§2L2.2	935	666	71.2	5	0.5	5	0.5	97	10.4	27	2.9	135	14.4

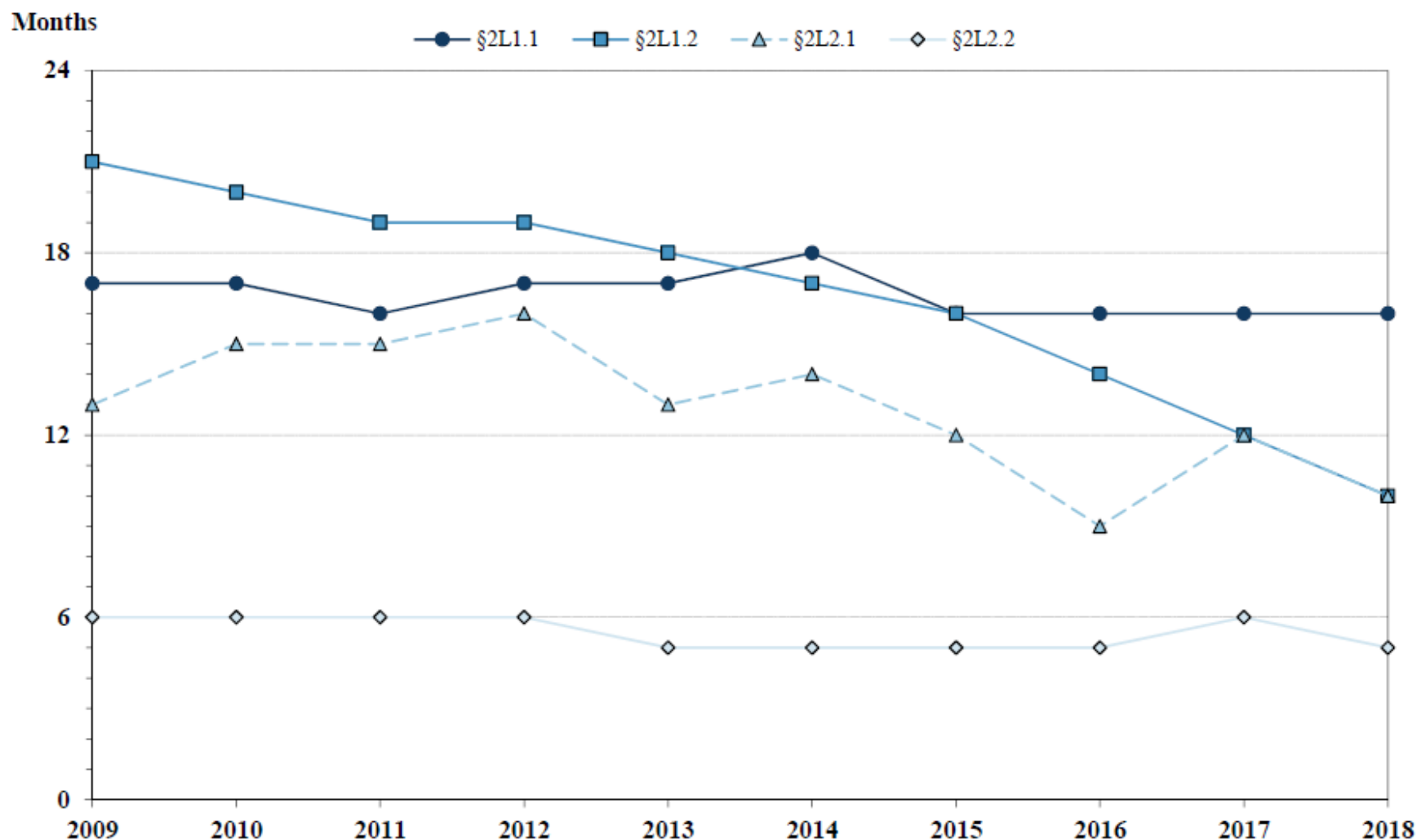
<sup>1</sup> Of the 69,425 cases, 22,136 offenders were sentenced under §§2L1.1 (Alien Smuggling), 2L1.2 (Unlawful Entering or Remaining in the United States), 2L2.1 (Trafficking in Immigration Documents, or Making False or Fraudulent Immigration Statements), or 2L2.2 (Acquiring Fraudulent Immigration Documents). Of these 22,136 offenders, one was excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2018 Datafile, USSCFY18.

Figure I-3

# SENTENCE LENGTH OF IMMIGRATION OFFENDERS OVER TIME<sup>1</sup>

Fiscal Years 2009 - 2018



<sup>1</sup> Only offenders sentenced under §§2L1.1 (Alien Smuggling), 2L1.2 (Unlawful Entering or Remaining in the United States), 2L2.1 (Trafficking in Immigration Documents, or Making False or Fraudulent Immigration Statements), or 2L2.2 (Acquiring Fraudulent Immigration Documents) are depicted in this figure. Sentences of 470 months or greater (including life) and probation were included in the sentence average computations as 470 months and zero months, respectively. The information in this figure includes time of confinement as described in USSG §5C1.1. Cases missing sentencing information were also excluded. Descriptions of variables used in this figure are provided in Appendix A.

## PENALTIES

- 8 U.S.C. § 1326(a) – imprisoned not more than two years
- 8 U.S.C. § 1326(b)(1) – imprisoned not more than ten years if, prior to removal,
  - Conviction for three misdemeanors involving drugs and/or crimes against the person
  - Felony conviction other than a violent felony
- 8 U.S.C. § 1326(b)(2) – imprisoned not more than twenty years if, prior to removal
  - Aggravated felony conviction

## PRIOR CONVICTIONS ≠ ELEMENTS

- *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)
  - Holding that prior felony is not an element of the offense and need not be charged in the indictment
- *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006)
  - Justice Thomas dissenting opinion from denial of certiorari calling for reconsideration of *Almendarez-Torres*

# CATEGORICAL APPROACH

- Look only to the **statutory elements** of an offense to determine if the conviction meets the criteria of a certain category of offense
- FACTS DO NOT MATTER
- DO NOT RELY ON COMMON SENSE
- DO NOT RELY ON THE NAME OF THE STATUTE



## CATEGORICAL APPROACH

- *Johnson v. United States*, 123 S.Ct. 2551 (2015)
- *Voisine v. United States*, 135 S.Ct. 2272 (2016)
- *Mathis v. United States*, 136 S.Ct. 2243 (2016)
- *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018)
- *Stokeling v. United States*, 139 S.Ct. 544 (2019)

## CATEGORICAL APPROACH

- *Jimenez v. Sessions*, 893 F.3d 704 (10<sup>th</sup> Cir. 2018)
- *Bedolla-Zarate v. Sessions*, 892 F.3d 1137 (10<sup>th</sup> Cir. 2018)
- *Munguia-Baeza v. Sessions*, 730 Fed.Appx. 576 (10<sup>th</sup> Cir. 2018)

# UNITED STATES SENTENCING GUIDELINES

**SENTENCING TABLE**  
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115

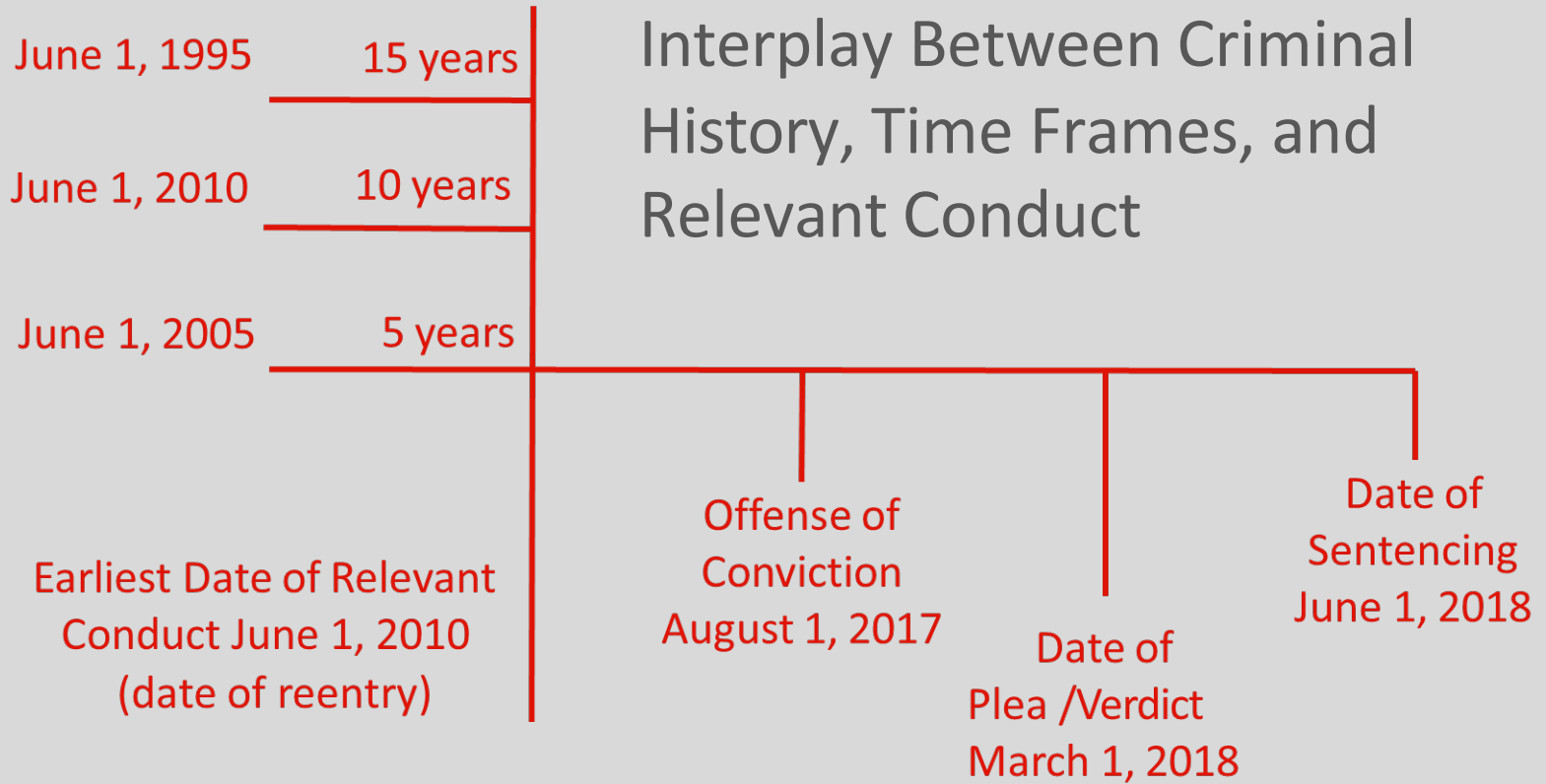
## CRIMINAL HISTORY – USSG §4A1.1

- (a) Add three points for each prior sentence of imprisonment exceeding one year and one month
- (b) Add two points for each prior sentence of imprisonment of at least sixty days
- (c) Add one point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection
- (d) Add two points if instant offense was committed while under any criminal justice sentence
- \*\*\* Sentence of imprisonment = maximum sentence imposed, without regard to time actually served\*\*\*

# APPLICABLE TIME PERIOD

Points	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Sentence imposed or released from incarceration within 15 yrs. of the earliest date of relevant conduct
2	≥60 days	Sentence imposed within 10 years of the earliest date of relevant conduct
1 (Max of 4)	All other convictions*	Sentence imposed within 10 years of the earliest date of relevant conduct
<p>*There are exceptions at §4A1.2(c)(1) – for these offenses, sentence imposed must be more than 1 year probation or a term of imprisonment of at least 30 days</p> <p>*There are also exceptions at §4A1.2(c)(2) – these offenses are never counted</p>		

# Interplay Between Criminal History, Time Frames, and Relevant Conduct



# PRIOR REVOCATIONS

- Sentence Length = time imposed at original sentence + time imposed upon revocation
- 10 vs 15 year time frame is determined by length of sentence



# EXAMPLES

## CHARGED WITH REENTERING ON OR BEFORE 2/15/19

- Sentenced to 15 months custody on 6/9/06
  - 3 points
- Sentenced to 12 months custody on 8/21/08
  - 0 points

## ADMITTED TO ENTERING ON 4/12/2015

- Sentenced to 15 months custody on 6/9/06
  - 3 points
- Sentenced to 12 months custody on 8/21/08
  - 2 points

## EXAMPLES - REVOCATIONS

Illegal reentry on or before 2/15/19

- 6/13/01: sentenced to 10 years custody, all time suspended
- 5/21/04: suspended sentence revoked, sentenced to 10 years custody (sentence discharged 8/07/07)
- Revocation converts 0 point prior to 3 point prior

## ILLEGAL REENTRY – USSG §2L1.2

### §2L1.2(a) – Base Offense Level of 8

- §2L1.2(b)(1)(A) –  
4 level increase if  
defendant has prior  
felony reentry  
conviction
- or
- §2L1.2(b)(1)(B) –  
2 level increase if  
defendant has  $\geq 2$   
misdemeanor  
convictions under 8  
U.S.C § 1326

## §§2L1.2(b)(2) and(3)

### CRIMINAL HISTORY PRIOR TO FIRST REMOVAL

- 10 levels –  
Sentence imposed  $\geq$  5 years;
- 8 levels –  
Sentence imposed  $\geq$  2 years;
- 6 levels –  
Sentence imposed  $>$  13 months;
- 4 levels – any other felony; or
- 2 levels –  
 $\geq$  3 misdemeanor crimes of violence  
or controlled substance offenses

### CRIMINAL HISTORY AFTER FIRST REMOVAL

- 10 levels –  
Sentence imposed  $\geq$  5 years;
- 8 levels –  
Sentence imposed  $\geq$  2 years;
- 6 levels –  
Sentence imposed  $>$  13 months;
- 4 levels – any other felony; or
- 2 levels –  
 $\geq$  3 misdemeanor crimes of violence  
or controlled substance offenses

Prior conviction must be scorable pursuant to §4A1.1(a), (b), or (c)

# EXAMPLE

Illegal Reentry on or before 2/21/19  
First removal – 4/17/01

- 8/19/1997 – 1 year custody Tulsa County Jail, all time suspended
- 12/17/00 – 3 years custody Oklahoma Department of Corrections
- 9/30/03 – 5 years Oklahoma Department of Corrections, all time suspended
- 6/9/12 – 5 years custody Oklahoma Department of Corrections

Total offense level – 18  
USSG §2L1.2(a) – base offense level 8  
USSG §2L1.2(b)(3)(A) – plus 10 levels

## ACCEPTANCE OF RESPONSIBILITY USSG §3E1.1

- If defendant clearly demonstrates acceptance of responsibility, decrease by two levels
- Offense level of 16 or higher, decrease by additional 1 level upon motion by the government

# DEPARTURES AND VARIANCES

# DEPARTURES

- §2L1.2 comment. (n.6) – enhancement(s) overstates seriousness of conduct underlying prior offense
- §2L1.2 comment. (n.7) – defendant is serving time on state sentence when discovered by immigration authorities
- §2L1.2 comment. (n.8) – cultural assimilation
  - Age defendant began residing in US
  - How long defendant attended US school
  - Duration of continued residence
  - Nature and extent of ties to US vs ties to country of origin
  - Seriousness of criminal history
  - Criminal activity after reentry
- §5K3.1 – Fast Track



# VARIANCE

- 18 U.S.C. § 3553(a) factors
  - Nature and circumstances of the offense and the defendant's personal history and characteristics
  - To reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense
  - Adequate deterrence to criminal conduct
  - Protection of the public
  - Provide the defendant with needed education or vocational training; medical care; and other correctional treatment
  - To avoid unwarranted sentence disparities
- Departure rationales
- Twilight Zone Time

# COLLATERAL CONSEQUENCES

- Ineligible for minimum security designation
- Ineligible for certain BOP programs
- Barred from completing sentence at halfway house

## EX POST FACTO

- USSG §1B1.11 –

“If the Court determines that the Guidelines Manual in effect on the date the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the Court shall use the Guideline Manual in effect on the date the offense of conviction was committed.”

- The last date of the offense is controlling (the date defendant is discovered by immigration authorities)
- Current guideline structure came into effect November 1, 2016

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# **Immigration Hurdles in Intercountry Adoption**

**Tulsa - September 13, 2019**

**Oklahoma City - OBA-CLE - October 10, 2019**

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Some of the most difficult legal issues facing U.S. residents who seek to expand their families through international adoption involve satisfying the requirements of U.S. immigration law. U.S. residents seeking lawful entry and nationalization for their transnationally adopted children encounter a legal regime of complex federal statutes and regulations created in the context of international treaty obligations, and at times augmented by additional state law requirements.

Private attorneys have a limited role to play in some aspects of the intercountry adoption process, because adoption agencies specifically accredited to facilitate intercountry adoptions assist their clients with the immigration paperwork and shepherd the majority of prospective adopters through the immigration maze in the typical case. Nevertheless, immigration lawyers play an important role both in advising clients who are considering intercountry adoption and representing clients when pitfalls arise. These materials provide an overview of the process and summarize some of the significant court and administrative decisions interpreting federal immigration law, with particular emphasis on the issues for which private attorneys are most likely to be called on to assist.

One reason that immigration law in this field is so complex is that Congress and the Departments of State and Homeland Security (who promulgate the relevant federal regulations) are trying to accomplish multiple goals. U.S. federal immigration law regulating intercountry adoption attempts to ensure that:

- prospective adopters are suitable to adopt;
- children who are adopted or about to be adopted by U.S. citizens are authorized to enter the country on preferential visas, so that family formation may be accomplished without years of waiting for visas that are subject to numerical limitation;<sup>1</sup>

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<sup>1</sup> Children coming to the United States to join adoptive families are classified for immigration purposes as immigrants (those seeking permanent residence) rather than non-immigrants (those seeking admission for a limited period of time). Two types of visas are available for immigrants—those that are subject to numerical limitation, which are obviously less desirable for prospective adopters because they require a significant wait, and those that are not.

- child trafficking is deterred;
- sham adoptions are thwarted (i.e., that the purpose of the adoption is to form a bona-fide parent-child relationship --*suspicion of adoptions by uncles and aunts is evident in the case law*); and
- the law of the state of the adopter(s)' residence, the child's country of origin, and applicable international treaties are satisfied.<sup>2</sup>

## I. International Treaties

Three conventions form the centerpiece for the global regulation of intercountry adoption:

- the Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 U.N.T.S. 3;
- the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography (CRC Protocol), May 25, 2000, S. Treaty Doc. No. 106-37 (2000), G.A. Res 54/263, Annex II, U.S. GAOR 54<sup>th</sup> Sess., U.N. Doc. A/54/L.84; A/54/49; and
- the Convention on Protection and Cooperation in Respect of Intercountry Adoption (Hague Intercountry Adoption Convention), May 29, 1993, S. Treaty Doc. No. 105-51, 32 I.L.M. 1134.

The CRC is a human rights treaty to which virtually every nation in the world except the United States is a party.<sup>3</sup> In Article 21 it sets broad parameters for intercountry adoption, but implementation was left to the two subsequent treaties to which the United States is a party, the CRC Protocol and the Hague Intercountry Adoption Convention.

The CRC Protocol on the Sale of Children, which currently has 176 states parties and was

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8 U.S.C. §1151. U.S. citizens seeking to adopt a child from abroad will therefore seek to qualify that child as an immediate relative, in order to obtain a visa not subject to numerical limitation. 8 U.S.C. §1151(b)(2)(A). As will be discussed below, permanent residents of the United States who are not yet citizens may seek family preference visas for children they are adopting from abroad, but those visas are subject to numerical limitation allocated by country. 8 U.S.C. § 1151(a)(1).

<sup>2</sup> See Elizabeth Bartholet, *International Adoption: Overview*, in 2 *Adoption Law and Practice* §10.03[2][c][iii] (Joan Hollinger ed. 2019)

<sup>3</sup> For a list of states parties, see [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en). The United States signed the treaty on Feb. 16, 1995, but has never ratified it.

ratified by the United States in 2002,<sup>4</sup> mandates *inter alia* criminal sanctions and legal liability for adoption intermediaries who improperly induce or attempt to induce consent to adoption. Implementing legislation in the United States in 42 U.S.C. §§14944 and 14925 imposes civil penalties under federal law for making false statements or factual misrepresentations or offering, soliciting, or accepting compensation in order to influence or affect a parental relinquishment or consent to adoption, or for engaging an agent who violates such norms; as well as criminal sanctions for intentionally engaging in such conduct.<sup>5</sup>

The Hague Intercountry Adoption Convention, which entered into force for the United States on April 1, 2008, has significantly impacted U.S. federal law regulating the immigration of children to the United States through intercountry adoption, prompting the creation of a third category of visa for children adopted transnationally by at least one U.S. citizen (see Section II below). The Convention is implemented in the United States through the Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. § 14901 *et seq.*, and a plethora of federal regulations mandating government oversight and standards of practice for accredited adoption agencies and approved persons who facilitate Convention adoptions. As of 2014, the standards mandated by the Convention for adoption facilitators working with Convention countries have now been extended by the Intercountry Adoption Universal Accreditation Act of 2012 (UAA) to agencies and persons facilitating adoptions from non-Convention nations as well.<sup>6</sup> Extensive coverage of the provisions of the Hague Convention, the IAA, and the implementing regulations is beyond the scope of this program, but certain key provisions that place the immigration law in context will be discussed below.

It is critical to understand that not all intercountry adoptions by U.S. citizens or residents are regulated by the Hague Intercountry Adoption Convention. The Convention itself applies only if the prospective adoptive parents and the child are all habitually resident in a contracting nation. Hague Intercountry Adoption Convention, art. 2. For purposes of U.S. immigration law, U.S. federal regulations generally equate “habitual residence” with domicile. 8 C.F.R. § 204.3. Currently, 101 nations (approximately half of the nations in the world) are states parties to the

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<sup>4</sup> For a list of states parties to the CRC Protocol, see [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=_en).

<sup>5</sup> Initially these sanctions applied only to conduct related to the adoption of children from nations that were parties to the Hague Intercountry Adoption Convention, but they were made applicable to the adoption of children from non-Convention countries who immigrate through orphan visas in the Intercountry Adoption Universal Accreditation Act of 2012 (UAA), effective July 1, 2014.

<sup>6</sup> The UAA, *id.*, now requires all agencies and persons who facilitate adoption of children who emigrate from non-Convention nations under “orphan visas” (see Section II below) to satisfy all of the standards established by the Intercountry Adoption Act of 2000 (IAA).

Hague Intercountry Adoption Convention.<sup>7</sup> According to the data provided in the most recent U.S. Department of State *Annual Report on Intercountry Adoptions*, approximately 65.5% of intercountry adoptions in FY2018 involved children immigrating to the United States from nations that are party to the Hague Intercountry Adoption Convention.<sup>8</sup>

## **II. The Three Paths to Immediate Relative Immigration Status for Children Adopted by U.S. Citizens**

Children coming to the United States to join adoptive families are classified for immigration purposes as immigrants (i.e., aliens seeking permanent residence).<sup>9</sup> A U.S. citizen seeking to adopt a child from abroad will wish to qualify that child as an immediate relative, in order to obtain a visa not subject to numerical limitation and avoid a significant wait. 8 U.S.C. §1151(b)(2)(A).

A child adopted abroad or entering the United States for adoption by a U.S. citizen may qualify for immediate relative immigration status through three different routes, i.e., the “Orphan Visa,” the “Convention Visa,” and the “Adopted Child Visa”:

- (1) the child satisfies the statutory definition of orphan, 8 U.S.C. §1101(b)(1)(F);
- (2) the child is adopted from a nation that is party to the Hague Intercountry Adoption Convention and the requirements of 8 U.S.C. §1101(b)(1)(G) are satisfied; or
- (3) the child has been adopted and in the legal and residential custody of the adoptive parent for at least two years, 8 U.S.C. §1101(b)(1)(E).

The following chart presents a brief comparison of the major differences in the requirements of each of these categories.

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<sup>7</sup> For a complete list of the states parties to the Hague Intercountry Adoption Convention, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

<sup>8</sup> See Table 1, U.S. Department of State *Fiscal Year 2018 Annual Report on Intercountry Adoptions* (March 2019) at <https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Tab%201%20Annual%20Report%20on%20Intercountry%20Adoptions.pdf>. The reporting period for FY 2018 is from October 1, 2017 through September 30, 2018. *Id.* at 1.

<sup>9</sup> Two types of visas are available for immigrants—those that are subject to numerical limitation and those that are not. 8 U.S.C. §1151.



**THREE AVENUES TO ACHIEVE IMMEDIATE RELATIVE CLASSIFICATION  
FOR A CHILD IMMIGRATING FOR/AFTER ADOPTION**

**Orphan Visa**

8 USC 1101 (b)(1)(F)

1. Adoption facilitated by ASP
2. Child is habitually resident in a non-Hague Convention nation
3. Adopted by U.S. citizen and spouse or unmarried US. citizen 25 yrs. old when I-600 filed 1101 (b)(1)(F), and 24 yrs. old when I-600 A filed. 204.3(b). An alien spouse residing in US must be in lawful immigration status. 204.3(b). If child adopted abroad, a parent personally saw child before or during adoption.
4. Valid home study with favorable recommendation; 1154(d); 204.3, and USCIS determines child will receive proper care from adoptive parent; 1101 (b)(1)(F)
5. If adoption is to take place in U.S., country of origin must approve emigration for adoption, and any state preadoption requirements must be satisfied; 204.3 (d)(1)(f)
6. Child under 16 when petition filed (or sibling and under 18) 1101 (b)(1)(F)
7. Child meets statutory def of orphan- death or disappearance of, abandonment or desertion by, separation or loss from both parents, or sole or surviving parent incapable of providing proper care and has consented; 1101 (b)(1)(F).

**Convention Visa**

8 USC 1101(b)(1) (G)

1. Adoption facilitated by ASP
2. Child habitually resident/from nation that is party to Hague Convention; 1101 (b)(1)(G), and certification from Central Authority of country of origin. 1154(d)(2)
3. Adopted by U.S. citizen habitually resident in U.S. and spouse (an alien spouse residing in US must be in lawful immigration status. 204.307) or unmarried US. citizen 25 yrs. old when I-800 filed; 1101 (b)(1)(G), and 24 yrs. old when I-800 A filed, and habitually resident in U.S. 204.307.
4. Valid home study with favorable recommendation; 1154(d), and USCIS determines child will receive proper care from adoptive parent; 1101 (b)(1)(G)
5. If adoption is to take place in U.S., country of origin must approve emigration for adoption, and any state preadoption requirements must be satisfied; 1101 (b)(1)(G)
6. Child under 16 when petition filed (or sibling under 18) 1101 (b)(1)(G)
7. Parents or sole or surviving parent have consented or institution with custody has consented, and if there are two living parents, they are incapable of providing proper care, and USCIS determines child's relationship with birth parents has been terminated and purpose of adoption is to form bona-fide parent-child relationship; 1101 (b)(1)(G)
8. Convention safeguards satisfied.

**Adopted Child Visa**

8 USC 1101 (b)(1)(E)

1. Adopted by a U.S. citizen; 1101 (b)(1)(E)  
-Adoption must be valid in country where it took place. Foreign adoption need not satisfy same U.S. legal requirements for adoptions occurring in United States.
2. Child adopted under 16 (or sibling and under 18); 1101 (b)(1)(E), and petition filed for unmarried child before child is 21,
3. Child must have  
been in legal custody of adoptive parent or parents 2 years  
and  
have resided with adoptive parent or parents two years at time petition (I- 130 ) is filed. 1101 (b)(1)(E)  
(To ensure bona fide parent child relationship)

## **A. Eligibility for Immediate Relative Status as an Orphan**

The vast majority of children who emigrate to the United States on the basis of their adoption or intended adoption by a U.S. citizen qualify for immediate relative status by satisfying the requirements for an orphan or Convention visa. As you can see from the above chart, many of the requirements for these two visas are similar, but there are also some significant differences in the eligibility criteria and process.

### **1. Facilitator Must be an ASP**

One of the most important safeguards established by the Hague Intercountry Adoption Convention is the requirement that certain critical functions related to intercountry placement must be performed by governmental entities or by agencies or individuals that have been specifically accredited or approved. Although the Hague Intercountry Adoption Convention itself applies only to the adoption of children from nations that are parties to the Convention, Congress extended these protections to children emigrating to the United States under orphan visas from non-Convention nations as well in the Intercountry Adoption Universal Accreditation Act of 2012 (UAA), Pub. L. 112-276, 126 Stat. 2466.. After July 1, 2014, only accredited agencies or approved persons (collectively referred to under U.S. law as adoption service providers [ASPs]) may facilitate intercountry adoptions of children emigrating to the United States through orphan or Convention visas. 42 U.S.C. §14925.

U.S. federal legislation and implementing regulations define the following six functions as “adoption services”:

- (1) identifying a particular child for adoption and arranging the adoption;
- (2) obtaining the consents necessary for termination of parental rights and adoption;
- (3) preparing and reporting home studies on prospective adopters and background studies on the child;
- (4) making a non-judicial determination of the child’s best interests and the extent to which a particular placement is appropriate;
- (5) post-placement monitoring until adoption finalization; and
- (6) assumption of custody and provision of care following a disruption. 42 U.S.C. § 14902; 22 C.F.R. 96.2.

Thus, after July 1, 2014, only public (governmental) authorities, accredited agencies, approved persons, or providers acting under the supervision of accredited agencies or approved persons may perform these six adoption services for children emigrating through orphan or Convention

visas, with the exception that the preparation of home studies and background reports on children may be performed by social work professionals or organizations that are not accredited or approved, as long as these reports are subsequently approved by an accredited agency. 42 U.S.C. § 14921; 22 C.F.R. 96.12-96.17.

Prospective adoptive parents may, however, hire a lawyer to prepare immigration petitions and visa applications on their behalf and to represent them in proceedings before USCIS or consular officers, as provision of legal services are explicitly not included in the adoption services that must be provided by an ASP. 42 U.S.C. § 14921(b)(3).<sup>10</sup>

Prior to the effective date of the UAA, private attorneys did on occasion shepherd prospective adoptive parents seeking an orphan visa through the placement and immigration process without involving an agency, particularly for adopters who wished to adopt a family member, a friend's child, or a child whom they had identified through their own overseas work or other international connections they had made. Because the UAA now requires that an ASP serve as the primary provider for the adoption services identified above for all children emigrating under Convention or orphan visas, even prospective adopters who have located a particular child will need to seek the services of an accredited agency or approved person even if that child is emigrating from a non-Convention country, if they are seeking an orphan visa.. In such cases, the ASP typically guides the prospective adopters through the immigration process, although private immigration attorneys are often called upon when they encounter particular obstacles or need assistance in completing the USCIS forms.

Of course, private attorneys may choose to go through the lengthy federal accreditation process to become "approved persons," i.e., approved entities or individuals who may serve as the ASP, i.e., the primary provider of the six "adoption services." The Convention and U.S. standards for accredited agencies and approved persons are virtually identical, with two exceptions: (1) approved persons are not required to be non-profit; and (2) approved persons need not be licensed by a State to provide adoption services, whereas accredited agencies must also be state-licensed. Convention, *supra*, art.22, 42 U.S.C. §14923. The criteria for federal accreditation as an accredited agency or approved person are detailed and exacting, however, and the process is expensive, so relatively few private attorneys have sought such approval. The most recent list of accredited ASP, dated August 30, 2019, appeared to list only two private attorneys (neither of whom were located in Oklahoma) as approved persons and over 135 accredited agencies.<sup>11</sup>

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<sup>10</sup> See also Joan Heifetz Hollinger, *Intercountry Adoption: Legal Requirements and Practical Considerations*, in 2 *Adoption Law and Practice* §11.07[6] (Joan Hollinger ed. 2019).

<sup>11</sup> See Intercountry Adoption Accreditation and Maintenance Entity (IAAME), *Intercountry Adoption Accredited/Approved Adoption Service Providers as of: August 30, 2019*, at <https://www.iaame.net/accreditation/accredited-approved-agencies-persons/>. Dillon International, in Tulsa, was the only ASP listed with its primary office in Oklahoma.

## **2. Child Must Be Emigrating from a Non-Convention Nation**

Historically and even as recently as 2014, the orphan visa remained the most frequently used route to immediate relative status. From April 1, 2008 forward, however, orphan visas may be used only for children adopted from non-Convention nations. 8 C.F.R. §204.3.<sup>12</sup> While the Convention visa is now used by the majority of immigrating adoptees, 34% of the children immigrating to the United States through adoption in FY 2018 were still emigrating from non-Convention nations.<sup>13</sup>

## **3. Prospective Adopter's Eligibility**

The process for obtaining an orphan visa normally occurs in two stages, each of which can present significant hurdles for prospective adopters. The first stage focuses on obtaining a determination by the USCIS that petitioners will be suitable adoptive parents.

### **a. Citizenship, Marital Status, Age, and Meeting with Child**

If the adopters are a married couple, at least one spouse must be a U.S. citizen in order for the child to be eligible for immediate relative status. If the other spouse is an alien residing in the United States, he or she must be in lawful immigration status. There is no age requirement for married adopters. 8 U.S.C. § 1101(b)(1)(F); 8 C.F.R. § 204.3(b).

If the adopter is single, he or she must be a U.S. citizen at least 24 years of age on the date that the I-600 A form [the Application for Advanced Processing of an Orphan Petition] is filed and 25 years of age when the I-600 form [Petition to Classify Orphan as an Immediate Relative] is filed. 8 U.S.C. § 1101(b)(1)(F); 8 C.F.R. § 204.3(b).

If the child is to be adopted abroad, which occurred in over 90% of the intercountry adoptions reported by the U.S. Department of State for Fiscal Year 2018,<sup>14</sup> at least one of the adoptive parents must have personally seen and observed the child before or during the adoption proceedings. 8 U.S.C. § 1101(b)(1)(F).

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Nightlight Christian Adoption, a California-based accredited ASP, also advertises an office in Tulsa.

<sup>12</sup> See also Hollinger, *supra* note 10 at §11.07[6]. .

<sup>13</sup> U.S. Department of State *Annual Report on Intercountry Adoptions*, at <https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Tab%201%20Annual%20Report%20on%20Intercountry%20Adoptions.pdf>.

<sup>14</sup> *Id.*

## **b. Suitable Prospective Parent Confirmed by Home Study**

Petitioners for an orphan visa must submit to the U.S. Citizenship and Immigration Services (USCIS) a home study satisfying federal criteria with a favorable recommendation, and USCIS must independently determine that the child will receive proper care. 8 U.S.C. §§ 1101(b)(1)(F); 1154(d). The process for obtaining an orphan visa normally occurs in two stages, the first of which focuses on obtaining this determination by USCIS that the petitioners will be suitable parents. Although advanced approval is not required for an orphan visa, most prospective adopters will choose to seek advanced approval by filing Form I-600A (Application for Advanced Processing of an Orphan Petition), in order to avoid delay later when a specific child has been identified and the adopters are eager to bring the child home to the United States.

When they file their Form I-600 A, prospective adopters must supply extensive documentation, including evidence of their U.S. citizenship and the lawful immigration status of an alien spouse residing in the United States, their marriage certificate, any divorce or dissolution decrees for any previous marriages, and, if the child is to be adopted or readopted in state court, proof that any state preadoption requirements have been satisfied. 8 C.F.R. § 204.3(c)(1).

A home study must either be submitted with the application or within a year of filing the I-600 A. 8 C.F.R. § 204.3(c)(2),(h)(5). Following submission, each prospective adoptive parent and any other adult household member must be fingerprinted by the USCIS, which then seeks a criminal background report from the FBI. 8 C.F.R. §§ 204.3(c)(3).

A home study can be no more than six months old at the time of submission. If older, it must be updated, and significant changes after submission, such as a move, a divorce, or additional household members, require an amendment. 8 C.F.R. § 204.3(e)(9).

Pursuant to the UAA, all home studies submitted by petitioners seeking either orphan or Convention visas must be performed or approved by an accredited agency federally certified as an ASP, whose employees are licensed or authorized as required by the law of the jurisdiction in which the home study is conducted. 22 C.F.R. §§ 96.47, 96.37. The UAA also extends the duty of disclosure found in 8 CFR §204.311(d) and 8 CFR §204.309(a) to orphan visa applicants filing a Form I-600A applicant or Form I-600, as well as the petitioner's spouse and any adult member of the household, which extends to completion of the forms and throughout the home study and the entire adoption process until a final decision has been made to admit a child with a visa.<sup>15</sup> USCIS officers are directed to deny Convention applications if they discover a failure to disclose or misrepresentation of an arrest, conviction, or history of substance abuse, sexual abuse, child abuse, criminal history, or family violence regarding any application or adult household member or if any such person failed to cooperate with the child abuse registry check or disclose a prior home study. 8 C.F.R. § 204.3(h)(4). A denial for failure to disclose will bar the applicant from filing a subsequent Application for one year after the decision becomes administratively

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<sup>15</sup> Hollinger, *supra* note 10, at § 1104 [2].

final. *Id.*

The UAA requires that home studies prepared by petitioners for orphan visas must now satisfy the same standards for the manner of preparation and content as are mandated for Convention visas under 8 C.F.R. § 204.311 and 22 C.F.R. §96.47,<sup>16</sup> Preparers must interview each prospective adopter and any adult member of the adopter's household and conduct a home visit. The home study must contain an assessment of each adopter's suitability to parent based on the applicant's background, family and medical history, physical, mental, and emotional health, social environment, motivation for adoption, ability to undertake an intercountry adoption, and the characteristics of children for whom the adopter would be qualified to care. Evaluations by doctors, mental health professionals, or substance abuse counselors may be requested and included if the preparer identifies areas beyond the preparer's expertise that should be addressed. The study must also include assessment of the adopter's financial circumstances, the adopter's current living accommodations, and the living accommodations where the child will reside. Available child abuse registries must be checked regarding each adopter and any adult member of the adopter's household for any state or foreign country in which the individual has resided from the age of 18. The home study preparer must inquire about any history on the part of the adopter or an adult household member regarding arrests or convictions for any crime, as well as any history of substance abuse, sexual or child abuse, or domestic violence, even if it resulted in no arrests or convictions; and include this information in the report, as well as any evidence of rehabilitation. Previous rejection for adoption or unfavorable home studies regarding any prospective adopter or adult household member must be attached. The home study must also summarize any counseling that has been given to prepare the adopter for international adoption and plans for post-placement counseling. Any specific requirements of countries of origin from which the applicant seeks to adopt must also be addressed. If the applicant seek to adopt a special needs child, assessment of the prospective adopter's willingness, preparation, and ability to provide proper care must be included. Finally, if the findings are favorable, the home study must

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<sup>16</sup> See USCIS, *The Universal Accreditation Act of 2012*, at <https://www.uscis.gov/adoption/universal-accreditation-act-2012>, which provides:

All home studies, including home study updates and amendments, must comply with the Hague Adoption Convention home study requirements in 8 CFR 204.311, which differ from the home study requirements in effect for orphan cases before July 14, 2014, in 8 CFR 204.3(e).

For greater detail regarding guidance provided to USCIS employees to implement the UAA's requirements for similar suitability determinations in assessing home studies in orphan and Convention visa petitions, see USCIS Policy Memorandum PM-602-0165, Nov. 9, 2018, *Guidance on Determining Suitability of Prospective Adoptive Parents for Intercountry Adoption*, at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-09-PM-602-0165-Suitability-of-Pro prospective-Adoptive-Parents-for-Intercountry-Adoption.pdf>.

contain a specific approval of the prospective adoptive parent or parents, a discussion of the reasons for the approval, the number of children the applicant(s) may adopt, and any restrictions regarding characteristics of an adoptee that should apply. If the state of the prospective adopter's residence requires review of the home study by state officials, this state review must occur before the home study is submitted to the USCIS.<sup>17</sup>

In addition to satisfying the requirements of federal immigration regulations, the content of home studies must also satisfy the criteria established by the child's country of origin<sup>18</sup> and the law of the state of the child's proposed residence, if the child is going to be adopted or readopted in a U.S. state court, as well as any professional or state standards for performing a home study to which the individual preparer is subject.

USCIS officers are responsible for making an independent determination regarding whether or not prospective adopters are capable of providing proper care and are not bound by a favorable recommendation in the home study, although they may consult with the preparer or agency for clarification of specific issues. 8 C.F.R. §204.3(h). Successful applicants for advanced processing for an orphan visa are sent a Form I-171H, Notice of Favorable Determination Concerning Advanced Processing of Orphan Petition or Form I-797, Notice of Action.<sup>19</sup>

Unsuccessful applicants are advised in writing of their right to file a motion to reconsider based on incorrect application of law or policy, a motion to reopen based on new facts, or an appeal.<sup>20</sup> This is obviously one point in the process in which unsuccessful prospective adopters

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<sup>17</sup> D. Marianne Blair, Merle H. Weiner, Barbara Stark, Solangel Maldonado, *Family Law in the World Community* 867-68 (Carolina Academic Press (2015))

<sup>18</sup> Country-specific information may be obtained on the website of the U.S. Department of State, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information.html>. Chairman Smith, in opening remarks at a House oversight hearing in 2006, reinforced the importance of this compliance in speaking about all intercountry adoptions by suggesting: "I want to be assured by State, DHS and the Accrediting Entities that, as the United States moves toward ratification [of the Hague Convention], aggressive actions will be taken to let sending countries know that the United States will prepare and approve its home studies to satisfy the guidelines that sending countries require." *House Subcommittee Holds Hearing Regarding Hague Convention on International Adoption*, 83 No 46 Interpreter Releases 14 (2006), on Westlaw at 83 No. 46 Interrel 14.

<sup>19</sup> USCIS, *After Approval of Orphan and Hague Application*, at <https://www.uscis.gov/adoption/after-approval/after-approval-orphan-and-hague-application>.

<sup>20</sup> See USCIS, *Questions and Answers, Appeals and Motions*, at <https://www.uscis.gov/forms/questions-and-answers-appeals-and-motions>; and USCIS, *When to*

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Use Form I-290-B, *Notice of Appeal or Motion*, at <https://www.uscis.gov/i-290b/jurisdiction>. For information about where the appeal or motion document(s) should be sent, see <https://www.uscis.gov/i-290b-addresses>.

Appeals of a denial of an I-600 are handled by the Administrative Appeals Office in a two step process:

Initial field review: The office that issued the unfavorable decision has 45 days to evaluate the appeal and determine whether to take favorable action on the appeal. If that office does not take favorable action, it will forward the appeal to the AAO and send the appellant a Notice of Transfer to the AAO.

AAO appellate review: The AAO strives to complete its appellate review within 180 days from the time it receives a complete case record after the initial field review. Some cases may take longer than 180 days due to factors beyond the AAO's control. For example, additional documentation may be needed to complete the record, or the case may be more complex and require additional review.

USCIS, *AAO Processing Times*, at

<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/aao-processing-times>.

In general, the AAO issues non-precedent decisions, which are binding on the parties but do not create or modify agency practice or policy. However, some AAO decisions are designated as precedent decisions by the Secretary of Homeland Security, with the Attorney General's approval.

These precedent decisions must be followed by DHS employees except as modified or overruled by later precedent decisions, statutory changes, or regulatory changes. AAO precedent decisions may announce new legal interpretations or agency policy, or they may reinforce existing law and policy by demonstrating how it applies to a unique set of facts.

USCIS, *The Administrative Appeals Office (AAO)*, at

<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao>.

In addition, sometimes the USCIS will adopt a non-precedent decision "to provide policy guidance to USCIS employees in making determinations on applications and petitions for immigration benefits. Unlike precedent decisions, adopted decisions do not establish policy that must be followed by personnel outside of USCIS." USCIS, *AAO practice Manual*, at



will seek legal counsel, even if they are pursuing an agency adoption in which the agency has previously shepherded them through the early stages of filing. Approval of prospective adopters may<sup>21</sup> be denied if the USCIS discovers a failure to disclose negative information such as a criminal record or history of child or substance abuse,<sup>22</sup> 8 C.F.R. § 204.3(h)(4), and has been denied in the past for a variety of other reasons, including irregular employment histories,<sup>23</sup>

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<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/practice-manual/chapter-3-appeals>.

Unless otherwise indicated, none of the AAO decisions cited in these materials are precedent or adopted decisions, and are provided only as illustrations of how the AAO have in the past resolved certain issues.

<sup>21</sup> See, e.g., Matter of [Name Withheld], File No. [withheld], 2008 WL 3989741 (INS) (AAO Jan 4, 2008) (Administrative Appeals Office [AAO] observed petitioner's failure to disclose arrest and two felony convictions for financial crimes was ground for denial, in discretion of USCIS, but approved I-600A in this action, based on positive recommendations and steady home life and job of applicant and fact that underlying incidents that were basis for convictions were 7 years prior.).

<sup>22</sup> See Matter of Name Withheld], File No. [withheld] (AAO Jan 4, 2008), 85 No. 45 Interpreter Releases 3093, 85 No. 45 Interrel 3093 (Westlaw) (AAO approved application and withdrew initial denial of applicant convicted of driving under the influence and placed on probation until Feb. 2009, based on recommendation of home study preparer, psychologist, and evidence incident was isolated and probation was terminated following compliance with court-imposed requirements. The Convention regulations, which now apply to orphan home studies as well, provide even more detail regarding the treatment of criminal history and accompanying documentation, specifically requiring a certified copy of the documentation showing final disposition of each incident and a written statement submitted with the home study giving details, including any mitigating circumstances about each arrest, signed under penalty of perjury by the person arrested. 8 C.F.R. § 204.311(c)(12). Applicants who disclosed have been denied initially for failure to provide such documentation, or for inadequately discussing mitigating circumstances. See *In re [Name Redacted]*, AAU SIM 09 258 10019, 2010 WL 3426787 (INS) (AAO February 25, 2010)(Applicant who did disclose arrest when she was age 20 for driving after revocation of her license, 25 years before her application, was denied by district director because her statement discussing the incident consisted of a single sentence that did not provide mitigating circumstances, although AAO ultimately found applicant satisfied the regulation with supplementation on appeal with an adequate statement regarding her arrest and subsequent rehabilitation.)

<sup>23</sup> See Matter of Suh, 10 I. & N. Dec. 624, 1962 WL 12925 (B.I.A. 1962) (lack of steady work of husband, wife's work shift from 11 p.m. to 7 a.m., two daughters of own, discharge from United States Army due to chronic alcoholism, and long record of minor arrests and convictions

criminal convictions, substance abuse, financial insolvency and a history of welfare receipt, delinquency of other children of the petitioners,<sup>24</sup> and removal of foster children or poor relationships with other children.<sup>25</sup> Prospective adopters have been approved even if they are residing with another adult out of wedlock, whether the partner is of the opposite gender<sup>26</sup> or same gender.<sup>27</sup>

### **c. State Pre-adoption Requirements if Adoption in the U.S.**

If the child is to be adopted in the United States rather than in his or her country of origin, prospective adopters must also establish that any state pre-adoption requirements for transnational adoptive placements have been satisfied. State preadoption requirements for immigrating foreign-born children vary from state to state, and many, if not most states, like Oklahoma, have no such preadoption requirements.<sup>28</sup>

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failed to establish proper care); Matter of T-E-C-, 10 I. & N. Dec. 691, 1964 WL 12117 (B.I.A. 1964) (petitioner's financial status, erratic work record, receipt of welfare, erratic rent payments, indicated difficulty in supporting six children of her own).

<sup>24</sup> Kathleen M. Sullivan, *Intercountry Adoption, A Step-by-Step Guide for the Practitioner*, 95-09 Immig. Briefings 1 (1995), at n.123 and accompanying text.

<sup>25</sup> Cf. Matter of [Name Withheld], File No. [withheld], 2007 WL 5746519 (INS) (AAO Dec. 13, 2007) (AAO reversed denial of I-600A, initially denied due to estrangement from birth children and removal of foster children, because foster care agency reported applicant was excellent foster parent and children removed for other reasons and adult children reported relationship strained but healthy and adequate.)

<sup>26</sup> Matter of [Name Withheld], File No. [withheld], A72 466 877 (AAU Oct. 18, 1992), reported in 71 No. 11 Interrel 391.

<sup>27</sup> Matter of Gressin, A 72 457 702 (AAU Sept. 13, 1993), reported in 70 No. 46 Interrel 1603.

<sup>28</sup> The two state laws typically given as examples in the treatises of pre-adoption requirements no longer effectively have them. Illinois previously required in 750 Ill. Comp. Stat. Ann. 50/41, *inter alia*, medical reports, verification that an adoptive family is a licensed foster family, and a bond or contract from a placement agency assuming responsibility if an adoption disrupted; however, the statute was amended in 2015 to eliminate these requirements.

New York still has a statute on the books, N.Y. Dom. Rel. §115-a., imposing preadoption requirements only for independent adoptions of children immigrating through orphan visas. It mandates that before a child who has not been placed by an agency is admitted to the United States for adoption in New York, prospective adopters must file a petition, home

#### 4. Child's Eligibility for Orphan Visa

The second stage of the process of obtaining an orphan visa focuses on determining the child's eligibility. Prospective adopters typically work with their ASP to compile and forward documentation to a country of origin in order to arrange a placement. In some nations, documentation may be received and a referral made before an I-171H or favorable Notice of Action is actually issued, while other nations may refuse to arrange a placement for prospective adopters until they have received a copy of this documentation.. The legal requirements and practices of sending countries vary dramatically, so generalization is difficult, but ultimately, the prospective adoptive parents must obtain a decree of adoption or custody and permission for the child to emigrate from competent governmental authorities in the child's country of origin. Once a child has been identified, prospective adopters submit Form I-600 (Petition to Classify Orphan as an Immediate Relative).<sup>29</sup>

##### a. Age and Marital Status of the Child

To qualify for an orphan visa, the statute requires the child must be unmarried and under the age of sixteen when the petitioner files the I-600 (Petition to Classify Orphan as Immediate Relative) with USCIS. 8 U.S.C. §1101(b)(F).<sup>30</sup> The statute creates a sibling exception,

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study, other documentary evidence verifying orphan status and consents, and background and medical information on the adopters and the child; a pre-adoption investigation by an independent investigator must be made, and the prospective adopters must appear for examination before a judge, who, if satisfied, will issue a pre-adoption certificate that the adoption appears to be in the best interests of the child. Because federal law now requires an ASP to facilitate the adoption of children immigrating through orphan visas, it appears the statute could only apply in rare cases in which the adoption is facilitated by an approved person.

<sup>29</sup> See e.g., U.S. Dep't of State, *Non-Hague Visa Proces*, at <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/immigrant-visa-process/non-hague-visa-process.html>. For more detail regarding where the Form I-600 should currently be filed, see Dept. Of State, Bureau of Consular Affairs, *Non-Hague Adoption Process*, at <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/how-to-adopt/non-hague-adoption-process.html>.

<sup>30</sup> In *In re [Name Redacted]*, 2011 WL 5023704 (INS) (AAO April 5, 2011), the Administrative Appeals Office created an exception, to promote consistency with Convention regulation 8 C.F.R. 204.313(c)(3), which provides:

If the Form I-800A was filed after the child's 15th birthday but before the child's 16th birthday, the filing date of the Form I-800A will be deemed to be the filing date of the Form I-800, provided the Form I-800 is filed not more than 180 days

permitting a child under the age of eighteen to qualify if he or she is the birth sibling of a child under sixteen who is or will be adopted by the same parents. 8 U.S.C. §1101 (b)(F). To qualify as siblings, the adoptees must share at least one biological parent. Thus non-biological siblings adopted in the country of origin by the same adoptive parent do not qualify for the sibling exception.<sup>31</sup>

Because the "orphan" must satisfy the definition of "child" under 8 U.S.C. §1101 (b)(1),

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after the initial approval of the Form I-800A.

Even though the orphan visa regulations do not contain such a provision, the AAA determined that if Form I-600A is filed after a child's 15th birthday but before the 16th birthday, and Form I-600 is filed no more than 180 days after the initial approval of the Form I-600A, USCIS will deem the I-600A filing date to be the I-600 filing date. Applying this policy, the AAO determined a child met the age requirement in a case in which the I-600 was filed after his 16th birthday, because the Form I-600A was filed between his 15th and 16th birthdays and his I-600 was filed 135 days after initial approval of the I-600A..

The AAO has refused to apply the doctrine of "equitable tolling" to the statutory cut-off at age 16, however, finding that there is no discretion over a statute of repose. *E.g., In re A-C-N*, 2019 WL 2881303 (DHS) (despite military conflicts in Camaroon that closed courts and delayed finalization of adoption, petition filed when child was 17 must be denied, because "there is no exception or waiver to the statutory filing requirements."); *In re [Name Redacted]*, 2009 WL 4982016 (AAO Aug. 4, 2009) (untimely I-600 cannot be saved by previous I-600 filed before 16th birthday and denied); *In re [Name Redacted]*, 2009 WL 4982038 (AAO Aug. 4, 2009)(attempt to timely file at National Visa Center did not satisfy the regulations, which require filing at overseas site or USCIS office having jurisdiction over place of residence of prospective adopters, and later filing in correct office, after 16th birthday, would not suffice); *In re [Name Redacted]*, 2007 WL 5319032 (INS) (AAO March 15, 2007). In the same action, the AAO found that refusal to accept the I-600 without full documentation when petitioner attempted to file it before the 16th birthday was also not an abuse of discretion, and that a post-filing adoption decree would not have sufficed in any case, because it would not be evidence of eligibility at the time of filing. *Id.*

<sup>31</sup> See Sarah Ignatius and Elisabeth Stickney *Immigration Law and the Family* § 13:17 (2019 ed.), citing Memorandum from Michael Pearson, Exec. Assoc. Comm'r, INS, HQADN 70/8.3 (entitled: "Guidance on Processing Petitions for Adopted Alien Children Less Than 18 Years of Age Considered a Child Under the Immigration and Nationality Act through Public Law 106-139" (Nov. 13, 2000), reprinted in 78 Interpreter Releases 353 (Feb. 5, 2001).

he or she must be under 21 at the time of immigration to the United States.<sup>32</sup>

### **b. Meeting the Statutory Definition of “Orphan”**

The most significant hurdle in this second stage of assessment is qualifying the child as an “orphan.” Although in the common vernacular we normally refer to a child as an orphan only if the child's parents are deceased, immigration law defines a child as an orphan if:

(1) both of the child's parents have died, disappeared, abandoned or deserted the child; or if the child has been separated from them due to the involuntary termination of their parental rights by the country of origin or the child has lost them permanently due to civil unrest, a natural disaster, or some other calamitous event beyond the parents' control; or

(2) the sole or surviving parent is not capable of providing the child with proper care and has irrevocably released the child for adoption and emigration. 8 U.S.C. § 1101(F)(I).

The terms used in the above criteria are defined narrowly in 8 C.F.R. §204.3(b):

*Abandonment* must include both the intent to and actual surrender of all parental rights, control and custody. Relinquishment of a child to prospective adoptive parents, or for a specific adoption, is not regarded as abandonment. Relinquishment to a third party for care in anticipation of an adoption also will not be considered abandonment, unless the third party is a government agency, court, adoption agency, or orphanage legally authorized by the country of origin to receive such a relinquishment.

*Desertion* requires that the child has become a ward of a governmental authority because the parents have willfully forsaken the child and refused to fulfill their parental responsibilities.

*Disappearance* means that following a reasonable effort to locate both parents, as determined by a governmental authority, their whereabouts are unknown, their absence from the child's life is inexplicable, and there is no reasonable hope of their reappearance.

*Separation* is the involuntary termination of parental rights by a governmental authority, upon notice to the parents and after opportunity to be heard, for good cause in accordance with the law of the foreign sending nation.

*Loss* refers to an involuntary severance or detachment from a parent due to a natural disaster, civil unrest, or other calamitous event that is beyond the parent's control and is verified by a governmental authority in accordance with the law of the foreign sending

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<sup>32</sup> 7 Immigration Law Service 2d PSD Foreign Affairs Manual 502.3 (Westlaw Aug. 2019 Update), 9 FAM 502.3. Adoption-based Classifications and Processing.

nation.

With the exception of abandonment (the intentional surrender of all parental rights to an entity permitted by law to receive such a relinquishment), all of the other bases on which a child with two parents can become “orphaned” require affirmative action or intervention by a governmental authority confirming the status.

A recent “disappearance” AAO case illustrates that this requirement of governmental investigation is applied stringently. Petitioner sought an orphan petition for a 15 month old Pakistani child, ultimately submitting three guardianship orders from a Pakistani family court indicating that while an alleged birth mother gave custody to a Welfare Organization, the alleged birth mother and the welfare organization’s president were both subsequently arrested for child abduction and child selling. However, the Pakistani family court in the second and third orders giving guardianship to the adopters determined the whereabouts of the actual birth parents were unknown and could not be located and that the petitioner and his spouse “tried their level best to find the birth parents via police and published the notices in national news papers [sic].”<sup>33</sup> Nevertheless, the AAO, citing a USCIS Policy Memorandum,<sup>34</sup> noted that primary evidence of the birth parents’ disappearance is a decree from a court or other competent authority which makes the child a ward of the state because of such disappearance and unconditionally divests the parents of all parental rights over the child. Moreover, the AAO noted that no criminal investigation was conducted in Pakistan after the arrest to determine whether the child was one of the abducted children from the hospital, which would be relevant to identifying her birth parents. Thus, even though making the child a ward of the court is not included in the regulation’s definition of disappearance, its absence combined with the lack of a law enforcement investigation to identify the birth parents rendered the child ineligible for the orphan visa on the grounds of disappearance, which requires that both parents “have unaccountably or inexplicably passed out of the child’s life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them.”<sup>35</sup>

A child of a sole or surviving parent may become an “orphan” if that parent irrevocably releases the child for adoption and immigration and is incapable of providing the child with proper care. The incapacity to care for the child is the inability to provide for the child’s basic needs, consistent with the local standards of the country of origin. 8 C.F.R. §204.3(b)

Under some circumstances, the mother of a child born out of wedlock may be considered to be a sole parent. This is because the birth father of an out-of-wedlock child is not considered a

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<sup>33</sup> In re A-S-N, 2019 WL 2423169 (DHS), May 21, 2019, at \*2.

<sup>34</sup> USCIS Policy Memorandum, PM 602-0116, Guidance on conducting Form I-604, Determination on Child for Adoption, Orphan Determinations 17 (June 17, 2015).

<sup>35</sup> In re A-S-N, 2019 WL 2423169 (DHS), May 21, 2019, at \*3.

parent under the statute if he has disappeared or abandoned or deserted the child, or if he has irrevocably released the child in writing for adoption and emigration. 8 U.S.C. § 1101(b)(2). However, the father is a parent if he has legitimated the child under the law of the father's place of domicile at a time when the child was in his legal custody. 8 U.S.C. §1101(b)(1)(F). Moreover, the regulations provide that this definition is not applicable to children born in countries “which make no distinction between a child born in or out of wedlock, if all such children are considered “legitimate.” 8 C.F.R. §204.3(b).

*Rogan v. Reno*, 75 F. Supp. 2d 63 (E.D. N.Y. 1999), illustrates the restrictions of the “orphan definition.” The petitioners sought to adopt their niece, a newborn who was the fourth child of the petitioning wife’s sister and her unmarried partner. The prospective adoptive mother was present at the baby’s birth and, with the birth parents’ permission, lived with the baby for six months away from the birth family, after which she and her husband adopted the baby girl, with the birth mother’s consent and without objection from the birth father. The federal court confirmed the denial of the orphan visa petition, however, because the child was not “abandoned,” since under the regulatory definition, the relinquishment “had to occur independently of and prior to Ederlina Rogan’s petition to adopt” the baby. As the regulations clarify, relinquishment to prospective adopters or for a specific adoption is not “abandonment” under the statute.<sup>36</sup> Moreover, the birth mother was not a “sole parent,” even though the child was born out of wedlock, because the birth father had not disappeared, abandoned, or deserted the child, as those terms are defined in the regulations, nor had he specifically irrevocably released the child in writing for adoption and emigration. But even had he done so, the court observed that the child still would not have qualified as an orphan because the birth mother was capable of providing for her care. The court found that the birth parents lived together and

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<sup>36</sup> In many cases the AAO has held that parental consent to the adoption of a child by a specific person is not abandonment. *E.g., In re [Name Redacted]*, 2010 WL 6527468 (INS) (AAO June 10, 2010). In another Philippine aunt/uncle adoption, the AAO observed that relinquishment to the Philippine court handling the adoption was not sufficient, as the child was never placed in the legal custody or control of the Philippine government. To establish abandonment, a Philippine child must be committed by way of Deed of Voluntary Commitment to the Department of Social Welfare and Development prior to the matching. *In re [Name Redacted]*, 2008 WL 5326432 (INS) (AAO Aug.20, 2008). Even when such a Deed has been signed, however, the AAO has rejected abandonment as a ground when the document was signed in anticipation of a planned adoption by an aunt and uncle. *In re [Name Redacted]*, 2006 WL 5914256 (INS) (AAO Nov. 21, 2006). Similarly, placing a child in an orphanage in anticipation of a specific adoption will not establish abandonment. *In re [Name Redacted]*, (AAO March 17, 2003), 80 No. 21 Interrel 749 (Westlaw May 23, 2003). *Cf. In re [Name Redacted]*, 2006 WL 5914918 (INS) (AAO Dec. 12, 2006) (Birth parents found to have *deserted* child, who was given to petitioner as infant to raise, under mistaken belief he was the biological father, because the birth father and whereabouts of the birth mother were unknown, after well documented attempts to locate her, and court had granted a petition for involuntary commitment of the child to the DSWD, and thus became a ward of a competent authority prior to her adoption by petitioner.)

supported their three other children, meeting their basic needs according to local standards. The birth mother enjoyed an above average standard of living because of the birth father's employment, which the court took into account because nothing in the regulations limited the court's assessment to only money earned by the sole parent. Thus, *Rogan* illustrates that an adoption that is legal in the country of origin and would have been legal under the laws of most U.S. states was not sufficient to qualify the child for immigration under an "orphan" visa.

Several recent Office of Administrative Appeals (AAO) decisions provide insight into how counsel might assist a petitioner in proving that a sole or surviving parent is incapable of providing support. In one case involving a specific relinquishment of rights by a birth mother to petitioner, following the death of the birth father, the administrative judge accepted as sufficient (1) a letter from a chartered accountant in India that included a financial assessment of the birth mother's income and compared it to the minimum monthly cost of food and shelter; and a letter from the Punjab State Welfare Society that discussed the child's living conditions.<sup>37</sup> In another case in which a petitioner adopted his wife's great-nephew, the AAO found sufficient the bank statements, checks and receipts documenting the money sent by petitioner to Peru to pay a neighbor to feed the mother and child after the relative who previously supported them had died, a letter from the boys home where the child was placed after the Peruvian adoption was finalized, and a letter from the mother stating she did not have sufficient means to care for her son.<sup>38</sup> But the statement of the attorney handling an adoption in Nigeria that the birth parent had lost her job and home, accompanied by the birth parent's own statement she was sick, was deemed insufficient, particularly in the absence of evidence of local standards.<sup>39</sup> The absence of authoritative reports from a "competent authority" establishing the inability to support in compliance with local standards is at the heart of many of the denials or orphan visas to aunt/uncle adopters.<sup>40</sup>

### **c. Child is Adopted Abroad or Approved for Emigration and Adoption by Country of Origin**

To qualify for an orphan visa, a child must have been adopted in the child's country of origin or the country of origin must have approved the child's emigration for adoption in the

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<sup>37</sup> *In re [Name Redacted]*, 2008 WL 5651986 (INS) (AAO Nov. 6, 2008).

<sup>38</sup> *In re [Name Redacted]*, AAO Nov. 2, 2000, 86 No. 5 Interrel 348 (Westlaw).

<sup>39</sup> *In re [Name Redacted]*, 2010 WL 6527418 (INS) (AAO June 18, 2010). *See also In re [Name Redacted]*, 2009 WL 1450630 (INS) (AAO Jan. 7, 2009) (In another nephew adoption case, birth mother was also held to be able to provide care, when child was living with her and grandparents and unemployed mother had secondary education degree, despite multiple affidavits from family that grandfather could not support them on his salary)

<sup>40</sup> *See, e.g., In re [Name Redacted]*, 2008 WL 5745332 (INS) (AAO Dec. 2, 2008).



United States and awarded custody of the child to the prospective adoptive parents or a person or entity working on their behalf in accordance with the laws of the foreign-sending country. 8 U.S.C. § 1101(b)(1)(F); 8 C.F.R. §204.3(d).

Although a child present in the United States in parole status [see Section II.A.6 below] who has not been adopted in the United States may qualify for an orphan petition if all of the statutory requirements are met, children in the United States who are undocumented or nonimmigrants are not eligible for orphan visas. 8 C.F.R. § 204.3(k)(3).

## **5. Process Following Submission of I-600**

Petitioners submitting a Form I-600 (Petition to Classify Orphan as an Immediate Relative) must provide additional documentation, as required by 8 C.F.R. §204.3(d)(1). Petitioners who have not filed an I-600A previously must file both the documentation required for an advanced processing application as well as the supporting documentation for an orphan petition.

USCIS will deny an I-600 filed more than eighteen months from the date of the approval of an advanced processing application, a problematic restriction given that it is not always possible to obtain a referral of a child from certain countries of origin within that time window. Unless the USCIS has authorized an extension, failure to file the I-600 renders the advanced processing application abandoned and the prospective adopters must reapply. 8 C.F.R. §204.3(d), (h)(7). USCIS permits one extension for an additional eighteen-month period, if the petitioner submits a written request for the extension with the National Benefits Center no earlier than 90 days before the expiration of the I-600A, but before the approval expires.<sup>41</sup>

If at least one of the U.S. citizen petitioners is traveling abroad to the sending country and they have already received approval on their I-600A, they may choose to file the I-600 stateside or, more typically, at an overseas site (the USCIS field office or U.S. consulate or embassy in the country of origin designated on the petition). If the adopters are not traveling, or if a child is identified and an I-600 is submitted while the advanced processing application is still pending, or if no advanced processing was requested and petitioners file their application for their own approval and the petition concurrently on Form I-600, the I-600 must be filed with the USCIS stateside and the USCIS National Benefits Office will adjudicate the petition.<sup>42</sup>

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<sup>41</sup> USCIS, *Extension and Validity Periods*, at <https://www.uscis.gov/adoption/after-approval/extension-and-validity-periods>.

<sup>42</sup> See 8 C.F.R. §204.3(h)(3); USCIS, Filing Instructions for Form I-600, Petition to Classify Orphan as an Immediate Relative, at <https://www.uscis.gov/forms/filing-instructions-form-i-600-petition-classify-orphan-immediate-relative>.

If the I-600 is approved, the National Visa Center notifies petitioners when their case has been assigned to a U.S. Embassy or Consulate abroad. A USCIS or consular officer in the child's country of residence then completes Form I-604 ( Determination on Child for Adoption) to ensure the child has been properly classified as an orphan as defined by INA.<sup>43</sup> An I-604 investigation is completed following submission of the I-600 in every orphan case. Normally, this is only a routine paper check of the available documents to verify the child's orphan status, but where concerns surface, it could include telephonic inquiries, interviews with the birth parents, blood tests of a birth parent, and/or a full field investigation. 8 C.F.R. §204.3(k). When the investigation is lengthy, sometimes the prospective adopters return to the United States pending its completion. If the investigation reveals grounds for a revocation or denial of the petition, the adoptive parents are notified and the investigation report, supporting documents, and petition are forwarded to the appropriate USCIS office for decision. *Id.* Potential problems could include that the adoption is not valid under the law of the nation in which it occurred; evidence of material fraud or misrepresentation in the I-600 or I-600A; a material change in the petitioners' circumstances, or evidence of the payment of money or other consideration as inducement to release the child. 8 C.F.R. §204.3((k)(2)).<sup>44</sup>

Although 8 C.F.R. §204.3(k)(1) directs consular officers to conduct an I-604 investigation in “in every orphan case,” the Departments of State and Homeland Security have on occasion suspended the processing of I-600 applications from a particular nation when consular offices have continuous difficulty in verifying reports of abandonment. In *Skala v. Kelly*, 246 F. Supp. 3d 147 (D. D.C. 2017), a D.C. District Court upheld the suspension of processing of all I-600 applications based on “abandonment” from Nepal since 2010, noting that a U.S. delegation had revisited the policy in Nov. 2014 and decided that “systemic issues with false or unverifiable reports in Nepal warranted keeping the suspension in place.” The Court determined that the agencies’ suspension without performing individual I-604 investigations in each case was both lawful and reasonable until such time as information from the Nepalese government was sufficiently reliable to satisfy the agencies that the statutory requirements for an orphan visa were actually met, given that accurately adjudicating whether a child was truly abandoned was the highest priority. The Court further noted that every other country in the world at that time had suspended orphan adoptions from Nepal.

When the I-600 has been approved, the embassy or consulate will schedule a visa interview, where petitioners must submit their immigrant visa application, evidence of the adoption or custody decree, and the results of the child's medical exam by a physician authorized

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<sup>43</sup> USCIS, *Non-Hague Visa Process*, at <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/immigrant-visa-process/non-hague-visa-process.html>.

<sup>44</sup> See also USCIS, *Non-Convention Adoption Cases: Form I-604 Determination and Immigrant Visa Appointment Scheduling*, at <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/immigrant-visa-process/Non-Convention-Adoption-Cases-Form-I-604-Determination-and-Immigrant-Visa-Appointment-Scheduling.html>.

by the U.S. consulate to perform immigrant visa examinations. If everything is in order, the consular officer issues an IR-3 visa for a child who has been adopted abroad by both adopting parents and an IR-4 visa, entitling the child to enter as a legal permanent resident, for a child who will be adopted in the United States.<sup>45</sup>

Even if an adoption took place in the country of origin, the USCIS will require that the child be readopted in the United States if the unmarried adopter or both spouses of a married couple did not personally see the child prior to the adoption, or if the adoption abroad was not "full and final," terminating the rights of the birth parents. 8 C.F.R. §204.3(c)(1)(iv). Some countries, particularly in Latin America, utilize what is sometimes referred to as a "simple" adoption, which does not fully terminate the rights of the birth parents.<sup>46</sup>

The denial of a petition for either a Convention or an orphan visa may be appealed to Office of Administrative Appeals<sup>47</sup> and subsequently to federal court.

## 6. Options

For families like the Renos who have adopted a child overseas and then found that the orphan petition was denied, there are some options, though none of them are easy.

(1) *Adopted Child Visa*. As explained in Section II.C. below, at least one of the prospective parents could fulfill the requirements of the adopted child visa by residing with the child outside of the United States for two years and having legal custody of the child for two years, and subsequently applying for an "adopted child" visa.

(2) *Advance Parole*. If an orphan petition is denied, adoptive parents may seek advance parole to permit a child to enter the United States pending completion of the requirement of two years of residence and legal custody, prior to petitioning for an adopted child visa. Advance parole has been granted in unusual or compelling circumstances, particularly for a child needing urgent medical care, for humanitarian or public interest reasons. Sarah Ignatius and Elisabeth Stickney explore this option in their treatise, *Immigration Law and the Family* § 13:34 (2019 ed.):

One possibility is to seek humanitarian parole, which the DHS is generally unwilling to grant absent severely compelling circumstances. In the past, the INS

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<sup>45</sup> See USCIS, *Your New Child's Immigrant Visa*, at <https://www.uscis.gov/adoption/bringing-your-internationally-adopted-child-united-states/your-new-childs-immigrant-visa>.

<sup>46</sup> Sullivan, *supra* note 24, at n.169 and accompanying text.

<sup>47</sup> See *supra* note 19.

would, however, grant parole in special circumstances. Humanitarian parole applications are submitted on Form I-131 and must be filed at USCIS' Dallas Lockbox. The application is adjudicated by USCIS' International Operations Division in Washington, D.C. As of February 2019, the USCIS estimates that processing time for such applications is three months. If the application is granted, the USCIS notifies the U.S. consulate nearest where the applicant resides. The applicant must then schedule an appointment at the U.S. consulate to obtain a "boarding foil," which is placed in the applicant's passport. The boarding foil looks like a U.S. nonimmigrant visa and is designed to assure U.S. airlines that they are authorized to let the applicant board a flight to the United States. For further information on requesting humanitarian parole, see <http://www.uscis.gov/humanitarian/humanitarian-parole>.

(3) *Private Congressional Immigration Bill*. In very compelling circumstances and after all administrative remedies have been exhausted, it has at times been possible to obtain admission for an adopted child through a private immigration bill. A private bill in effect exempts a particular alien from the general immigration laws. If the senator or congressperson who has been involved in the case agrees to initiate the process, a thorough presentation, similar to a brief, must be prepared for either the House or Senate Subcommittees on Immigration, Border Security and Claims, which in essence act like an equity court to grant special relief in individual cases.<sup>48</sup> Fewer than 15% of the private immigration bills introduced have actually been enacted, but they have been successfully employed for some adopted children in the past, particularly those who otherwise satisfy the orphan criteria and are adopted over the age of sixteen.<sup>49</sup> However, in recent years private bills declined significantly, and since 2007, only four private bills on any subject have been enacted.<sup>50</sup>

## **B. Eligibility for Immediate Relative Status for a Hague Convention Adoption**

Slightly over 65% of the children immigrating to the United States following or for an adoption emigrated from nations that are party to the Hague Intercountry Adoption Convention. The requirements for a Convention visa are very similar to those for an orphan visa, but the Convention and its implementing federal statutes and regulations have require some additional safeguards and procedures.

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<sup>48</sup> See Sullivan, *supra* note 24, at n.327 and accompanying text.

<sup>49</sup> See Anna Marie Gallagher, Remedies of Last Resort: Private Bills and Pardons, 06-02 Immigr. Briefings 1 (2006).

<sup>50</sup> Congressional Research Service, *Private Bills: Procedure in the House*, May 15, 2019, at <https://fas.org/sgp/crs/misc/R45287.pdf>.

## **1. Facilitator Must be an ASP**

See Section II.A.1. for a detailed discussion of this requirement, which was originally mandated by art. 22 of the Convention and, as of July 1, 2014, is not required under U.S. law for both orphan and Convention visas.

## **2. Child Must Be Emigrating from a Convention Nation**

To qualify for a Convention visa, the child who has been or is to be adopted must be emigrating to the United States from one of the other 100 nations that are a party to the Hague Intercountry Adoption Convention. 8 U.S.C. §1101(b)(1)(G)(i). Generally, U.S. regulations regard a child as habitually resident in the country in which the child is a citizen, although children will be regarded as habitually resident outside of their country of citizenship if their actual residence is in another nation and their situation is sufficiently stable for the Central Authority or another competent governmental authority of that nation to determine the child is properly within its jurisdiction. A child is not habitually resident in any nation in which the child resides temporarily or to which the child travels as a prelude to or in conjunction with an adoption or the child's immigration to the United States. 8 C.F.R. § 204.303(b). [See Section II.C.4 below for a discussion of the interaction of this regulation with a petition for an "adopted child" visa under Form I-130 and *Fingerson v. Dep't of Homeland Sec.*, 198 F. Supp. 3d 786 (W.D. Ky. 2016), which addressed this issue.]

Convention visas will not be granted for children physically in the United States unless the petitioner complies with all requirements for obtaining a Convention visa AND 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. U.S. regulations do not per se require the child's actual return to the Convention country; but instead the decision whether to permit the child's adoption without the child's return is a matter to be determined by the Central Authority of the country of the child's habitual residence.

However, approval of the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800) does not alleviate the child's ineligibility for adjustment of status if the child is in the United States without inspection or is otherwise ineligible for adjustment of status. In such cases, the Form I-800 might be provisionally approved only if the child will leave the United States after the provisional approval and apply for the visa abroad before the final approval of the Form I-800. 8 C.F.R. § 204.309(b)(4).

## **3. Prospective Adopter's Eligibility**

Unlike the orphan visa process, which permits the petitioner to seek a determination of

regarding the adopter(s)' eligibility through a two stage process (filing a Form I-600A petition before filing the I-600 Petition for an Orphan Visa), or in one-stage (combining a petition for both determinations regarding the adopter's eligibility as well as the child's eligibility by filing only an I-600), the process for obtaining a Convention visa must occur in two stages. Initially, the petitioner must file an Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A). Only after it has been approved may the ASP transmit it to the appropriate authority in the country of origin and facilitate a match; at which point the prospective adopters may accept the match and then file a Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800) to seek approval of the child. *See* 8 C.F.R. § 204.308(b).

**a. Citizenship, Marital Status, Age, and Habitual Residence in the U.S.**

If the adopters are a married couple, at least one spouse must be a U.S. citizen habitually resident in the United States in order for the child to be eligible for immediate relative status. If the other spouse is an alien residing in the United States, he or she must be in lawful immigration status. If the non-citizen spouse is not a permanent resident, his or her immigration status will be "a factor evaluated in determining whether the family's situation is sufficiently stable to support a finding that the applicant is suitable as the adoptive parents of a Convention adoptee." 8 C.F.R. § 204.307(a)(2)(3). There is no age requirement for married adopters. 8 U.S.C. § 1101(b)(1)(G);

If the adopter is single, he or she must be a U.S. citizen habitually resident in the United States and at least 24 years of age on the date that the I-800A form is filed and 25 years of age when the I-800 form is filed. 8 U.S.C. § 1101(b)(1)(G); 8 C.F.R. § 204.307(a)(1).

The U.S. citizen adopter is deemed to be habitually resident in the United States if:

(1) the adopter is domiciled in the United States, even if temporarily living abroad, or

(2) the adopter establishes by a preponderance of the evidence that

(i) he or she will have established domicile in the United States on or before the date that the child is admitted to the United States for permanent residence as a Convention adoptee; or

(ii) he or she intends to bring the child to the United States after an adoption abroad and before the child's 18th birthday, at which time the child will be eligible for and apply for naturalization. This final option is not available if the child will be adopted in the United States. 8 C.F.R. § 204.303(a).

## **b. Suitable Prospective Adopter(s) Confirmed by Home Study**

Similar to the I-600A process, applicants filing Form I-800A seeking a determination of their suitability to adopt must supply extensive documentation along with the form, including evidence of their U.S. citizenship and the lawful immigration status of an alien spouse residing in the United States, marriage certificates, any divorce or dissolution decrees for any previous marriages, proof of age if the adopter is single, and, if the child is to be adopted or readopted in state court, proof that any state preadoption requirements have been satisfied. 8 C.F.R. § 204.310(a). Like orphan visa petitioner, petitioners for a Convention visa must also submit a home study satisfying federal criteria with a favorable recommendation, and USCIS must independently determine that the child will receive proper care. 8 U.S.C. §§ 1101(b)(1)(G); 1154(d).

Since July 1, 2014, the standards for the approval, manner of preparation, and content of home studies for both orphan and Convention visas are the same and are summarized in Section II.A.3.b. above. The home study must be no more than 6 months old and must either be submitted with Form I-800A or within the period specified by the officer adjudicating the application. 8 C.F.R. §§ 204.310(a) (viii); 204.311(c)(4). Significant changes after submission, such as a move, a divorce, or additional household members, require an amendment. 8 C.F.R. § 204.311(u). As with orphan visa applicants, applicants for Convention visas and any adult household members must be fingerprinted, 8 C.F.R. § 310(b) and background checks must be completed. 8 C.F.R. § 204.311(c).

Just as with orphan visas, USCIS officers are responsible for making an independent determination regarding whether or not prospective adopters are capable of providing proper care and are not bound by a favorable recommendation in the home study, although they may consult with the preparer or agency for clarification of specific issues. 8 C.F.R. § 204.312 (b)

Successful Convention applicants will receive a decision specifying each country for which the Form I-800A is approved (if approval was sought for more than one country), and may also specify denial of approval for a particular country. 8 C.F.R. § 204.312 (a). Although approval is specified by country, the Convention regulations provide that if an applicant is otherwise eligible and suitable to adopt, the USCIS will not deny the application because the applicant does not appear to meet the adoption requirements of particular Convention country, but will instead leave the determination to the Central Authority of the country of origin to determine how it will apply its eligibility requirements in a given case. 8 C.F.R. § 204.312(c)(4).

Unsuccessful applicants are advised in writing of their right to appeal. 8 C.F.R. § 204.312(c)(3). USCIS officers are directed to deny Convention applications if they discover a failure to disclose or misrepresentation of an arrest, conviction, or history of substance abuse, sexual abuse, child abuse, criminal history, or family violence regarding any application or adult household member or if any such person failed to cooperate with the child abuse registry check or disclose a prior home study. 8 C.F.R. § 204.309(a). The fact that an arrest or conviction or

other criminal history was sealed, pardoned, expunged or subject to other amelioration does not alter the duty to disclose. *Id.* Before denying the Form I-800A for failure to disclose, the USCIS will issue a Notice of Intent to Deny (NOID). 8 C.F.R. § 204.309(c). In order to rebut the NOID, the applicant must establish by clear and convincing evidence that:

- (1) the applicant or the adult household member did disclose the information; or
- (2) if the nondisclosure or failure to cooperate related to an additional household member, that the person is no longer a member of the household and his or her conduct is no longer relevant to the applicant's suitability to adopt. 8 C.F.R. § 204.309(d).

A denial for failure to disclose will bar the applicant from filing a subsequent Form I-800A for one year after the decision becomes administratively final. 8 C.F.R. § 204.307(c).<sup>51</sup>

Approval has also been denied for violation of the duty to disclose, i.e., the duty to give complete and true information to the preparer, and the ongoing duty of candor to provide new information that might warrant submission of an amended or updated home study, as set forth in 8 C.F.R. § 204.311(d). In one case, the AAO confirmed denial of an I-800A because the original home study reported the applicant and his wife had resided in the State of Washington since the age of 18, when in fact the applicant's wife was temporarily residing in Belize for several months to care for the child they wished to adopt, who had been placed in her physical care at birth. When these facts came to light in an Article 16 report from the country of origin, the couple filed an addendum at the request of the USCIS. Despite the fact that the original preparer of the home study apparently was aware she was in Belize and later continued to recommend approval after reviewing the addendum, the AAO found the application should be denied for failure to disclose, rejecting their argument that applicant and his wife were always domiciled and habitually resident in Washington and only temporarily staying in Belize. The AAO emphasized that the preparer had a duty to check child abuse registries in any state or country in which the applicants had resided, and the concept of "habitual residence" is not interchangeable with the "residence(s)" that must be reported in the home study. The AAO found as a separate ground for denial the fact that the home study did not report that the applicants were in fact living with and caring for the child they hoped to adopt, given that their home study stated only that they wished to adopt a healthy child up to twelve months old.<sup>52</sup>

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<sup>51</sup> This regulation has been strictly enforced. See *In re [Name Redacted]*, AAU SIM 10 321 00033, 2011 WL 7068518 (INS) (AAO April 18, 2011)(AAO lacks authority to grant exemption from one-year ban and affirms denial for failure to disclose a charge of common assault against the applicant's wife, which occurred 11 years before the homestudy and I-800 filing, where applicant explains they mistakenly believed there was no criminal record to disclose because there had been no arrest, no prosecution, and no conviction.)

<sup>52</sup> *In re [Name Redacted]*, AAU SIM 08 296 01053, 2009 WL 6811400 (INS) (AAO Dec. 2, 2009).



### **c. State Pre-adoption Requirements if Adoption in the U.S.**

Just as with orphan visa applications, if the child is to be adopted in the United States rather than in his or her country of origin, prospective adopters must also establish that any state pre-adoption requirements for transnational adoptive placements have been satisfied. 8 U.S.C. §1101(b)(1)(G)(i)(V)(bb). For further discussion of this requirement, see Section II.A.3.c. above.

## **4. Child's Eligibility for Convention Visa**

The second stage of the process to obtain a Convention visa focuses on determining the child's eligibility under the criteria for a Convention visa. Following receipt of a favorable advanced processing determination, the ASP transmits the I-800A and other supporting documents to the appropriate governmental authority or accredited or approved body in the Convention country to review, arrange a placement, and return through the ASP a background report on a child, including medical and social history (as required by Article 16 of the Convention), with verification that governmental authorities in the country of origin have determined the child is eligible, intercountry adoption is in the child's best interests, appropriate consents have been obtained without inappropriate payments, and the requisite counseling was provided.

If the prospective adoptive parents accept the match, they then file an I-800 (Petition to Classify Convention Adoptee as an Immediate Relative), along with the I-800A approval notice and records (including the home study), the Article 16 report, the child's birth certificate, copies of the consents, a summary of the medical information provided to petitioners, proof that their pre-placement training was completed, evidence that any state pre-adoption requirements have been satisfied (if the child will be adopted in the United States), and information providing the factual basis establishing the grounds for the child's eligibility for the visa. These documents may be filed with the stateside or overseas USCIS office identified with the instructions that come with Form I-800 or with the visa-issuing post (a U.S. consular office) in the country of origin when permitted by the form's instructions.. 8 C.F.R. § 204.308(b).

### **a. Age and Marital Status of the Child**

To qualify for a Convention visa, the statute requires the child must be unmarried and under the age of sixteen when the petitioner files the I-800 (Petition to Classify Convention Adoptee as Immediate Relative) with USCIS. 8 U.S.C. §1101(b)(1)(G). An exception is created in 8 C.F.R. 204.313(c)(3), which provides:

If the Form I-800A was filed after the child's 15th birthday but before the child's 16th birthday, the filing date of the Form I-800A will be deemed to be the filing date of the Form I-800, provided the Form I-800 is filed not more than 180 days after the initial approval of the Form I-800A.

The statute itself also creates a sibling exception, permitting a child under the age of eighteen to qualify if he or she is the birth sibling of a child under sixteen who is or will be adopted by the same parents. 8 U.S.C. §1101 (b)(G)(iii). To qualify as siblings, the adoptees must share at least one biological parent. Thus, non-biological siblings adopted in the country of origin by the same adoptive parent do not qualify for the sibling exception.<sup>53</sup>

Because the Convention adoptee must satisfy the definition of "child" under 8 U.S.C. §1101 (b)(1), he or she must be under 21 at the time of immigration to the United States.<sup>54</sup>

#### **b. Meeting the Statutory Criteria for the Birth Parents' Circumstances and Adoption Safeguards under the Convention**

Congress approved somewhat more lenient Convention standards regarding the birth parents' circumstances, in the hope that the additional safeguards provided in the Convention, the Intercountry Adoption Act (IAA), and its implementing regulations would deter some of the abusive practices that the more restrictive orphan restrictions were intended to prevent. A child is eligible for a Convention visa if:

- (1) the child's parents or the sole or surviving parent or legal custodian has freely given written, irrevocable consent to termination of the parent's legal relationship with the child and to the child's emigration and adoption; and
- (2) if the child has two living parents, they are incapable of providing proper care for the child; and
- (3) USCIS determines that the child's relationship with the birth parents has been terminated and that the purpose of the adoption is to form a bona-fide parent-child relationship. In assessing this final factor, the statute provides that Secretary of Homeland Security may consider whether there is a petition pending to confer immigrant status on one or both of the birth parents. 8 U.S.C. § 1101(b)(1)(G).

The statutory criteria for a child to be eligible for a Convention visa are therefore broader than the criteria for an orphan visa in two ways:

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<sup>53</sup> See Ignatius & Stickney, *supra* note 31, at § 13:17, citing Memorandum from Michael Pearson, Exec. Assoc. Comm'r, INS, HQADN 70/8.3 (entitled: "Guidance on Processing Petitions for Adopted Alien Children Less Than 18 Years of Age Considered a Child Under the Immigration and Nationality Act through Public Law 106-139" (Nov. 13, 2000), reprinted in 78 Interpreter Releases 353 (Feb. 5, 2001); and § 13:44.

<sup>54</sup> See 7 Immigration Law Service 2d PSD Foreign Affairs Manual 502.3 (Westlaw Aug. 2019 Update), 9 FAM 502.3. Adoption-based Classifications and Processing.

(1) a sole or surviving parent need not be incapable of providing proper care; and

(2) married parents (or two living parents) may consent if they are incapable of providing proper care.

The facts of *Rogan v. Reno*, 75 F. Supp. 2d 63 (E.D. N.Y. 1999), one of the orphan visa cases discussed above, provide an illustration of these differences. In *Rogan*, the court held that even if the birth mother could have been considered a sole parent, the child was ineligible for an orphan visa because she was not incapable of providing proper care. For a Convention visa, if the mother had been determined to qualify as a sole parent, there would have been no need to establish inability to provide for the child because it is sufficient if the sole or surviving parent consents, which the birth mother did in that case. Moreover, had both parents been incapable of providing care (probably not true in the actual case), they could have established eligibility for a Convention visa by both giving consent, whereas a child with two parents is ineligible for an orphan visa in those circumstances.

In addition, the Convention regulations define statutory terms more broadly than the orphan regulations. A "sole parent" is defined in the orphan regulations as a mother of an illegitimate child whose father has severed all parental ties or irrevocably released a child for adoption, but under the orphan regulations this category is not applicable to children born in nations that make no distinction between children born in or out of wedlock. 8 C.F.R. §204.3(b). The Convention regulations define "sole parent" to include the mother or father of a child whose other parent has been determined by a competent authority to have abandoned or deserted the child or disappeared from the child's life, and contains no caveat about the sending nation's legal distinctions regarding out-of-wedlock children. 8 C.F.R. § 204.301.

Moreover, although the definitions for desertion and disappearance are virtually identical to those in the orphan visa regulations, abandonment is defined slightly more broadly in the Convention regulations. Under the orphan regulations, 8 C.F.R. § 204(b):

A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents 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.

By contrast, the Convention visa regulation provides that a parent's knowledge that a specific person might adopt the child does not void the abandonment, as long as it was not conditioned on adoption by that specific person. 8 C.F.R. § 204.301 (b). Under both sets of regulations, one parent must be deceased for the other to be a surviving parent. 8 C.F.R. § 204.301 (b).

The Convention regulations offer more clarification regarding stepparents as well, providing that a stepparent is not considered a parent if there is no legal parent-child relationship between the child and stepparent under the law of the Convention country of origin. Moreover, even a stepparent who does have a legal parent-child relationship may be found to have "disappeared" if he or she never knew of the child's existence or of his or her legal relationship to the child. 8 C.F.R. § 204.301. Past interpretations of the orphan visa regulations have disqualified parents from categorization as sole or surviving parents if the child also had a stepparent.<sup>55</sup>

For a child with two parents, the incapacity to care for that child therefore becomes crucial to eligibility, and failure to prove that criteria has been grounds for denial. In one recent case, the AAO found that initial statements by the birth parents, reporting that they were consenting to an uncle/aunt placement because the adopters were infertile, undermined the credibility of subsequent documentation of inability to support, and in any event, the lack of evidence on local standards rendered documentation insufficient, despite an affidavit by a local agency that the birth father's income was below the poverty line and pictures of a house in poor repair claimed to be the birth family's home.<sup>56</sup>

In a similar case from India involving a "familial surrogacy arrangement" the AAO refused to approve a Convention visa for a child conceived, according to his birth parents, for the sole reason of placing him with an aunt and uncle who were infertile. The AAO found that the birth mother was a teacher and the birth father owned his own business and supported another child and his parents in the household. Despite the birth parents' claims that they would place the child in foster care if he was not adopted, because the birth mother could not afford to give up her teaching job to stay home for child care, they were suffering financial problems, and the cost of schooling was high, the evidence was deemed insufficient to support their claim that they could not provide for his basic needs, where no evidence was submitted regarding local standards in India. The AAO rejected petitioner's claims that a child conceived for intra-family placement should be exempted from this requirement. Instead, the AAO had quite the opposite reaction, finding that even if petitioners were able to prove "inability to support," the approval of this petition would "accord legitimacy to the practice of conceiving children for the sole purpose of placing them for adoption, a type of abuse the Hague Convention was designed to prevent."

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<sup>55</sup> Aarti Kohli & Kathleen M. Sullivan, *Intercountry Adoption, A Practitioner's Update*, 01-07 Immigr. Briefings 1 (2001).

<sup>56</sup> *In re [Name Redacted]*, AAU SIM 09 226 10016, 2010 WL 3692535 (INS)(AAO March 15, 2010). For additional cases in which a Convention visa was denied for failure to prove incapacity of the parents to care for the child (several of which were also adoptions by relatives), see e.g., *Matter of W-I-N-J*, 2016 WL 4072896 (DHS); *In re [Name Redacted]*, 2014 WL 3888363 (DHS); *In re [Name Redacted]*, 2014 WL 4114195 (DHS); *In re [Name Redacted]*, 2013 WL 8124320 (INS).

In so ruling, the AAO noted that Section 505 of the Intercountry Adoption Act, 24 U.S.C. § 14952, provides USCIS with authority to establish alternative procedures for adoption of children from Convention nations by relatives, but determined that no such regulations had been promulgated that would circumvent application of the relevant regulations in this case. Although that statute also gives the Secretary the authority on a case-by-case basis to waive applicable statutory or regulatory requirements in the interests of justice or to prevent grave physical harm to a child, such authority may not be delegated to the USCIS and thus a request for such a waiver must be made directly to the Secretary of State.<sup>57</sup>

The AAO observed that documentation deficiencies provided three additional grounds, beyond those identified by the director, for disapproving the visa. The consent form from the parents did not satisfy all of the technical requirements of the regulations,<sup>58</sup> there was no documentary evidence that a competent authority in India had approved the child's emigration for adoption,<sup>59</sup> and the document submitted from India's Central Adoption Resource Authority regarding the child's circumstances did not satisfy the requirements for an Article 16 report, which must be submitted with the I-800 prior to approval.<sup>60</sup> The opinion thus may indicate that

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<sup>57</sup> *In re [Name Redacted]*, AAU SIM 09 155 10014, 2009 WL 6520496 (INS)(AAO October 6, 2009).

<sup>58</sup> *See* 8 C.F.R. § 204.301.

<sup>59</sup> 8 C.F.R. § 204.301 defines "competent authority" as "a court or governmental agency of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption."

<sup>60</sup> The requirements for the Article 16 Report, reflecting the standards established in Article 16 of the Convention itself, are described in 8 C.F.R. § 204.313 (d)(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:

- (i) Established that the child is eligible for adoption;
- (ii) 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;
- (iii) 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;
- (iv) 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

strict adherence to all of Convention placement, and in particular the requirement of consideration for in-country placement, could provide further obstacles to immigration for children born in some surrogacy arrangements that require an adoption.

Convention visas may be granted when a sole or surviving parent has freely given written, irrevocable consent to the adoption, without the necessity of showing that parent's inability to provide proper care. But as in the above case, strict adherence to the technical requirements for the consent is critical.<sup>61</sup> For example, in one AAO case case,<sup>62</sup> the AAO rejected both the

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required concerning the effect of the child's adoption, has freely consented in writing, in the required legal form, to the child's adoption;

(v) 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

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

<sup>61</sup> 8 C.F.R. § 204.301 defines "irrevocable consent as: "a document which indicates the place and date the document was signed by a child's legal custodian, and which meets the other requirements specified in this definition, in which the legal custodian freely consents to the termination of the legal custodian's legal relationship with the child. If the irrevocable consent is signed by the child's birth mother or any legal custodian other than the birth father, the irrevocable consent must have been signed after the child's birth; the birth father may sign an irrevocable consent before the child's birth if permitted by the law of the child's habitual residence. ...

(1) To qualify as an irrevocable consent under this definition, 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, the document does not qualify as an irrevocable consent unless the document is accompanied by a declaration, signed, by an identified individual, establishing that the identified individual is competent to translate the language in the irrevocable consent into a language that the parent 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 this explanation. If the person who signed the declaration is an officer or employee of the Central Authority (but not of an agency or entity authorized to perform a Central Authority function by delegation) or any other governmental agency, the person must certify the truth of the facts stated in the declaration. Any other individual who signs a declaration must sign the declaration under penalty of perjury under

original consent and a subsequent consent submitted by a birth mother, because the birth mother was not able to read and understand the language in which the consent was written (English) and the documents lacked a signed declaration by a translator certifying (1) the translator's competence, (2) certifying that the translator did read and explain the consent in a language the parent understood, and (3) indicating that language. A statement by a "Commissioner of the Supreme Court" stating the birth mother fully understood the consent document was insufficient, because the record did not establish if the commissioner actually saw the birth mother or how she was able to make that assessment. The second consent also was inadequate, because although the birth mother acknowledged that an individual read her the consent in Spanish and she understood it, that statement was also not accompanied by the requisite statement of the individual with a legible signature identifying the individual. In that particular case, the birth mother's consent was further put in jeopardy by a later statement in the Article 16 report recanting the consent, and expressing remorse over the placement, and then subsequent statements a year later by the birth mother supporting the adoption and dismissing her statements in the Article 16 report as made during a time of depression.

Convention regulations are framed to enforce specific requirements in the text of the Convention itself, including the prohibition in Articles 4, 32, and elsewhere in the Convention designed to deter child-buying and other improper payments. USCIS is directed to deny a visa if it finds that the petitioner or anyone acting on his or her behalf made prohibited payments inducing or influencing consents or other decisions affecting the placement of the child. See 8 C.F.R. § 204.304(a), 204.309(b)(3). Certain payments for medical care, legal services, and adoption-related expenses are permitted, 8 C.F.R. § 204.304(b), and all payments must be reported on Form I-800.<sup>63</sup> In case described above,<sup>64</sup> in addition to issues related to the consent, the AAO found that the visa should be denied because petitioners had not adequately addressed allegations regarding whether individuals acting on their behalf had induced consent by offering the birth mother financial assistance and a house, as alleged by the birth mother in her statement to Belize authorities and quoted in the Article 16 report. The AAO determined that all payments made by the petitioners directly to the birth mother were for medical and adoption-related expenses that were permitted by the regulations, and accepted the findings of the Belize

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United States law.

(2) 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.

<sup>62</sup> *In re [Name Redacted]*, AAU SIM 09 069 10022, 2009 WL6700892 (INS) (AAO December 2, 2009).

<sup>63</sup> See Form I-800 at <https://www.uscis.gov/i-800>.

<sup>64</sup> See *supra* note 62

government authority that petitioners had not directly may any payments to the birth mother. The birth mother herself in sworn statements agreed that the petitioners had never offered such payments. Nevertheless, there were vague allegations in some statements made by the birth mother to Belize authorities that individuals whose motives were deemed questionable had played an instrumental role in the adoption and may have promised or provided some financial assistance, and the AAO found that those allegations were not adequately addressed by petitioners or sufficiently laid to rest in the record as constituted. AAO concerns were augmented by the fact that the birth mother was Guatemalan and had reported selling a previous child, and the Belize authorities reported in general that they had seen a recent uptick in Guatemalan women coming to Belize to give birth and place their children for foreign adoption.

Convention immigrations regulations also attempts to enforce the no-contact rule in Article 29 of the Convention.<sup>65</sup> In 8 C.F.R. § 309(b)(2), USCIS is directed to deny an I-800 petition if the petitioners have met or had contact with the child's parents or caretakers before (1) the I-800A had been approved, (2) competent authorities in the country of origin had determined the child was eligible for intercountry adoption, and (3) the required consents had been given, unless:

(1) competent authorities in the country of origin permitted the contact,

(2) if an adoption occurred without complying with the Convention, that adoption was vacated by the country of origin to permit the petitioner to readopt in compliance with the Convention; or

(3) the petitioner is a relative of the birth parent.

Thus, in the case described above,<sup>66</sup> the fact that the petitioners met the birth mother prior to the child's birth, without permission of a Belize governmental authority or law of general application in Belize, provided an independent ground to deny the visa.

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<sup>65</sup> Article 29 provides:

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of article 4, sub-paragraphs a) to c) [regarding the determination by government authorities in the sending country that the child is adoptable and should be placed internationally, and that the necessary consents have been obtained] and article 5, sub-paragraph a) [regarding certification by the receiving nation that the parents are suited to adopt,] have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

<sup>66</sup> See *supra* note 62



The AAO has held that direct violations of the Convention provisions themselves are grounds for denial of an I-800. As a separate ground for denial in the above case,<sup>67</sup> the AAO found that the physical placement of the child at birth in the care of petitioners violated Article 17<sup>68</sup> of the Convention, which prohibits physical placement of the child with the adopters until after the Central Authority of the country of origin (in this case, Belize) has determined that the adopters had agreed to accept the placement, the Central Authorities of both the sending and receiving nations (Belize and the United States) had agreed the adoption could proceed; and USCIS had determined petitioners were eligible and suitable to adopt and the child would be approved for immigration to the United States.

As a final ground for denial, the AAO determined in the Belize adoption case that the placement violated Article 4 of the Convention,<sup>69</sup> which requires that competent authorities in the country of origin determine that intercountry adoption is in the child's best interests, after considering in-country options for placement. Placement of the child at birth and the absence of a finding by Belize authorities that in-country placement in Belize had been considered also, in the

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<sup>67</sup> See *supra* note 62

<sup>68</sup> Article 17 of the Convention provides:

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if -

- a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c) the Central Authorities of both States have agreed that the adoption may proceed; and
- d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

<sup>69</sup> Article 4 of the Convention provides:

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -

- a) have established that the child is adoptable;
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

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view of the AAO, precluded approval of the I-800 in that case.<sup>70</sup>

Petitioners for a Convention visa also must show in their application that they have not yet adopted the child or received custody (a guardianship order) for purposes of emigration and adoption prior to receiving provisional approval of their I-800. However, this restriction will not apply if, before the petitioners file the Form I-800, 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 and after receipt of notice from the U.S. Central Authority that the child is, or will be, authorized to enter and reside permanently in the United States, permits a new grant of adoption or custody. 8 C.F.R. § 309(b)(1).

## **5. Process Following Submission of I-800**

Although the time line is different, Convention visa petitioners, like orphan visa petitioners, may confront a roadblock if too much time passes between approval of their suitability (I-800A) and filing of their petition for a visa (I-800). An I-800A notice of approval expires fifteen months after the date on which the UCIS received the FBI report on the first person printed (one of the prospective adopters or their adult household members, all of whom must be fingerprinted before I-800 can be approved). Petitioners who have not received a placement in time to file their I-800 within that fifteen-month period must seek an extension for their approval notice, which requires re-fingerprinting and an amended or updated home study. 8 C.F.R. § 204.312(e). The Form I-800 Supplement 3 requesting the extension must be filed no earlier than 90 days before the expiration of the I-600A, but before the approval expires. There is no fee for filing the first Form I-800 Supplement 3, but subsequent requests for additional fifteen month extensions require a fee.<sup>71</sup>

After USCIS reviews a Form I-800 and accompanying documentation, if it is determined that the child qualifies as a Convention adoptee the USCIS will then provisionally approve the I-800 and notify the Department of State. The prospective adoptive parents are then instructed that their case has been assigned to a U.S. Embassy or Consulate abroad. An investigation, similar to that described above for orphan visas, may be undertaken in either this provisional review of the I-800 or in the final adjudication, if specific facts suggest to an officer that it is warranted, but it is not required in Convention adoptions. 8 U.S.C. § 204.313(f)(g).

Following receipt of notice of provisional approval, prospective adopters then submit an immigrant visa application, Form DS-260, to the embassy or consulate responsible for processing these applications for the country of origin. If the consular officer determines that the child

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<sup>70</sup> See *supra* note 62

<sup>71</sup> USCIS, *Extension and Validity Periods*, at <https://www.uscis.gov/adoption/after-approval/extension-and-validity-periods>.

appears to qualify for a visa, the consular officer sends an Article 5/17 letter to the Central Authority of the country of origin with notification that the requirements of article 5 of the Convention are satisfied, i.e., the petitioners are suitable to adopt, they have been appropriately counseled, and the child will be permitted to immigrate to the United States.<sup>72</sup>

The petitioner may adopt or obtain legal custody of the child only after the Article 5/17 letter is issued. If only one spouse travels to the foreign nation and adopts the child, the other spouse may adopt the child in the United States after the child is admitted. 8 C.F.R. § 204.313 (h)(2).. After an adoption or grant of custody has occurred in the Convention country, that country will issue an article 23 certification, which may be part of the adoption or custody decree itself, certifying compliance with the Convention. Petitioners must obtain a birth certificate and passport from the country of origin, because the child is not yet a U.S. citizen.<sup>73</sup>

When the article 23 certification is sent to the consular officer at the U.S. Embassy or Consulate, a final visa interview will be scheduled, and the valid adoption or custody decree is presented. At this interview, if no ineligibilities are found and the Convention process was followed correctly, the consular officer will grant final approval of the I-800 petition and attach a Hague Adoption Certificate (HAC) to the adoption decree or a Hague Custody Declaration (HCD) to the custody decree, certifying compliance with the Convention and the IAA. An IH-3 visa will be issued to a child who has been adopted in the country of origin, who will then automatically acquire citizenship upon entering the United States with the adoptive family. An IH-4 visa is issued to a child who will be adopted in the United States, who will then immigrate as a lawful permanent resident and become a citizen automatically if adopted before the age of eighteen.<sup>74</sup>

The denial of a petition for either a Convention or an orphan visa may be appealed to the Office of Administrative Appeals and subsequently to federal court.

### **C. “ Adopted Child” Visa**

A third way for U.S. citizens to seek immediate relative status for an adopted child is by filing Form I-130 (*Petition for Alien Relative*). My reference to this as an “adopted child” visa, a nomenclature typically used by commentators, is admittedly a bit confusing because as all three types of visas we discuss today are for children who have been or are about to be adopted.

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<sup>72</sup>See U.S. Dep’t of State, *Hague Visa Process*, at <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/immigrant-visa-process/us-hague-convention-adoption-and-visa-process.html>.

<sup>73</sup> *Id.*

<sup>74</sup> See 8 C.F.R. § 204.313(h); *Hague Visa Process*, *supra* note 72.

Nevertheless, this particular visa requires that the child must have already been adopted and in the legal and residential custody of the petitioner for two years. However, as you can see from the chart on page 5, it circumvents many of the other requirements of the orphan and Convention visas. There is no requirement that the adoption be facilitated by an ASP. There are no age requirements for single adopters. There are no specific requirements established by Congress or federal regulations for a home study, although an adoption in a foreign country would presumably require some equivalent assessment of the suitability of the adopters and an adoption in the United States would require a home study satisfying the criteria of the state in which the adoption took place. USCIS does not make its own determination that the child will receive proper care, and the specific Convention requirements and statutory criteria for classification of the child as an orphan do not apply.

Thus, in some ways, obtaining an "adopted child" visa is an easier process, because the circumstances of the child's birth family need not satisfy the orphan or Convention criteria and submission of a home study is not part of the USCIS process (although some type of home study would normally have been required by the country or U.S. state in which the adoption took place). On the other hand, obtaining an "adopted child" visa for a child residing abroad usually involves residing outside of the United States with the child for at least two years, and thus is normally utilized only by adoptive parents living abroad for other reasons. It is also utilized as a backup for parents whose orphan petitions were not approved, such as when a child is adopted before turning 16, but an orphan petition is not filed before the child turns 16, and it can be particularly useful if the parents can obtain advance parole for the child whose orphan visa application is unsuccessful for other reasons, as described in Section II.A.6).

Perhaps of greatest interest to private immigration attorneys, the adopted child visa can under some circumstances be used on behalf of children residing in the United States, as discussed below in Section II.C.3.

In order to be admitted as an immediate relative under this category, the following criteria must be satisfied:

- 1) the child must have been adopted under the age of 16 (or if a sibling of such a child, then under the age of 18) by a U.S. citizen in an adoption that is valid in the country where it took place; and the petition must be filed for the unmarried child before the child is age 21; and
- 2) the child must have been in the legal custody of and have resided with the adoptive parent or parents for at least two years. 8 U.S.C. 1101(b)(1)(E).

## 1. Age and Marital Status of the Child and Validity of the Adoption

### a. Age and Marital Status Requirement

Unlike the criteria for the orphan and Convention visas, the adopted child visa does not require that the visa petition be filed before a child reaches the age of 16 (or 18, if the biological sibling of a qualifying adoptee). Instead, 8 U.S.C. 1101(b)(1)(E) requires that the finalization of a valid adoption occur by the child's sixteenth birthday (or by the child's eighteenth birthday if the child is a biological sibling of another child adopted before the age of sixteen). The Petition for Alien Relative, Form I-130, must then be filed by a U.S. citizen petitioner while the child is still under the age of twenty-one and unmarried.<sup>75</sup> A U.S. citizen whose adopted child is over twenty-one or married, but who otherwise satisfies the criteria of 8 U.S.C. § 1101 (b)(1)(E), may file an I-130 to obtain a family-sponsored first preference visa for an unmarried adult adoptee and a third preference visa for a married adoptee.<sup>76</sup>

The age requirement has been scrutinized in a series of decisions regarding “retroactive adoptions,” most recently in the Fourth Circuit case of *Ojo v. Lynch*, 813 F.3d 533 (4<sup>th</sup> Cir. 2016). Two weeks after his lawful entry to the United States from Nigeria at the age of six, Ojo's uncle, a U.S. citizen, became his legal guardian. When Ojo was sixteen, his uncle and aunt filed a petition to adopt him, which was finalized in 2001 by a Maryland state court when he was seventeen. In deportation proceedings brought by the Department of Homeland Security following two drug-related offenses many years later, Ojo was adjudicated by the immigration judge and the Bureau of Immigration Appeals (BIA) to be removable because his adoption was not finalized until he was seventeen, and thus he did not derive citizenship under 8 U.S.C. § 1431 (See Section III below). Ojo's uncle then applied for and received a nunc pro tunc order from the Maryland state court, making his adoption effective on the day before Ojo turned sixteen. The Bureau of Immigration Appeals denied Ojo's petition to reopen, relying on its decision in *Matter of Cariaga*, 15 I. & N. Dec. 716 (BIA 1976) precluding consideration of nunc pro tunc orders entered after the relevant birthday, and in *Matter of Drigo*, 18 I & N. Dec. 223 (BIA 1982), affirming the rule in *Cariaga* and requiring strict construction of the statutory age.

The Fourth Circuit found the BIA's refusal to open removal proceedings to be arbitrary, capricious, and an abuse of discretion. In so ruling, the Fourth Circuit in *Ojo* noted that multiple federal district courts have cast doubt on the *Cariaga/Drigo* rule,<sup>77</sup> as well as the Ninth Circuit

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<sup>75</sup> USCIS, *Other Adoption-Related Immigration*, at 8 U.S.C. 1101(b)(1)(E)

<sup>76</sup> See USCIS, *Green Card for Family Preference Visas*, at <https://www.uscis.gov/greencard/family-preference>.

<sup>77</sup> The Fourth Circuit cited *Cantewell v. Holder*, 995 F.Supp.2d 316 (S.D. N.Y. 2014); *Hong v. Napolitano*, 772 F. Supp. 2d 1270 (D. Haw. 2011), and *Gonzalez-Martinez v. DHS*, 677 F. Supp. 2d 1233 (D. Utah 2009) as examples of lower courts rejecting BIA interpretation.

which rejected the rule in *Amponsah v. Holder*, 709 F.3d 1172 (9<sup>th</sup> Cir. 2013).<sup>78</sup> Although the BIA modified its blanket rule in mid-2015 in *Matter of Huang*, 26 I.&N. Dec. 627 (BIA 2015) to recognize nunc pro tunc adoption orders if the petition was filed before the adoptee's 16<sup>th</sup> birthday, the State entering the order expressly permitted an adoption decree to be dated retroactively, and the State court entered such a decree consistent with that authority, the Fourth Circuit noted Ojo's nunc pro tunc order did not meet these criteria. Nevertheless, the Fourth Circuit held, adoptions in the United States are conducted by state courts, and therefore a child is "adopted" for purposes of 8 U.S.C. § 1101(b)(1)(E), on the "effective date of the adoption as set forth in the relevant state court instruments."<sup>79</sup>

More recently, in *Brown v. Fedoruk*, 313 F. Supp. 3d 1252 (W.D. Wash. 2018), a Washington District Court similarly rejected the BIA's *Huang* restrictions on nunc pro tunc orders, agreeing with the Fourth Circuit that the date of the adoptee's adoption was the date set forth in the nunc pro tunc order issued by the Washington State court that entered the adoption order. Moreover, assessing petitioner's claim that the BIA's *Huang* criteria violated equal protection by treating adoptees that live in states expressly authorizing backdating adoption decrees from those whose decrees were backdated based on their respective State's common law concept of nunc pro tunc adoption decrees, the district court found that applying rational relationship scrutiny, the BIA's holding in *Huang* was not rationally related to a legitimate state purpose.

## **b. Validity of Adoption Decree**

To qualify for an immediate relative visa under 8 U.S.C. §§1101 (b)(1)(E) as an adopted child, the adoption must be valid in the country or state in which it occurs. To be considered legally valid for immigration purposes, an adoption must (1) be valid under the law of the country or place granting the adoption, (2) create a legal parent-child relationship between someone who is not already the child's parent and the child; and (3) terminate the parent-child relationship with the child's prior legal parents.<sup>80</sup> Even if the adoption would be valid if it had occurred in the United States, it will not be a valid adoption for purposes of this visa if it was not valid in the nation where it occurred.<sup>81</sup>

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<sup>78</sup> The Court noted that the 9<sup>th</sup> Circuit later withdrew this opinion based on the BIA's assurance that it was revisiting the *Cariaga/Drigo* rule, but then relied on it in *Ojo's proceedings in January 2015*.

<sup>79</sup> *Ojo*, 813 F.3d 533 at 541.

<sup>80</sup> Ignatius & Stickney, *supra* note 31 at §11.3. See also Foreign Affairs Manual, 9 FAM 502.3-2(B) §(b)(1), at <https://fam.state.gov/fam/09FAM/09FAM050203.html>.

<sup>81</sup> E.g., *Matter of Garcia-Rodriguez*, 16 I. & N. Dec. 438, 1978 WL 32429 (B.I.A. 1987).

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).

customary adoption has been held sufficient to serve as a substitute for legal custody.<sup>89</sup>

In addition, the petitioner must show that at least one of the adopting parents lived with the child for at least two years. The residence period, like the period of legal custody, can occur before or after the adoption, or some of both. 8 C.F.R. §204.2(d)(2)(vii)(B). The petitioner must submit evidence that he or she resided with the child in a familial relationship during this period and exercised parental control. To establish parental control, the adoptive parent may submit evidence that he or she owned or maintained the residence in which he or she lived with the child, financially supported the child, and provided day-to-day supervision, although other types of evidence might be relevant as well. *Id.* Most difficult are those situations in which the adoptive parent and child resided in the same home as the birth parent, which sometimes occurs in relative adoptions. In those cases, the burden is on the adoptive parent to prove that he or she exercised primary parental control during the period of residence. *Id.*

The two-year periods of legal custody and residency need not be coterminous.<sup>90</sup> Moreover, neither the two-year period of custody nor the two-year period of residence need be uninterrupted. The statutory requirements will be fulfilled as long as there has been two years in the aggregate of both legal custody and of residence. 8 C.F.R. §204.2(d)(2)(vii)(C). However, these two requirements are the means of ensuring that a bona fide parent-child relationship exists.<sup>91</sup> The BIA has scrutinized these requirements in order to prevent fraudulent adoptions entered solely to obtain an immigration status. For example, in *Matter of Reputan*, 19 I. & N. Dec. 119, 122 (B.I.A. 1984), the Board denied the visa petition filed by an aunt who alleged she had resided with her adopted niece and nephew in the Philippines for seven periods of various durations totaling twenty-seven months in the aggregate over a sixteen-year time span. Noting that "residence" is defined by 8 U.S.C. §1101(a) as a person's "principal, actual dwelling place in fact, without regard to intent," the Board found periodic visits to a child's home insufficient to satisfy the two-year residency requirement.

### 3. Process

To seek an adopted child visa for a child residing outside of the United States, petitioner must file a Form I-130 (Petition for Alien Relative),<sup>92</sup> along with a copy of the child's adoption

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<sup>89</sup> *Kaho v. Ilchert*, 765 F.2d 877 (9<sup>th</sup> Cir. 1985). See Ignatius & Stickney, *supra* note 31, at §13:8.

<sup>90</sup> *Matter of Cho*, 16 I. & N. Dec. 188 (B.I.A. 1977). See also Foreign Affairs Manual, 9 FAM 502.3-2(B) §(d)(3), at <https://fam.state.gov/fam/09FAM/09FAM050203.html>.

<sup>91</sup> Sullivan, *supra* note 24, at n.279 and accompanying text.

<sup>92</sup> See USCIS, *Bringing Your Internationally Adopted Child to the United States*, at <https://www.uscis.gov/adoption/bringing-your-internationally-adopted-child-united-states>.



decree, proof of the adoptive parents' U.S. citizenship or lawful immigration status, and evidence that the two year residency and legal custody requirements have been fulfilled. 8 C.F.R. §204.2(d)(2)(iv).

The federal statute authorizing adopted child visas explicitly clarifies that no natural parent or prior adoptive parent of any child classified as an immediate relative under 8 U.S.C. § 1101(b)(1)(E) shall thereafter receive any immigration benefits as a result of the parent's prior parental relationship. The Board of Immigration Appeals has taken the position that a child immigrating under an adopted child visa may not later petition on behalf of a biological sibling,<sup>93</sup> although federal courts have split on this issue.<sup>94</sup>

#### **4. Use of Adopted Child Visa for Children Adopted in the United States**

As illustrated in the *Ojo* case discussed above, 8 U.S. C. 1101(b)(1)(E) is a route to obtaining permanent residence as an immediate relative and U.S. citizenship for children who have entered the United States in nonimmigrant status and are adopted in the United States by U.S. citizens. As will be discussed in Section II.C.5, below, however, an adopted child visa may not be used for such children if they were habitually resident in a nation that was party to the Hague Intercountry Adoption Convention immediately prior to the adoption.

Foreign-born children may enter the United States as visitors with their non-citizen parents or relatives who leave them in this country with relatives or friends, or they may enter on student visas. If the parents later consent to their adoption by a U.S. citizen, the child may be able to obtain immediate relative status if the requirements of 8 U.S.C. § 1101(b)(1)(E) are satisfied, i.e., the child was adopted before his or her 16<sup>th</sup> birthday, the U.S. citizen adoptive parent has had legal custody of the child for two years (before or after the adoption) and the child has resided with the adopted parent for two years (before and/or after the adoption).<sup>95</sup> Obtaining legal custody or an adoption in a U.S. state court, of course, will not legalize a child's stay in the U.S. for immigration purposes, if the child is residing in the United States without legal immigration status because it expired or because the child entered without inspection.<sup>96</sup>

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<sup>93</sup> *Matter of Li*, 20 I. & N. Dec. 700, 1993 WL 424163 (B.I.A. 1993).

<sup>94</sup> *Compare* *Gee v. I.N.S.*, 875 F. Supp. 666 (N.D. Cal. 1994) *with* *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997). *See* *Ignatius & Stickney*, *supra* note 31, at § 13:14.

<sup>95</sup> *Hollinger*, *supra* note 10, at § 11:03.

<sup>96</sup> AllLaw, *Can You Adopt an Undocumented Immigrant and Get Them a Green Card*, at <https://www.alllaw.com/articles/nolo/us-immigration/adopt-undocumented-illegal-immigrant-get-green-card.html>.

The U.S. citizen petitioner must file Form I-130 (Petition for Alien Relative) for the unmarried child who is under the age of 21 and an adopted child who entered the United States legally should at the same time file an application to adjust status to permanent resident status (Form I-485) under 8 U.S.C. §1255.<sup>97</sup> If the child entered the United States without inspection, the petitioner can file Form I-130 and if that is approved, the case will be transferred to a U.S. consulate abroad, where a visa interview will be required.<sup>98</sup> Approval of a Form I-130 will not guarantee in all circumstances that a child can acquire permanent residence through adjustment of status or a visa interview,<sup>99</sup> but it is a route worthy of consideration that has been helpful to extended family members in many immigrant communities and others wishing to adopt foreign-born children in the United States.<sup>100</sup>

With particular concern for the protection of adoptees who reside in the United States, Congress created a battered child exception to the two-year custody and residence requirements in 8 U.S.C. § 1101(b)(1)(E), permitting an I-130 to be filed for a child who has not satisfied that criteria but has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household. It appears that the goal of this provision was to ensure that adopted battered children would not be deterred from reporting abuse by fear of deportation on the grounds that their two-year periods had not yet been satisfied.<sup>101</sup>

## **5. Adopted Children Habitually Resident in Convention Nations**

A U.S. citizen may seek a visa under 8 U.S.C. §1101(b)(1)(E) for a child who was adopted in a nation that is party to the Hague Intercountry Adoption Convention if the petitioner has obtained legal custody and resided with the child outside of the United States for the requisite two-year period.<sup>102</sup> This is because federal regulations specifically define the habitual residence

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<sup>97</sup> Hollinger, *supra* note 10, at § 11:03. *See also* Zhang & Associates, *The Immigration Procedure for an Adopted Child*, at <https://www.hooyou.com/adoption/regular-procedure.html>.

<sup>98</sup> AllLaw, *supra* note 94.

<sup>99</sup> *See* Hollinger, *supra* note 10, at § 11:03[2][b].

<sup>100</sup> *See* Ignatius & Stickney, *supra* note 31, at §13.41.

<sup>101</sup> *See also* 8 C.F.R. § 204.2(e).

<sup>102</sup> 8 C.F.R. 204.2 (d)(2)(vii)(D) provides:

(D) 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

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.<sup>103</sup> 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

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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].

<sup>103</sup> *Id.*; Ignatius & Stickney, *supra* note 31, at §13.41.

unrelated to adoption.<sup>104</sup> Rejecting this argument, the federal district court upheld the validity of the federal regulations, finding that 8 C.F. R. 204.2 (d)(2)(vii) promoted Congressional goals by avoiding foreign relations consequences if a foreign national temporarily in the United States was adopted without the consent of the child's country of origin, and by preventing avoidance of the Convention's safeguards by looking to the child's citizenship rather than the child's temporary location. *Id.* at 793.

Thus, instead of obtaining an adopted child visa through Form I-130, a petitioner such as Mr. Fingerson and his wife would need to seek approval through Form I-800A and then adopt the child in the Convention nation or seek a custody order from that nation for the purpose of adoption in the United States.<sup>105</sup> At this point the child may be eligible for adjustment of status or, if the child entered the United States without inspection, the child will need to go abroad to apply for a visa at a U.S. consulate after provisional approval of the I-800.<sup>106</sup>

Moreover, if an adoption has taken place before the I-800 is approved, the I-800 will be denied. In such a case, the adoption must be voided, vacated, annulled, or otherwise terminated so that the petitioner can proceed by filing an I-800 A and subsequently an I-800. After provisional approval of Form I-800, the petitioner may then seek a new adoption order. 8 C.F.R. § 204.309(b)(1).<sup>107</sup>

As an alternative to voiding the adoption, the U.S. citizen may attempt to seek a

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<sup>104</sup> The child was adopted by petitioner, who had previously been named his legal guardian, after his birth mother's health deteriorated a year after the child's arrival in the United States.

<sup>105</sup> Ignatius & Stickney, *supra* note 31, at §13.41.

<sup>106</sup> *Id.* Based on the Preamble to regulations, 72 Fed. Reg. 56832, 56834 (Oct. 4, 2007), the authors observe:

In some cases, then, the child may be eligible to adjust status in the U.S. since nothing in the regulations requires the child to return to the country of citizenship. However, the I-800A and I-800, by themselves, do not grant the child any status in the U.S. Thus, if the child entered the U.S. without inspection, after provisional approval of the I-800, the child will need to go abroad and apply for a visa at a U.S. consulate.

*See also* USCIS, Policy Memorandum PM 602-0095, *Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries*, November 20, 2017, at 5.

<sup>107</sup> Ignatius & Stickney, *supra* note 31, at §13.41.

determination from the Central Authority or another competent governmental authority of the child's country of citizenship documenting that the child was no longer habitually resident in that country at the time of adoption.<sup>108</sup> If the adoption order (or amended order) expressly states that the Central Authority advised the U.S. court with jurisdiction over the adoption that it (1) is aware of the child's presence in the United States and of the proposed adoption, and (2) has determined that the child is not habitually resident in the child's country of origin, then USCIS may approve an I-130 petition for the child. In these cases, a written statement from the Central Authority must accompany the Form I-130 and the adoption order (or amended order). Alternatively, if the Central Authority considers the child to be habitually resident in the country of origin, despite the child's presence in the United States, the USCIS must deny the I-130 petition and the petitioner must proceed through the Convention visa process.<sup>109</sup>

Commentators have observed, however, that statements from a Central Authority regarding a child's habitual residence can be difficult to obtain, particularly if the child left the country of origin to escape abuse, violence, or political turmoil.<sup>110</sup> When the Central Authority in the country of origin cannot or will not take a position regarding whether the child is habitually resident in that nation, under some circumstances the USCIS will make such a determination. If the petitioner cannot obtain a statement from the Central Authority of the country of origin because:

- The child's COO does not issue statements of habitual residence, as confirmed by the Department of State; or
- The Central Authority of the COO has informed the petitioner in writing that it will not make a determination on habitual residence upon the petitioner's request; or
- The Central Authority of the COO has not issued a statement of habitual residence for at least 120 days following the petitioner's request to obtain such a statement.;

then the USCIS has taken the position that it may approve Form I-130 if it finds:

1. At the time the child entered the United States, the purpose(s) of the entry were for reasons other than adoption (intent criteria);
2. Prior to the U.S. domestic adoption, the child actually and physically resided in the United States for a substantial period of time, establishing compelling ties in the United States, (actual residence criteria); and

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<sup>108</sup> USCIS, Policy Memorandum PM 602-0095, *supra* note 106, at 3-5.

<sup>109</sup> *Id.*

<sup>110</sup> Hollinger, *supra* note 10, at § 11:03[2][b].

3. Any adoption decree issued after February 3, 2014, confirms that the Central Authority of the country of origin was notified of the adoption proceeding in a manner satisfactory to the court and that the Central Authority 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).<sup>111</sup>

### **III. Family Preference Visas for Children Adopted Transnationally by Permanent Residents**

Although lawful permanent residents of the United States, as non-citizens, are not eligible to seek immediate relative status for adopted children under orphan, Convention, or adopted child visas, they are eligible to file Form I-130 to seek a family-sponsored second preference visa for their children or unmarried sons or daughters of any age who satisfy the criteria for adopted children..8 C.F.R. § 204.2(d)(1)((2)(ii)).<sup>112</sup> As with I-130 petitioners who are U.S. citizens, the petitioner who is a lawful permanent resident must establish that the adoption took place before the child's sixteenth birthday and that the child has been in the legal custody and resided with the adoptive parent or parents for at least two years. *Id.* [See Section II. C. above for a detailed discussion of these criteria.] Although second preference visas are subject to numerical limitation and may entail a lengthy wait for entry, this is normally the only avenue available to obtain an immigrant visa for a child adopted after the parent obtains lawful permanent residence. 8 U.S.C. §1151(a).<sup>113</sup>

An adopted child "accompanying" or "following to join" a parent who is also immigrating with a family-sponsored, employment-related, or diversity immigrant visa is admitted in the same preference category as the parent and is considered a derivative beneficiary for whom no separate adopted child petition must be filed. 8 C.F.R. §204.2(d)(4). Derivative status was created to avoid separation of nuclear families who are attempting to immigrate. A child adopted after the parent obtains lawful permanent residence, however, is not entitled to derivative status and it is these children for whom adopted child visas are filed..<sup>114</sup>

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<sup>111</sup> USCIS, Policy Memorandum PM 602-0095, *supra* note 106, at 3-5.

<sup>112</sup> See Hollinger, *supra* note 10, at § 11:03[2][b]. Thus, Form I-130 may be filed to obtain these visa for adopted children at any time and need not be filed before the twenty-first birthday.

<sup>113</sup> See Hollinger, *supra* note10, at 11-23.; David Weissbrodt, Immigration Law and Procedure 122 (5th ed. 2005)

<sup>114</sup> *Id.*

#### IV. Obtaining U.S. Citizenship for Adopted Children

After February 27, 2001, the effective date of the Child Citizenship Act of 2000, adopted children born abroad become U.S. citizens automatically as of the date that the Act's four requirements are satisfied, i.e.:

- (1) at least one parent of the child is a U.S. citizen;
- (2) the child is under 18 years of age;
- (3) the child is residing in the United States in the legal and physical custody of the citizen parent, pursuant to a lawful admission for permanent residence, and
- (4) the child is adopted by a U.S. citizen parent if the child satisfies the requirements applicable to adopted children under section 1101(b)(1). 8 U.S.C. § 1431.

Under the Act, it does not matter in which order the requirements are met. Thus, children adopted abroad will become citizens as soon as they are residing with their U.S. citizen parent in the United States, and children who are entering the United States from abroad for adoption in U.S. courts will become citizens when their adoption is final. All of the requirements must be satisfied before the child's eighteenth birthday, however, in order for automatic citizenship to come into effect.

A U.S. Certificate of Citizenship issued by USCIS or a U.S. passport issued by the Department of State are the documents generally used as evidence of U.S. citizenship for a foreign-born adopted child. The process for obtaining a U.S. Certificate of Citizenship varies depending upon the type of immigrant visa the child received after the child's approval for immediate relative status.<sup>115</sup>

An IR-3 visa will typically be issued to a child who immigrates after approval for an orphan visa if (1) at least one of the parents saw and observed the child before or during the adoption proceedings and (2) the petitioner (and spouse, if any) adopted the child abroad in a proceeding recognized as a final adoption in both the country of origin and the United States. Similarly, an IH-3 visa will typically be issued after final approval of Form I-800 in a Convention adoption if the petitioner (and spouse, if married) complete the final adoption abroad before the child enters the United States.<sup>116</sup> If the child was admitted to reside permanently in the United States on an IR-3 or IH-3 visa after January 1, 2004, USCIS will send the Certificate of

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<sup>115</sup> USCIS, *U.S. Citizenship for an Adopted Child*, at <https://www.uscis.gov/adoption/bringing-your-internationally-adopted-child-united-states/us-citizenship-adopted-child>.

<sup>116</sup> USCIS, *Your New Child's Immigrant Visa*, at <https://www.uscis.gov/adoption/bringing-your-internationally-adopted-child-united-states/your-new-childs-immigrant-visa>.

Citizenship to the child by mail automatically.<sup>117</sup>

An IR-4 visa is generally issued after approval of an orphan visa if (1) neither parent has seen or observed the child before or during the adoption; the adopter(s) plan to complete the final adoption in the United States, or only one of the married adopters adopted the child abroad and the other parent will adopt the child in the United States. An IH-4 visa will be issued after final approval of the I-800 if the petitioner did not complete a final adoption abroad, or if only one spouse of a married couple completed a final adoption abroad. Generally an IR-2 visa is issued to an adopted child after approval of Form I-130.<sup>118</sup>

If a child enters to reside permanently on an IR-4, IH-4, or IR-2 visa, the child will receive a green card (a permanent resident card) by mail and if the child meets all of the conditions for citizenship before the child's 18<sup>th</sup> birthday, the family can file an N-600 form with a fee to USCIS to obtain a Certificate of Citizenship.<sup>119</sup> I am told anecdotally that the waiting time to receive the Certificate after sending the N-600 form varies by region, and is approximately four months in Oklahoma, but could be as long as 16-18 months elsewhere.<sup>120</sup> A different form and process must be used if the child will reside outside the United States.<sup>121</sup>

An adopter may obtain a U.S. passport for a foreign-born adopted child by submitting a Certificate of Citizenship to the Department of State, or if a Certificate of Citizenship has not been obtained, the applicant must submit other proof of acquisition of citizenship, including a certified copy of the final adoption decree (and translation if not in English) and evidence the child met all the conditions of 8 U.S.C. § 1431 while under the age of 18. Once the Department of State has issued a passport for a child, USCIS may deny a Certificate of Citizenship because the passport will serve as evidence of citizenship.<sup>122</sup>

Prior to 2001, foreign-born adopted children remained lawful permanent residents until their parents, on their behalf, or they as adults applied for naturalization. Adopted children who had not yet been naturalized by February 28, 2001, but who met all of the requirements of the Act on that date, became automatic citizens as long as they had not yet reached eighteen years of

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<sup>117</sup> *U.S. Citizenship for an Adopted Child*, *supra* note 115.

<sup>118</sup> *Your New Child's Immigrant Visa*, *supra* note 116.

<sup>119</sup> *U.S. Citizenship for an Adopted Child*, *supra* note 116.

<sup>120</sup> Telephone conversation with Jennifer Kern, August 27, 2019.

<sup>121</sup> *See U.S. Citizenship for an Adopted Child*, *supra* note 16, for additional information on this process.

<sup>122</sup> *Id.*



age. Those over the age of eighteen on February 28, 2001 were still required to apply for naturalization. *Id.* In May 2019, The Adoptee Citizenship Act of 2019 was introduced by Representative Adam Smith that would provide automatic citizenship to adults who:

(A) was adopted by a United States citizen before the individual reached 18 years of age;

(B) was physically present in the United States in the legal custody of the citizen parent pursuant to a lawful admission before the individual reached 18 years of age;

(C) never acquired United States citizenship before the date of the enactment of the Adoptee Citizenship Act of 2019; and

(D) was residing in the United States on the date of the enactment of the Adoptee Citizenship Act of 2019 pursuant to a lawful admission.

The Act would afford more limited rights to citizenship to certain adult adoptees living abroad. Unfortunately, GovTrack predicts the bill has a 3% chance of passing,<sup>123</sup> although the bill has bipartisan support.<sup>124</sup> This is truly unfortunate, as it is estimated that between 25,000 and 49,000 children adopted to the U.S. between 1945 and 1998 lack U.S. citizenship, causing some to face deportation and many to experience hurdles in obtaining student financial aid, drivers licenses, and passports as adults.<sup>125</sup>

## **V. Adoption of Foreign-Born Children, Re-adoption of Children Adopted Abroad, and Recognition of Foreign Adoptions in Oklahoma State Courts**

In the 1990s, Oklahoma passed legislation to facilitate the adoption and readoption of foreign adoptees in Oklahoma courts and the recognition of foreign adoption decrees. Although most foreign adoptees are adopted in their country of origin, some nations award custody to an adopting parent or an entity, such as an adoption agency representing the adopter, and the adoption is completed in a U.S. court. In fiscal year 2018, however, only 8% of the adoptions of children immigrating to the United States through intercountry adoption were finalized in the United States, and the adoption of only one of the 37 children who came to Oklahoma in FY

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<sup>123</sup> See GovTrack, *H.R. 2731: Adoptee Citizenship Act of 2019*, at <https://www.govtrack.us/congress/bills/116/hr2731/text>;

<sup>124</sup> Susan Collins, *Senator Collins Joins Bipartisan Group in Introducing Adoptee Citizenship Act of 2019*, at <https://www.collins.senate.gov/newsroom/senator-collins-joins-bipartisan-group-introducing-adoptee-citizenship-act-2019> (June 3, 2019).

<sup>125</sup> Adam Smith, *Congressman Smith and Congressman Woodall Introduce Adoptee Citizenship Act of 2019*, at <https://adamsmith.house.gov/2019/5/congressman-smith-and-congressman-woodall-introduce-adoptee-citizenship-act-of-2019>.

2018 was finalized in the United States.<sup>126</sup>

Similarly, the need for readoption is rare. Prior to the U.S. ratification and implementation of the Hague Convention, many adoptive parents of foreign born children readopted their children when they were back in their home states to ensure recognition of the adoption, to obtain a domestic birth certificate or to similar document, or to facilitate a name change. The need or desire for readoption in Oklahoma is diminished both by the federal law requirement that any foreign adoption certified by the U.S. Secretary of State through a Hague Adoption Certificate is entitled to recognition as a valid final adoption for purposes of all federal, state, and local law within the United States. 42 U.S.C. § 14931. Oklahoma law similarly requires Oklahoma courts to recognize a foreign decree, judgment or order of adoption issued by a court or other governmental authority with appropriate jurisdiction in a foreign country and to afford the parties the same rights and responsibilities as if the order had been issued by an Oklahoma court. Okla. Stat. Tit. 10 § 7502-1.4(A).

To obtain a name change, Oklahoma law provides that a parent who adopted a child in a foreign nation may present the foreign order or proof that the child has U.S. citizenship to an Oklahoma court with a petition for a name change, and the Oklahoma court must order the State Registrar to prepare a supplementary certificate of birth for the child, “unless good cause is shown why the certificate should not be issued.” Okla. Stat. Tit. 10 §§ 7502-1.4(B); 7505-6.6.

Nevertheless, Oklahoma statutes specifically recognize the jurisdiction of Oklahoma courts to proceed with an adoption of a foreign-born minor child if no final adoption order was issued by a foreign court with jurisdiction and if one or both petitioners for adoption are citizens of Oklahoma and the child is residing in Oklahoma at the time the petition for adoption is filed. Okla. Stat. Tit. 10 § 7502-1.4(C). Oklahoma law also permits adoptive parents of children adopted in a foreign nation to petition to readopt the minor child under Oklahoma law, if one or both of the petitioners are citizens of Oklahoma and the minor is residing in Oklahoma at the time the petition for adoption is filed. Okla. Stat. Tit. 10 § 7502-1.4(D).

The Oklahoma Adoption Code applies to such proceedings, but there are several provisions in Okla. Stat. Tit. 10 § 7502-1.4(E) to specifically address some of the challenges presented by the international context of the proceedings.

- The court may waive the requirement of notice to and consent from a birth parent if the petitioner files with the petition for adoption a copy of the termination of parental rights granted by a judicial, administrative, or executive body of the country of origin, or document(s) or documents from the foreign nation’s governmental body stating that the

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<sup>126</sup> U.S. Department of State *Fiscal Year 2018 Annual Report on Intercountry Adoptions* (March 2019) at <https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Tab%201%20Annual%20Report%20on%20Intercountry%20Adoptions.pdf>. The reporting period for FY 2018 is from October 1, 2017 through September 30, 2018.

biological parent has consented to the adoption, or stating that the parental rights of the biological parent of the minor have been terminated, or stating that the minor to be adopted has been relinquished by the biological parent or stating that the minor has been abandoned.

Such documents in a foreign language must be translated into English by the Department of State or a translator who certifies the accuracy of the translation, and a copy of the translation and certification must be filed with the court along with a copy of the original documents.

- If the child is in the legal custody of a child-placing agency at the time that the petition for adoption is filed, notice of the proceedings must be given to the child-placing agency prior to the hearing on the petition, and the consent of the child-placing agency to the adoption must be obtained prior to the granting of the decree of adoption; and
- The issuance of an interlocutory decree of adoption and the waiting period of six (6) months provided in Okla. Stat. Tit. 10 §§ 7505-6.1 and 7505-6.3 may be waived and a final decree of adoption may be granted if:
  - a. the child has been in the home of the petitioner for at least six (6) months prior to the filing of the petition for adoption, and
  - b. a postplacement report has been submitted to the court.

Oklahoma will recognize a consent or relinquishment signed by a resident of a foreign nation as long as the consent or relinquishment is valid under the Oklahoma Adoption Code OR the law of the nation in which the individual who signed the consent or relinquishment resides. Okla. Stat. Tit. 10 §§ 7503-2.3(K); 7503-2.4(J).

# ETHICS IN REMOVAL PROCEEDINGS

By Melissa Lujan

## *Practicing Across State Lines*

Most immigration attorneys will find themselves practicing law outside of the State of Oklahoma at some point whether it be attending a USCIS interview for a client in another state or advocating with a CBP office at a port of entry. Those that practice removal proceedings may even find themselves practicing law outside of the state on a regular basis. The ABA Model Rules of Professional Conduct Rule 5.5 provides the circumstances in which an attorney may practice outside of their jurisdiction such as when authorized by federal law. Oklahoma has adopted the model rules, but in states that have not, immigration attorneys must review those states' rules on practicing in another jurisdiction to ensure that one does not commit the unauthorized practice of law. Under federal Immigration law attorneys are permitted to practice before immigration courts, the Board of the Immigration Appeals (BIA), U.S. Citizenship and Immigration Services (USCIS), and the Department of Homeland Security (DHS) in any state if they are in good standing in one state and not disbarred or suspended from the practice of law.<sup>1</sup> Therefore, Oklahoma attorneys may practice in another jurisdiction if it is related to the practice of immigration law.

In addition to being familiar with state ethical rules, immigration attorneys must also be familiar with the rules of Professional Conduct for Practitioners promulgated by EOIR.<sup>2</sup> Immigration attorneys are subject to discipline not only by state bar authorities but also by the Board of Immigration Appeals (the Board) or an adjudicating official.<sup>3</sup> Grounds for discipline by EOIR include grossly excessive fees or compensation; making false or misleading statements of material fact or law; solicitation of professional employment through in-person or live contact; criminal activity; engaging in frivolous behavior before the Immigration Court, the Board, or other administrative agencies; engaging in conduct that constitutes ineffective assistance of counsel; failure to provide competent representation; and other grounds.<sup>4</sup>

In general, an immigration attorney should strive to follow both state and federal rules of professional conduct, complying with the rules of the state of licensure, the rules of the state(s) in which the attorney is practicing, and all EOIR and federal rules. However, what should an immigration practitioner do if EOIR or DHS rules conflict with state bar rules?

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<sup>1</sup> 8 CFR §292.1 authorizes any attorney as defined in 8 CFR §1.2 to practice law. 8 CFR §1.2 defines an “attorney” as “any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting him or her in the practice of law.”

<sup>2</sup> Professional Conduct for Practitioners—Rules and Procedures, 8 CFR §1003.101 *et seq.*, available at [https://www.ecfr.gov/cgi-bin/text-idx?SID=9ac3efd9a95e1a880e309de37c67f6a6&mc=true&node=sp8.1.1003.g&rgn=div6#se8.1.1003\\_1101](https://www.ecfr.gov/cgi-bin/text-idx?SID=9ac3efd9a95e1a880e309de37c67f6a6&mc=true&node=sp8.1.1003.g&rgn=div6#se8.1.1003_1101) (last visited Mar. 20, 2019).

<sup>3</sup> 8 CFR §1003.101.

<sup>4</sup> 8 CFR §1003.102.

In the case of a conflict, state ethics rules take precedence. To practice before immigration courts, a lawyer must be eligible to practice law and be a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States.<sup>5</sup> Thus, as a prerequisite to practice in immigration court, an attorney must maintain state licensure. In the event of a conflict between a state ethics rule and an EOIR rule, the best practice would be to advise the immigration court, on the record, of the conflict and why an attorney cannot comply with a request of the court by virtue of being bound by state ethics rules.

Could federal preemption require lawyers to place ethical rules issued by EOIR above their own state rules? The answer is likely it does not—state ethical rules still take precedence. First, while EOIR has the authority to discipline practitioners before the immigration court, the disciplinary committee may report a case to the lawyer’s state bar for the purpose of allowing the state to then handle the issue of counsel’s ethics violation.<sup>6</sup> It then becomes up to that state to proceed as they see fit or as their rules provide. Second, in a Ninth Circuit case the court specifically addressed this issue, reasoning that federal preemption did not prevent a state bar from disciplining an attorney for conduct related to representation in immigration court.<sup>7</sup> The court noted that the federal scheme contemplated cooperation between federal and state authorities in disciplinary matters.<sup>8</sup> In fact, 8 CFR §1003.103 requires immediate suspension of any lawyer who has been found guilty of a serious crime or suspended or disbarred by any state. Whether a state would reciprocally require that an individual be disbarred or disciplined if disbarred or disciplined before the immigration court would be a matter of state ethics rules. ABA Model Rule 8.5, which provides for choice of law in disciplinary matters, would suggest that each jurisdiction is to make its own determination as to whether conduct violates its rules, and therefore, violation of EOIR rules may not per se result in violation of state rules.

If a conflict arises between EOIR rules of conduct and state ethics rules, then state ethics rules may defend the individual from sanctions in the state in which they are licensed. However, this would not necessarily stop the EOIR disciplinary counsel from disciplining counsel in immigration court. It is likely little comfort to immigration lawyers practicing removal defense that they could be disciplined out of immigration court, but still eligible to practice law in their state. However, practically speaking, an attorney would likely be able to avoid this situation by (1) striving to know and follow both state and EOIR rules; and (2) advising the immigration court on the record of any conflict in state ethics rules that prohibits an attorney from complying with the request of the court.

### ***New EOIR Guidance for Disciplinary Action***

Being familiar with the rules of Professional Conduct for Practitioners promulgated by EOIR is particularly important in light of new efforts by the Department of Justice regarding reporting attorneys for disciplinary action. On December 18, 2018, Director James R. McHenry III issued a memorandum titled “Internal Reporting of Suspected Ineffective Assistance of Counsel and

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<sup>5</sup> 8 CFR §1.2 (defining “attorney”).

<sup>6</sup> 8 CFR 1003.103.

<sup>7</sup> *Gadda v. Ashcroft*, 377 F.3d. 934 (9th Cir. 2004).

<sup>8</sup> *Id.*

Professional Misconduct,” which was distributed to all EOIR staff.<sup>9</sup> Effective January 1, 2019, all EOIR employees are required to report all suspected violations to EOIR disciplinary counsel for investigation within 60 days of the suspected violation.<sup>10</sup> Immigration Judges and members of the BIA are also instructed to inform the disciplinary counsel of suspected ineffective assistance of counsel discovered through review of the record.<sup>11</sup> EOIR disciplinary counsel may then decide if such action should then be reported to local state bars.<sup>12</sup> The Director’s authority is derived from 8 CFR §1003.0(e)(1), which provides that “the General Counsel shall administer programs to protect the integrity of immigration proceedings before EOIR, including administering the disciplinary program for practitioners and recognized organizations.”<sup>13</sup> The Board of Immigration Appeals has authority under 8 CFR §1003.101 to discipline any practitioner if it is in the public interest to do so based upon the grounds for discipline under 8 CFR §1003.102. Discipline may include disbarment or suspension from practice before the Board, Immigration Courts, DHS, or all three authorities; public or private censure; or other sanctions deemed appropriate.<sup>14</sup>

With the recent implementation of the EOIR Internal Reporting Procedures memorandum, it appears that EOIR has taken a renewed interest in the ethical obligations and effective assistance of counsel. This comes at a time when pressure is at an all-time high in removal defense given the tremendous backlog, aversion to the use of prosecutorial discretion, and changing rules due to opinions coming from all levels of courts as well as the Attorney General. With the former attorney general using terminology like “dirty immigration lawyers,” it would certainly beg the question whether this new focus is meant to have a chilling effect by causing practitioners to take caution in their choice of strategies when challenging rules and decisions, including those decisions issued by the Attorney General.

At a minimum, it is a reminder to those who practice before immigration courts that they are bound to follow not only the rules of their licensing jurisdiction, but also the grounds for discipline before the immigration courts.<sup>15</sup>

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<sup>9</sup> EOIR Memorandum, James R. McHenry III “Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct” (Dec. 18, 2018), *published on AILA InfoNet at Doc. No. 18121938 (posted Dec. 18, 2018), available at <https://www.justice.gov/eoir/file/1121096/download>* (last visited Mar. 20, 2019).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 8 CFR §1003.0(e)(1).

<sup>14</sup> 8 CFR §1003.101. For a detailed discussion of EOIR disciplinary procedures, *see* Margaret Mikyung Lee, “Legal Ethics in Immigration Matters: Legal Representation and Unauthorized Practice of Law,” Congressional Research Service (Sept. 18, 2009).

<sup>15</sup> *See* Appendix A of “Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct.”

# IMMIGRANT BUSINESS

AFFIDAVITS OF SUPPORT

WAIVERS

GENERAL LAWYER  
STUFF

INTERVIEWS

## **Affidavits of Support are more Important than ever:**

USCIS adjudicators will apply a complex totality of circumstances test that weighs the alien's age; health; family status; education and skills; and assets, resources, and financial status, taking into account a broad range of positive and negative factors.



- 
- USCIS notes in the final rule that it interprets "likely at any time" to mean that it is "more likely than not" that the individual at any time in the future will receive one or more public benefits as defined by the rule

# MAKE A CHAMPION OF YOUR CLIENT

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In arbitration matters in professional sports the player and the team will meet and the arbitrator will lay out all the things that are bad about the player. (EOIR or USCIS)

The player will rebut the argument with how many good things there are about him. (THE LEARNED COUNSEL FROM OKLAHOMA)

What's good about your client? Painting a house quickly is a skill, carpentry is a skill, management is a skill, and being debt free is a blessing. All things that might impress



# WAIVERS

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- LET'S FOCUS ON WHAT IS GOOD ABOUT OUR *ACTUAL CLIENTS*.
- *We represent some pretty awesome families and individuals.*
- Decorators, Party Planners, Friends, Religious are great words to use;
- Work on your own case, don't try the government's case.

# TOOK OUR JOBS!

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- At an interview for AOS your client is asked “did you work in the United States”?
- What is the response?
- Most who just don’t outright lie about the Social Security Number start a business.
- How do we handle that?
- Have a plan and develop a strategic answer on how your client handles everyday business.





# WHAT QUESTIONS IN AN AOS INTERVIEW MAKE YOUR STOMACH TURN?

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1. Do you admit to working without authorization in the United States?
2. Do you admit to being unlawfully present in the United States?
3. How many times have you entered the United States?
4. When is the last time you lawfully entered?

# INTERVIEWS

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- PREPARE YOUR CLIENT FOR THE HARD QUESTION WITH A HARD ANSWER
- *I did work without authorization because I do not want to rely on anyone else.*
- Proper preparation may turn the tide of a bad interview;
- *I do pay my taxes and the payroll taxes for seven employees.*

# THE BUSINESS OF BEING AN IMMIGRANT

Immigrants have started more than half (44 of 87) of America's startup companies valued at \$1 billion dollars or more and are key members of management or product development teams in over 70 percent (62 of 87) of these companies.

March 2016 National Foundation of American Policy, Policy Brief

by Stuart Anderson

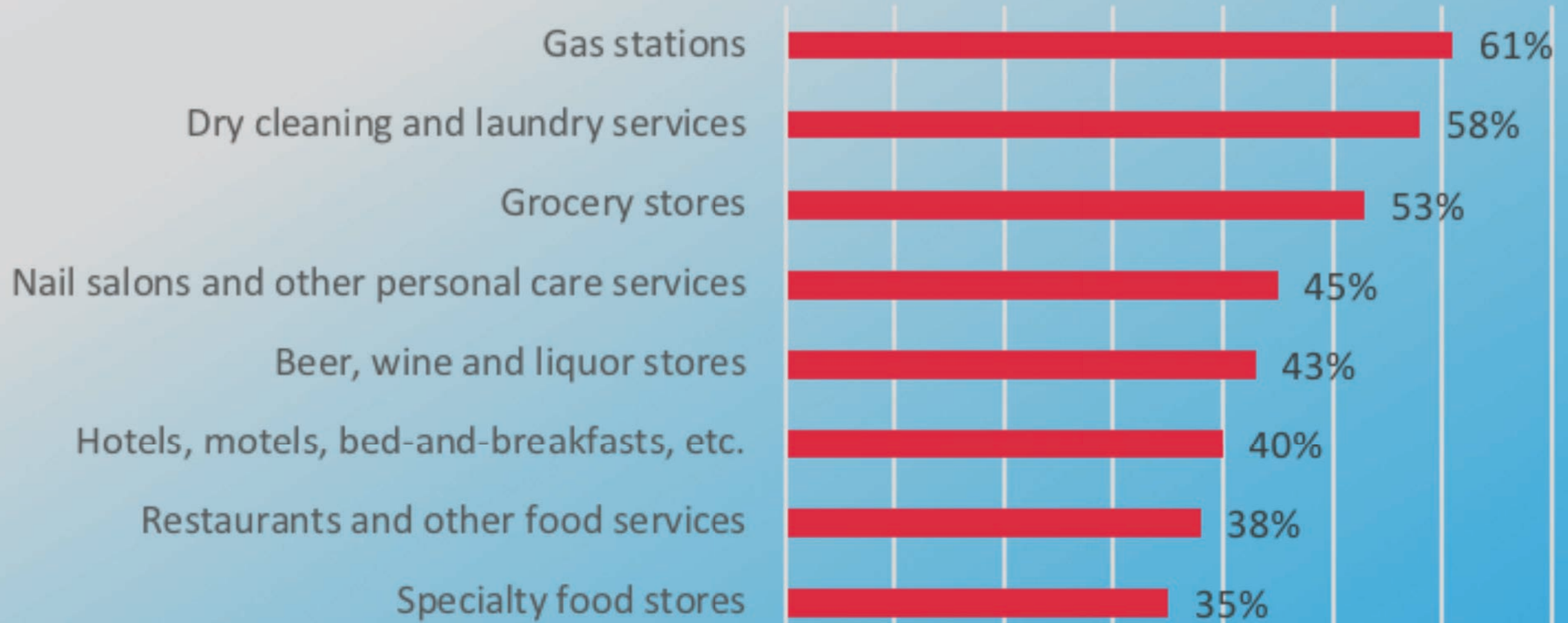


## WHAT CAUSES PROBLEMS:

- FEAR
- NECESSITY over NEGOTIATION
- NO VISION OF FUTURE
- PROCRASTINATION MENTALITY
- Undervaluing of work and of self



# Share of "Main Street" business owners who are immigrants



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## HOW DO YOU BELIEVE ATTORNEYS ARE PERCEIVED?

Expensive

Arrogant

Selfish

Rich

# TO IMMIGRANT CLIENTS YOU MAY BE MORE:

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- You are the most educated Person they have ever met;
- Experienced every type of case they could imagine
- Savior from the terrible strife
- LINE OF DEFENSE AND PROTECTOR





# SECTION 14

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- Negotiation. In the event that any claim, dispute, controversy, difference, disagreement, or grievance (of any and every kind of type) (“Dispute”) arising out of, connected with or relating in any way to this MSA cannot be resolved informally within fifteen (15) days after the Dispute arises, either Party may give written notice to the other Party requesting that a representative of Subcontractor’s senior management and Clear Creek’s senior management meet in an attempt to resolve the Dispute. Each such management representative shall have full authority to resolve the Dispute and shall meet at mutually agreeable time and place within thirty (30) days after receipt by the non-notifying Party of such notice, and thereafter as often as they deem reasonably necessary to exchange relevant information to attempt to resolve the Dispute. In no event shall this Section 14.a. be construed to limit either Party’s right to take any action under this MSA.
- b. Mediation. In the event such senior management representatives are not able to resolve the Dispute within thirty (30) days of receipt of the notice set forth in Section 14.a., then either Party may request a mandatory, non-binding mediation of the Dispute by providing written notice to the other party requesting such mediation, which shall be held in Oklahoma City, Oklahoma, and shall be conducted by a single mediator mutually selected by the Parties. If the Parties are unable to agree upon a mediator within ten (10) days after the date written notice of mediation is received, either Party may petition the Dallas Office of the American Arbitration Association for the appointment of a mediator, and the mediation, including the selection of the mediator, shall occur pursuant to the American Arbitration Association’s Construction Industry Arbitration Rules and Mediation Procedures then in effect. Mediation is an absolute condition precedent to arbitration and/or litigation, except (i) to the extent necessary to avoid statute of limitation issues or (ii) if another Dispute is already subject to arbitration or litigation pursuant to this Section 14.b.
- c. Arbitration. If the Dispute is not resolved by mediation within ninety (90) days after the date written notice of mediation is received (or as such other time as may be agreed in writing by the Parties), then the Parties agree that the Dispute shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgement on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
- d. Choice of Law. The rights and obligations related to the Work and/or arising under this MSA shall be governed by and construed in accordance with the laws of the state of Oklahoma, without reference to its conflicts of laws provisions.
- e. Continuation of Work. Notwithstanding any Dispute, it shall be the responsibility of the Subcontractor to continue to perform all of the Work, diligently and in a good and workmanlike manner in conformity with this MSA and/or Purchase Order. In no event shall the occurrence of any Dispute, negotiation, or litigation prevent or affect Clear Creek from exercising its rights under this MSA, at law or in equity, including Clear Creek’s right to terminate this MSA and/or Purchase Order.

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- e. Continuation of Work. Notwithstanding any Dispute, it shall be the responsibility of the Subcontractor to continue to perform all of the Work, diligently and in a good and workmanlike manner in conformity with this MSA and/or Purchase Order. In no event shall the occurrence of any Dispute, negotiation, or litigation prevent or affect Clear Creek from exercising its rights under this MSA, at law or in equity, including Clear Creek's right to terminate this MSA and/or Purchase Order.

# INTERLUDE

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DON'T LET YOUR CLIENT BUY A CAR FROM ANY BUY HERE PAY HERE DEALERSHIPS.

TIO CHUY will be less TIO and more taking your money with no recourse other than arbitration. Just mark out what you don't understand. IF they throw a fit, just leave.

Negotiate everything and advise clients to not spend over 10 minutes negotiating price. Create a client who is confident.













# WHAT ARE WE TALKING ABOUT?

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- Immigration Clients have a plethora of questions and problems that are interrelated.
  - Making Money
  - Raising Kids
  - Paying Bills (can be a challenge)
  - Owning property/Purchasing Assets
  - Sickness and Dying

# LISTEN TO THE CLIENT AND ASK QUESTIONS

## *ISSUE SPOTTING REVISITED*

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- IF they make money?
- Do they own a House?
- Who is paying them? Is it by contract?
- How ?
- Whose name is it under? How are you paying for it?
- Is it fair or are they getting taken advantage of?
- Are they owed money.

# MAJOR ISSUES

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## PROBLEMS

- Getting Permits
  - Where who and how?
  - Lots of information is needed on these permits, including DOB Addresses, Full names and insurance requirements

## NEGOTIATIONS

- Language Barrier
- Experience
- Trust

# MAJOR ISSUES

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## PROBLEMS

- Debt Recovery
  - Where who and how?
  - Afraid of blow back

# CONTRACT EXAMPLE

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## 18. SUSPENSION OF WORK

Contractor may at any time, by written notice to Subcontractor, suspend all or any portion of the Work to be performed hereunder. Upon receipt of such notice, Subcontractor shall immediately suspend such portion of the work take steps as necessary to mitigate the adverse effect of such suspension. **In no event shall Contractor be liable for any loss of anticipated profits or damages incurred by reason of such suspension.**

## 19. TERMINATION FOR CONVENIENCE

Contractor and/or owner may at any time for its convenience and without cause terminate all or any portion of the work to be performed hereunder. Upon notice of terminations, Subcontractor shall immediately stop all Work so terminated and shall take immediate steps **(1) to protect all Work in progress and (2) to mitigate the cost to owner and contractor of such termination.**



# ANOTHER EXAMPLE:

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18. PRICE TO BE PAID. The Contractor agrees to pay to the Subcontractor for the satisfactory performance of the Work (a) the sum of Five Hundred Thirty Five Thousand and no/100 Dollars (\$ 535,000.00 ),

Contractor (Rogers Construction) will pay monthly rent for housing to the landlord, this amount will be deducted in full prior to paying invoicing from the Subcontractor.

Retainage on this subcontract will be 5 % as specified in the Contract Documents.

19. METHOD OF PAYMENT. As the Work progresses, the Contractor shall make weekly payments to the Subcontractor as follows:

- \$20,000.00 at the start of work
- Weekly progress payments thereafter – Invoices to be submitted on Wednesdays with payments to be made on Fridays.

# BENEFITS WILL CAUSE PROBLEMS; WE WILL HAVE TO MAKE DECISIONS THAT OUR VERY SERIOUS

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- Workers' Compensation Benefits are available for anyone who works in the state of Oklahoma for someone else.
  - Not available for subcontractors
- Soonercare Benefits
  - Necessary Benefit
- Employment Benefits are not (Minimum Wage Protection and Wrongful Termination)
  - Only available to those who have the right to work

# WHAT'S THIS MEAN FOR THE ATTORNEY'S BOTTOM LINE

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- Failing to listen and explore every aspect of a client's life and concerns is costing everyone;
- If its important, most clients will strive to solve it;
- Build the trust you deserve to have the guts to ask for big money \$\$\$\$.
- You do not have to be an expert in an area of law to solve a small problem
  - Value your time for actual work
  - Seek help or referral networks for particular problems
- Stop overvaluing your time in initial interviews
  - Really figure out where your client can be helped



**QUESTIONS?**

**DUNN &  
HERNANDEZ**

**(405) 609-6601**

**Lambert Dunn and his wife Maria Fernanda Dunn reside in Oklahoma City. Mr. Dunn founded his firm in 2005 to help families and individuals who have suffered life changing problems, such as severe injury or death. As the years passed it was apparent that his community needed simple practical legal advice in other areas such as business planning and contractual advice or sometimes just someone to explain the process to someone whose family member died.**

**Mr. Dunn has years of experience in Workers' Compensation law, Civil Rights Violations, Injury Law, Insurance Bad faith, Immigration Law, and the specific legal problems faced by our immigrant community, with experience in multiple jury trials. Lambert Dunn and Associates' clients are almost exclusively immigrant and a majority are undocumented.**

**Mr. Dunn is a founding member of the OK Bar Immigration Section, long time member of the AILA, former roughneck, former fry cook, former auto mechanic, former carpenter, OCDLA Member, The Iron Butt Motorcycle Association Member, 25-year member of The LongRider Motorcycle Club, and a 19-year member of Holy Angel's Catholic Church.**

## Step-Up Your Immigration Law Practice - CLE

### Panel Discussion Topics:

1. Have you had to make changes to your law practice given all the recent changes in the law? (i.e. have you had to change billing, including RFE in prices, clearer disclaimers in representation agreements)
2. What do you think the Supreme Court is going to do with DACA? How are you advising clients to this point?
3. What advice are you giving clients regarding the new public charge rules and the new policy requiring health insurance?
4. Tips and advice for negotiating state court plea deals for green card holders or clients without status.
5. What, in your opinion, has been the single biggest change to immigration law under the Trump administration?
6. What single piece of advice or information would you give someone who is considering going into immigration law?
7. Do you think that we, as immigration attorneys, can better serve immigrant communities? If so, how?
8. If you could make just one change to the current immigration system, what would it be?