

New Regulations Affecting State Judicial Processing of Emigrating Intercountry Adoption Cases Take Effect April 1, 2008

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On April 1, 2008, the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (the Convention) entered into force for the United States. With this milestone, intercountry adoptions between our country and more than 70 Convention countries with whom the United States will have a treaty relationship must meet new requirements aimed to ensure that such adoptions take place in the best interests of children.¹ A list of all Convention countries can be found on the Hague Permanent Bureau website, www.hcch.net. A similar list will be placed on the Department of State website, www.travel.state.gov, if there comes a time when the United States objects to another Convention country's accession to the treaty.

The Intercountry Adoption Act (IAA), the U.S. implementing legislation for the Convention, names the U.S. Department of State (the Department) as the U.S. Central Authority under the Convention and gives the Department primary responsibility for implementing it. In accordance with the IAA, the Department has issued new regulatory requirements for intercountry adoption—22 CFR parts 96, 97, 98 and 99, and 22 CFR 42.24. These new regulations affect State adoption court practice as well as change certain other intercountry adoption procedures affecting legal practitioners, prospective adoptive parents, and intercountry adoption agencies.

Emigrating Convention Adoption Cases

State adoption courts will need to refer to new rules and regulations when considering a case involving the intercountry adoption of a U.S. child who is emigrating from the U.S. to a Convention country (an "outgoing" case).²

1. Threshold Issue: Identifying an "Outgoing" Convention Case

As a threshold matter, the court will need to determine whether the case is covered by the Convention. To do so, the court must find that all of the following are true:

- a) The child is resident in the United States (IAA § 3(10));
- b) The prospective adoptive parent(s) is(are) resident in another Convention country, to which the child has moved or will move for the purposes of adoption (IAA § 3(10)); and
- c) The Convention applies to the case because the case was initiated after the entry into force of the Convention for the United States on April 1, 2008 (IAA § 505(b)).

The new regulations do not address the first component—residence of the child.

The second component—the residence of the prospective adoptive parent(s)—will be evaluated by the receiving country (i.e., the country to which the child will be immigrating) as a necessary step prior to the State court's adoption proceedings. This evaluation is central to the receiving country's approval of the proposed adoption and its determination that the child will be able to enter and reside in the receiving country—two of the prerequisites integral to the State adoption court's issuance of an order finalizing the adoption or granting legal custody of the child. (See IAA § 303(b) (incorporating by reference IAA § 303(a)(2)); 22 CFR §§ 97.3(e)-(f) (2007).

Finally, the third component—whether the case was initiated after the Convention entered into force for the United States—is governed by the IAA's transition rule, IAA § 505(b), and convention article 41. Under the transition rule, the Convention *does not* apply to an outgo-

ing Convention case if the prospective adoptive parent(s) "initiated the adoption process in their country of residence with the filing of an appropriate application" before April 1, 2008. Similarly, the Convention provides that it does apply to every case where an application has been received by the central authority of the prospective adoptive parent(s)' country of residence after April 1, 2008.

The Department considers the phrase "initiated the adoption process in their country of residence with the filing of an appropriate application" to mean a formal, written effort undertaken prior to April 1, 2008, to initiate the adoption process in the prospective adoptive parent(s)' country of residence filed with (received by) an authorized entity in that country.

Such formal, written efforts that the Department is aware of would generally consist of a written application or request to start the adoption process filed with the foreign Central Authority, the responsible government office, or any other entity delegated the authority to receive such applications/requests. This could include, depending on the legal structure of the country at issue, an application for screening of prospective adoptive parent eligibility to adopt filed with the appropriate entity authorized to conduct home studies.

2. New Requirements for Court Findings

The IAA and 22 CFR Part 97, *Issuance of Hague Adoption Certificates and Hague Custody Declarations in Hague Convention Adoption Cases*, set forth new considerations for State adoption court findings in outgoing cases. See IAA § 303(b) and 22 CFR 97.2 - 97.3:

- **Conditions on State court orders** are set forth in the IAA, as noted above. Section 303(b) states that an order finalizing the adoption or granting legal custody of the child shall not be entered unless the court has determined that the adoptive placement is in the best interests of the child and verified: 1) documentation that a child background study has been completed; 2) documentation that the adoption service provider has made reasonable efforts to place the child in the United States and has been unable to do so; 3) documentation of the U.S. authorized entity's determination that the adoptive placement is in the best interest of the child; 4) the home study on the prospective adoptive parents (background report); 5) the declaration by the Central Authority (or other competent authority) of the receiving country that the child will be permitted to enter and reside permanently in the receiving country; 6) the declaration by the Central Authority (or other competent authority) of the receiving country that the Central Authority consents to the adoption, if necessary; and 7) satisfactory evidence that Articles 4 and 15 through 21 of the Convention³ have been met.
- **Specific State adoption court findings** are required as part of the application for a Hague Adoption Certificate (HAC) or Hague Custody Declaration (HCD) from the Department of State. (See 22 CFR Part 97.) The HAC or HCD:
 - a) Certifies that the adoption or grant of custody for purposes of adoption was performed in compliance with the Convention and the IAA; and
 - b) Obligates other Convention countries to recognize the adoption or grant of custody for purposes of adoption.
- To provide the findings necessary for issuance of an HAC or HCD to the prospective adoptive parent(s),⁴ **the State adoption court**

needs to verify compliance with specific requirements in the following areas, as outlined in 22 CFR 97.3(a)-(k):

- a) Preparation of child background study;
 - b) Transmission of child data;
 - c) Reasonable efforts to find domestic placement;
 - d) Preparation and transmission of home study;
 - e) Authorization to enter;
 - f) Consent by foreign authorized entity;
 - g) Counseling and consent of birthparent(s) or guardians;
 - h) Child counseling and consent;
 - i) Authorized entity duties;
 - j) Contacts; and
 - k) Improper financial gain.
- **To meet the requirements for an HAC or an HCD, the State adoption court's findings should thus include the following:**
 - a) That the adoptive placement is in the child's best interest;
 - b) Verification that substantive regulatory requirements set forth in 22 CFR 97.3(a)-(k) have been met;⁵ and
 - c) The grant of adoption or custody for purposes of adoption.

Among the new substantive legal requirements listed above that a State adoption court needs to evaluate and verify is the new requirement in Section 303(a)(1)(B) of the IAA (and reflected in 22 CFR 97.3(c)) that "reasonable efforts were made to actively recruit and make a diligent search for prospective adoptive parent(s) to adopt the child in the United States" and a timely adoptive placement in the United States was not found. Section 97.3(a) defines "reasonable efforts" according to 22 CFR 96.54, which outlines the measures that demonstrate reasonable efforts but also acknowledges that reasonable efforts may mean no efforts, when in the best interests of the child. *See 22 CFR 96.54(a) (1-4), 96.54(b)*. Section 22 CFR 96.54(a) also provides that the domestic adoptive parent recruiting requirements do not apply: 1) in the case of adoption by relatives; and 2) in the case in which the birth parent(s) have identified specific prospective adoptive parent(s);⁶ or 3) in other special circumstances accepted by the State court with jurisdiction over the case.

Requirements Regarding Adoption Service Providers

Section 201 of the IAA generally requires that all adoption service providers be accredited or approved in order to provide adoption services in connection with an intercountry adoption. Accordingly, the Department promulgated accreditation regulations (22 CFR Part 96) to ensure that U.S. adoption service providers perform their duties in a manner consistent with the Convention and the IAA. Once a State adoption court determines that the case at hand is a Convention case, the court should check that only the following authorized adoption services providers offered or provided adoption services⁷ in the United States in the case:

1. An accredited agency;
2. A temporarily accredited agency;
3. An approved person;
4. A supervised provider (a provider who is not accredited or approved but is supervised by one who is); or
5. An exempted provider (a provider who performs a background study on a child but is not currently providing and has not previously provided any other adoption service in the case). (*See IAA § 201, 22 CFR §§ 96.12 - 96.15*)

As of February 29, 2008, the Department will maintain a list of accredited, temporarily accredited and approved adoption service providers at www.travel.state.gov.

In the event that the State adoption court determines that an adoption service(s) has been performed in a Convention adoption case by an adoption service provider other than one authorized to provide the adoption service(s), the case should not go forward until an accredited agency, temporarily accredited agency, approved person, supervised provider, or exempted provider is identified to provide adoption services in the case.

The U.S. Department of State stands ready to help State adoption courts as they navigate these new requirements. More detailed information is available in our Web-Guide on outgoing Convention cases for State adoption court judges posted on the Department's website, www.travel.state.gov. Please visit the Department's website for more information on the Convention, related laws and regulations, frequently asked questions, and other technical assistance. In addition, feel free to contact the Office of Children's Issues at AdoptionUSCA@state.gov with any questions or concerns.

END NOTES

¹ The Permanent Bureau of the Hague Conference on Private International Law maintains a current list of the more than 70 Convention member countries on its website, http://www.hcch.net/index_en.php.

² While adoption cases involving the immigration of a child to the United States (incoming cases) will also need to meet new requirements, this article concentrates on the requirements affecting outgoing cases.

³ In summary, Articles 4 and 15 through 21 of the Convention require:

1) Article 4: That the competent authorities of the country of origin have established that the child is adoptable; have determined, after due consideration of opportunities for adoption in the country of origin, that an intercountry adoption is in the child's best interests; have ensured that the proper consents have been freely given and obtained from the persons, institutions and authorities whose consent is necessary for adoption; and, depending upon the age and maturity of the child, that the child has been counseled, due consideration granted to the child's wishes and opinions, and that the child has confirmed in a written statement that he/she has not been coerced or induced by payment or compensation of any kind to consent to the adoption.

2) Article 15: That if the Central Authority of the receiving country is satisfied that the applicants are eligible and suitable to adopt, it shall prepare a report on the applicants and transmit that report to the Central Authority of the country of origin.

3) Article 16: That if the Central Authority of the country of origin is satisfied that the child is adoptable, it shall prepare a report on the child that gives due consideration to the child's upbringing and ethnic, religious and cultural background, and ensures that consents have been obtained according to Article 4; determine that the placement is in the best interests of the child; and transmit the report to the Central Authority of the receiving country.

4) Article 17: That a decision in the country of origin to place the child may only occur if the Central Authority of the country of origin has ensured that the prospective adoptive parents agree, the Central Authority of the receiving country has approved of the decision, both Central Authorities have agreed that the adoption may proceed, and that the requirements of Article 5 have been met.

5) Article 18: That the two Central Authorities shall take all necessary steps to obtain permission for the child to leave the country of origin and to enter and reside permanently in the receiving country.

6) Article 19: That the child may only be transferred if the requirements of Article 17 have been satisfied; that both Central Authorities shall ensure that the transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents; and that if the transfer does not take place, the reports referred to in Articles 15 and 16 are returned to the authorities who forwarded them.

7) Article 20: That the Central Authorities shall keep each other informed about the adoption process and measures taken to complete it, as well as the progress of the placement if a probationary period is required.

8) Article 21: That the receiving country shall take the measures necessary to protect a child if the child was transferred prior to an adoption and the Central Authority of the receiving country determines that continued placement with the prospective adoptive parents is not in the best interests of the child; that these measures shall include withdrawing the child from the prospective adoptive parents and arranging for temporary care, arranging without delay a new placement for the child in consultation with the Central Authority of the country of origin (though not an adoption unless the country of origin Central Authority has approved of the new prospective adoptive parents), and arranging the return of the child as a measure of last resort; and that the child, if of an appropriate age and maturity, be consulted and, where appropriate, his or her consent obtained in relation to measures described in this Article.

⁴ However, in certain circumstances individuals who will not be adoptive parents of the child may be able to obtain an HAC or HCD.

⁵ If an adoption court has not verified that a particular requirement has been met, authenticated documentation that the requirement has been met may be submitted. 22 CFR 97.2(b)(3).

⁶ The Department has interpreted this requirement to mean that birth parent(s) are allowed to identify specific prospective adoptive parent(s) prior to the birth of the child so long as the decision was made without the assistance of an adoption service provider. If an adoption service provider assists birth parent(s) in identifying prospective adoptive parents, the exception for birth parent identification does not apply.

⁷ The IAA defines adoption services as:

- 1) Identifying a child for adoption and arranging an adoption;
- 2) Securing the necessary consent to termination of parental rights and to adoption;
- 3) Performing a home study and reporting on prospective adoptive parents or a background study and report on a child;
- 4) Making non-judicial determinations of a child's best interests and of the appropriateness of an adoptive placement;
- 5) Monitoring a case after a child has been placed with prospective adoptive parents until final adoption; and
- 6) Assuming custody of a child and providing childcare or any other social service, when necessary, because of a disruption pending alternative placement. IAA § 14902(3).