



November 20, 2017

PM 602-0095

## Policy Memorandum

SUBJECT: *Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries*

### Purpose

On January 3, 2014, USCIS published interim guidance entitled “Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries.” This guidance established criteria to determine whether the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Adoption Convention”) applies to the adoption in the United States of a child from another Hague Adoption Convention country.<sup>1</sup> This policy memorandum (PM) adopts the interim policy guidance as a final USCIS policy memorandum with certain changes. These changes were made after: (1) reviewing public comments received during the comment period for the interim guidance, and (2) applying the guidance to USCIS adjudications. Specifically, this final PM:

- Extends the guidance to children who are paroled into the United States based on humanitarian or significant public benefit reasons under section 212(d)(5) of the Immigration and Nationality Act (INA);
- Clarifies the applicable timeframes and what evidence can satisfy the intent, residence and notice criteria;
- Explains what criteria apply when an adoption took place before February 3, 2014; and
- Confirms under what circumstances an amended adoption order is required.

This final PM also supplements the USCIS guidance entitled *Intercountry adoption under the Hague Adoption Convention and the USCIS Hague Adoption Convention rule at 8 CFR 204, 213a, and 322*, issued on October 31, 2008; AFM Update AD09-26.

This PM does not supersede any regulation or law and does not, nor is it intended to, change any state or country-specific adoption laws or requirements. This PM revises Chapter 21.4(d)(5)(G) of the Adjudicator’s Field Manual (AFM); AFM Update AD13-11.

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<sup>1</sup> AFM AD13-11.

## Scope

Unless specifically exempted, this PM applies to and binds all USCIS employees adjudicating an immediate relative petition filed for an adopted child from a Hague Convention country who is physically present in the United States.

## Authorities

- INA section 101(b)(1)(E)
- Title 8 Code of Federal Regulations (CFR) 204.2(d)(2)(vii)
- 8 CFR 204.303

## Background

The Hague Adoption Convention entered into force for the United States on April 1, 2008.<sup>2</sup> The Hague Adoption Convention applies to the adoption of a child who is habitually resident in one Convention country (the “country of origin” or “COO”<sup>3</sup>) by someone habitually resident in another Convention country (the “receiving country”), and who “has been, is being, or is to be moved” from the COO to the receiving country, either after the adoption, or for the purposes of adoption.<sup>4</sup> Under the Intercountry Adoption Act of 2000, at least one of the adopting parents must be a U.S. citizen who is habitually resident in the United States for the Hague Adoption Convention to apply to incoming adoptions to the United States.<sup>5</sup>

U.S. regulations state that if a child is a citizen of a Hague Adoption Convention country (other than the United States) and is present in the United States based on an adoption, the child should generally be deemed to be habitually resident in the child’s country of citizenship, even though the child is already in the United States.<sup>6</sup> Therefore, U.S. citizen petitioners generally must adopt the child by following the Hague Adoption Convention process for the child to acquire lawful permanent residence based on the adoption.<sup>7</sup>

A child is generally deemed to be habitually resident in a Hague Adoption Convention country if they are a citizen of that Convention country. A child’s country of citizenship is usually the child’s COO. However, a child living outside the country of the child’s citizenship may be deemed habitually resident in the child’s country of actual residence based on a determination by

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<sup>2</sup> FR 71730 (December 18, 2007).

<sup>3</sup> The term country of origin or “COO” originates from the text of the Hague Adoption Convention, where it appears as “State of origin.”

<sup>4</sup> Hague Adoption Convention, Article 2(1).

<sup>5</sup> Pub. L. No. 106-279.

<sup>6</sup> See 8 CFR 204.2(d)(2)(vii)(F) and 204.303(b).

<sup>7</sup> 8 CFR 204.309(b)(4) specifically provides that a Form I-800 can be filed, even if the child is in the United States, if the other Hague Adoption Convention country is willing to complete the Hague Adoption Convention process with respect to the child.

the Central Authority<sup>8</sup> or another competent authority<sup>9</sup> of the country where the child actually physically resides.<sup>10</sup>

USCIS is a competent authority that can make a factual determination of habitual residence when a child is present in the United States. Accordingly, USCIS may determine a child living in the United States is habitually resident in the United States. If USCIS makes such a determination, the Hague Adoption Convention would not apply to the adoption of the child.

Accordingly, USCIS' October 31, 2008 memorandum noted that if "there is a sufficient basis for saying that the Hague Adoption Convention and the implementing regulations no longer apply to a child who came to the United States from another Hague Adoption Convention country, then USCIS can conclude that 8 CFR 204.2(d)(2)(vii)(F) does not preclude adjustment of status."<sup>11</sup>

Therefore, USCIS must generally know whether the Central Authority of the COO still considers the child habitually resident in the COO before USCIS can determine if a child is a habitual resident of the United States. However, in some instances, the Central Authority in the COO either cannot or will not take a position concerning whether the child is considered habitually resident in the COO. Thus, the petitioning adoptive parent(s) may be unable to establish either that the Hague Adoption Convention did not apply to the adoption or that the adoption was completed in accordance with the Hague Adoption Convention process.

This final PM provides additional guidance to USCIS officers regarding when USCIS can find that the Hague Adoption Convention does not apply to the adoption in the United States of a child whose COO is another Hague Adoption Convention country. Specifically, USCIS can find that the Hague Adoption Convention does not apply without an express statement from the COO's Central Authority regarding a child's habitual residence if the record of the adoption proceeding affirmatively shows that the petitioner(s) gave the Central Authority at least 120 days' written notice of the date, time, and place of the adoption proceeding and met other criteria outlined in this PM.

## **Policy**

It remains USCIS policy that 8 CFR 204.2(d)(2)(vii)(F) does not bar USCIS from approving a Form I-130, Petition for Alien Relative, if the adoption order (or amended order) expressly states that the Central Authority in the COO advised the U.S. court with jurisdiction over the adoption that it:

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<sup>8</sup> "Central authority means the entity designated as such under Article 6(1) of the Convention by any Convention country, or, in the case of the United States, the United States Department of State." *See* 22 CFR 96.2.

<sup>9</sup> "Competent authority means a court of governmental authority of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption." *See* 22 CFR 96.2

<sup>10</sup> *See* 8 CFR 204.303. For more information about determining the habitual residence of the petitioners, see the *Intercountry adoption under the Hague Adoption Convention and the USCIS Hague Adoption Convention rule at 8 CFR 204, 213a, and 322 (USCIS October 31, 2008 Memo)*, issued on October 31, 2008; AFM Update AD09-26.

<sup>11</sup> *See* AFM 21.4(d)(5)(F).

- Is aware of the child's presence in the United States and of the proposed adoption, and
- Has determined that the child is not habitually resident in the COO.

In these cases, a written statement from the Central Authority must accompany the Form I-130 and the adoption order (or amended order).

USCIS will deny a Form I-130 petition filed for a child in the United States if the COO's Central Authority advises the U.S. government, the petitioner, or the U.S. adoption court that it considers a child habitually resident in the COO, despite the child's presence in the United States. If the COO's Central Authority considers the child habitually resident in the COO, the petitioner(s) must follow the DHS regulations implementing the Hague Adoption Convention (i.e., the Form I-800A and Form I-800 Hague process).

However, there may be cases where the petitioner cannot obtain a written statement regarding the child's habitual residence from the COO's Central Authority 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.

In these situations, USCIS may approve a Form I-130 if:

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
3. Any adoption decree issued after February 3, 2014,<sup>12</sup> confirms that the COO Central Authority was notified of the adoption proceeding in a manner satisfactory to the court and that the COO's 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*).

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<sup>12</sup> If the petitioner was unable to obtain a statement from the Central Authority in the appropriate COO addressing the child's habitual residence, the interim PM stated the notice criteria applied to adoption decrees issued one month after the publication date – therefore, the notice criteria applies to adoption orders issued on or after February 3, 2014.

Language in the court order alone is not sufficient to establish that the Hague Adoption Convention does not apply to a particular case. Although an adoption order issued by a court in the United States may contain language that the child was not habitually resident in the COO or that the adoption is not governed by the Hague Adoption Convention, such determinations are made solely by USCIS when adjudicating the Form I-130. USCIS will review each Form I-130 filed under this guidance on a case-by-case basis and based on the totality of the evidence.

In summary, USCIS can determine that the Hague Adoption Convention did not apply to an adoption and may approve a Form I-130 if the petitioner either:

- Obtains a statement from the COO's Central Authority stating the child is not habitually resident in the COO and the statement is incorporated into the adoption order (or amended adoption order) submitted to USCIS;<sup>13</sup> *or*
- Provides evidence that:
  - He or she tried to obtain a habitual residence statement from the COO's Central Authority but could not obtain one within 120 days, *or*
  - The COO's Central Authority has a policy of not issuing statements of habitual residence, as confirmed by the Department of State.

USCIS will apply the intent, residence, and notice criteria from this memorandum on a case-by-case basis to determine whether the beneficiary child is considered habitually resident in the United States and whether USCIS may approve the Form I-130 petition.

If USCIS approves a Form I-130 under this guidance, the child will still need to meet the requirements for adjustment of status to obtain lawful permanent resident status. Certain statutory limitations could apply. Therefore, if a child entered the United States without inspection, was admitted in certain visa categories, or is subject to other inadmissibility grounds, the child may need to depart the United States to obtain an immigrant visa that he or she could then use to seek admission to the United States as a lawful permanent resident.

## **Implementation**

The AFM is revised as follows (AFM Update AD13-11):

- ☞ 1. In Chapter 21.4, revised narrative is added to section 21.4(d)(5)(G), and reads as follows:

In cases where petitioners do not obtain a written statement from the Central Authority of the child's COO until after the adoption is finalized, petitioners must submit an amended order that

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<sup>13</sup> USCIS October 31, 2008 Memo.

contains the required language, as well as a copy of the COO's Central Authority's written statement.

However, there may be cases where the petitioner is unable to obtain a written statement regarding the child's habitual residence from the COO's Central Authority, because:

- The child's COO does not issue statements concerning a child's 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.

Note: A current list of Central Authorities for the Hague Adoption Convention can be found on the Hague Conference website: <https://www.hcch.net>.

In these situations, USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130, Petition for Alien Relative, if:

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 resided in the United States for a substantial period of time, establishing compelling ties in the United States (*actual residence criteria*); and
3. Any adoption decree issued after February 3, 2014,<sup>14</sup> confirms that the COO Central Authority was notified of the adoption or amended adoption proceedings in a manner satisfactory to the court and that the COO 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*).

### **General Notes**

- USCIS will review each Form I-130 filed under this guidance on a case-by-case basis and based on the totality of the evidence.
- Language in the adoption order alone is not sufficient to establish that the Hague Adoption Convention does not apply to a particular case. Although an adoption order issued by a court in the United States may contain language that the child was not habitually resident in the COO or that the adoption is not governed by the Hague

Adoption Convention, such determinations are made solely by USCIS when adjudicating the Form I-130.

- USCIS will deny any Form I-130 petition filed for a child in the United States if the COO's Central Authority advises the U.S. government, the petitioner, or the U.S. court with jurisdiction over the adoption that it considers a child to remain habitually resident in the COO, despite the child's presence in the United States. If the Central Authority of the COO states that they consider the child to be habitually resident in the COO, the petitioner(s) must follow the DHS regulations implementing the Hague Adoption Convention (i.e., the Form I-800A and Form I-800 Hague process).
- If USCIS approves a Form I-130 under this guidance, the child will still need to meet the requirements for adjustment of status to obtain lawful permanent resident status. Certain statutory limitations could apply. Therefore, if a child entered the United States without inspection, was admitted in certain visa categories, or is subject to other grounds of inadmissibility, the child may have to depart the United States to obtain an immigrant visa that he or she could then use to seek admission to the United States as a lawful permanent resident.

When adjudicating Form I-130 petitions based on an adoption in the United States by U.S. citizen parent(s) of a child from another Hague Adoption Convention country where the petitioner is unable to obtain a statement concerning the child's habitual residence from the Central Authority of the child's COO, USCIS will consider the following criteria:

### **1. Intent Criteria: Entry for Purposes Other than Adoption**

USCIS will review the case to determine whether the child entered the U.S. for adoption purposes.

#### Evidence for Intent Criteria

- Affidavit, made under penalty of perjury, from the petitioning adoptive parent(s), which should include a:
  - Description of child's circumstances prior to child's entry into the United States (e.g., Where did the child live and/or go to school? Who cared for the child? What events led to the child's travel to the United States? Reason for the child's travel to the United States? etc.);
  - List of individuals who have cared for the child since his or her entry into the United States and the relationship to the child;
  - Description of any contact the adoptive parents had with the child, the child's birth parents, or any adoption or child welfare agency or nongovernmental organization (in the United States or abroad) related to the child that took place:

- (a) Before the child came to the United States; and/or
- (b) After the child's arrival but before a court placed the child with the petitioning adoptive parent(s); *and*
  - Adoptive parents' declaration that on the date the child entered the United States, the adoptive parent(s) did not intend to adopt the child or circumvent the Hague Adoption Convention procedures.
- Evidence establishing the timeline and course of events that led to the child's availability for adoption by the adoptive parents, which may include one or more of the following:
  - An order from a court with jurisdiction over the child if the order includes express findings related to the child's purpose for entering the United States, such as a finding that the child did not enter the United States for the purpose of adoption. (Note: This information in a court order does not in itself indicate that USCIS will determine that the child is no longer habitually resident in the COO.)
  - Addresses where the birth parents have resided since the child's date of birth (if known), and any time periods the birth parents resided with the child.
- Any other evidence to support the statements made in the affidavit (such as informal consent documentation) or to document that the adoptive parent(s) did not intend to adopt the child when he or she entered the United States.
- Method of arrival, as indicated in visa records or other government system checks. Specifically, any records related to the child's stated purpose of travel to the United States or whether the child had any intent to immigrate.
- Evidence that the child was a ward of a U.S. state or state court prior to the adoption. In such cases, the evidence should establish that the child was in state care due to the child's bona fide need for state managed care and was not abandoned in order for the petitioner to adopt the child.
- Evidence of birth parent's inability to provide proper care for the child.
- Evidence to establish one or both birth parents are deceased.
- Evidence to establish any living birth parents freely consented to the proposed adoption *or* the birth parents' parental rights were fully and properly terminated.
- Any other evidence to establish that entry into the United States was for purposes other than adoption.



The following are examples of adverse factors that may be considered in determining if the child entered the United States for the purpose of adoption. This is a non-exhaustive list:

- A prior adoption of the child in the COO by the adoptive parent(s) in the United States. (This is a heavily weighted adverse factor.)
- Prior contact between the adoptive parent(s) and the child. (This could be an adverse factor if the contact was related to the adoption. USCIS will consider present and prior family relationships when reviewing the intent criteria. Prior contact between adoptive parent(s) and the child if the child is a relative may not be an adverse factor, but the case will be reviewed based on the totality of the evidence.)
- Any evidence that suggests that the entry was for the purpose of adoption.

## **2. Actual Residence Criteria: Compelling Ties for a Substantial Period of Time**

If the child was physically present in the United States for two years or more before the adoption, USCIS will presume that a child has actually and physically resided in the United States for a substantial period of time, establishing compelling ties in the United States prior to the U.S. domestic adoption. However, if the child has been present in the United States for less than two years, adjudicators must consider the length of time that the child has spent in the United States before the adoption and supporting evidence establishing the child's actual residence and compelling ties in the United States before the adoption.

### Evidence for Actual Residence Criteria

- Depending on the child's age, documentation from the time period before the adoption may include, but is not limited to, the following:
  - Evidence of ongoing medical care in the United States;
  - Statement from the petitioners explaining the child's social interactions, including family and peer relationships;
  - School records;
  - Registration for extra-curricular activities;
  - Affidavits from knowledgeable individuals (such as the child's doctor or teacher, day care provider, landlord, or neighbors) attesting to the child's actual residence in the United States; and/or
  - Evidence that the child's birth parent(s), guardian, or caretaker resided in the United States.

- An order from a court with jurisdiction over the child if that order includes express findings that the child actually resided in the United States for a substantial period of time or had compelling ties in the United States before the adoption. (Note: This information in a court order does not in itself indicate that USCIS will determine that the child is no longer habitually resident in the COO.)
- Evidence that the child was a ward of the state or court before the adoption.

If there is evidence that the child lived outside of the United States shortly before the adoption, it may be considered as an adverse factor.

### **3. Notice Criteria: Notification from the Central Authority of the Child's Country of Origin**

The notice criteria are required in **any case** where the adoption took place on or after February 3, 2014. (Note: USCIS will not apply the notice criteria or require an amended adoption order if the adoption occurred before February 3, 2014. USCIS will only apply the intent and residence criteria.) Even if the intent criteria and actual residence criteria are met, the notice criteria must also be met in order for USCIS to make a determination that the Hague Adoption Convention does not apply.

If the petitioner cannot obtain a written statement addressing a child's habitual residence from the Central Authority of the child's COO in 120 days, the petitioner still must notify the Central Authority of the adoption in a manner satisfactory to the court. The Central Authority then has an additional 120 days to object to the adoption.

#### Evidence for Notice Criteria

- Copy of the notice provided to the Central Authority of the child's COO informing it of the pending adoption and providing the Central Authority with 120 days to object.
- Any and all responses received from the COO Central Authority.
- If the Central Authority of the child's COO does not reply to the notice, an adoption order (or amended adoption order) containing language regarding:
  - The petitioner's request for a statement of habitual residence (if applicable);
  - A written indication from the court indicating the Central Authority did not respond to the court notice; and

- The court's confirmation as noted in the court order that the court required the petitioner(s) and their representatives (if any) to provide all correspondence from the Central Authority to the court, even responses stating the child is considered habitually resident in the COO.
- Copies of the request for a statement of habitual residence (if applicable) and court notice in the language used for official proceedings in the COO. Additionally, the petitioner must submit a certified English translation of each document and proof of service in the manner specified by the court.

### **Important Notes about Notice Criteria**

#### *Notification of the Central Authority*

- When notifying the Central Authority of the child's COO of the adoption proceedings, petitioners must follow the court's rules of procedure or the instructions in a specific order from the court. The notice must include a copy of the adoption petition or the motion for amended adoption order and must also clearly specify:
  - The name of the child, together with the place and date of birth of the child and the name(s) of the birth parent(s), if known;
  - The country of the child's nationality;
  - The name of the agency or individual that is the Central Authority in the COO;
  - The name of the adopting parents;
  - The date of the child's departure from the COO, if known;
  - The date of the child's arrival in the United States, if known; and
  - The court name and the date, time, and place of the court's hearing on the adoption petition or motion for amended adoption order.
- Additionally, the notice should indicate that the Central Authority should notify the court if the Central Authority:
  - Does not intend to object, or
  - Requires additional time beyond 120 days.

- The notification can take the form of a court order or another document authorized by the court. Notice by email or fax is generally not sufficient unless the court rules clearly allow email or fax notifications.
- Both the request for a statement addressing the child's habitual residence (if applicable) and the notice of the court proceeding must be provided directly to the Central Authority.
- Notice to another competent authority or an Embassy or consulate of the COO in the United States will generally not be sufficient. If a country has a different Central Authority for different parts of the country (such as a regional or state Central Authority), the petitioner must provide the request for a statement addressing the child's habitual residence and the notice of the court proceeding to the Central Authority for the place where the child last resided in that country.

A current list of Central Authorities for the Hague Adoption Convention can be found on the Hague Conference website: <https://www.hcch.net>.

*Timing of Request for Statement on Habitual Residence and Timing of Notice of Adoption*

If the Central Authority of the COO does not respond to an initial request for a statement of habitual residence within 120 days, the petitioner still must notify the Central Authority of the COO of the adoption in a manner satisfactory to the court per the notice criteria and provide an additional 120 days to object to the adoption. USCIS may deny adoption based Form I-130 petitions that do not include evidence that the petitioner cannot obtain a statement of habitual residence from the COO Central Authority or evidence that the COO Central Authority was given proper notice of the adoption.

- If permitted by the court, the petitioner can send both the request for a habitual residence statement and the notice of the court proceeding to the Central Authority at the same time.
- The petitioners do not need to give 120-day notice of the court hearing on the adoption proceeding more than once. If the Central Authority does not respond to the notice of the court hearing on the adoption proceeding within the 120-day period, there is no need to give additional notice, even if the court grants any continuances in the adoption proceedings and the adoption hearing takes place at a later date than what was stated in the notice provided to the Central Authority.
- If the Central Authority informs the court in writing that it does not consider the child to be habitually resident in that country before the expiration of the 120-day period, there is no need to delay the hearing for the 120-day period. USCIS will not apply the intent, residence, and notice criteria when adjudicating a Form I-130 if the requirements from the 2008 guidance are met.

*Amended Orders (if Applicable)*

- In cases where the petitioner does not obtain a written statement from the Central Authority of the child's COO until after the adoption is finalized, the petitioner must submit an amended order that contains the required language, as well as the Central Authority's written statement.
- For purposes of the age, custody, and joint residence requirements in INA section 101(b)(1)(E), the date of the adoption will be the date of the *original* order, not the amended order.
- If an order is amended after February 3, 2014, to meet the notice criteria, USCIS will deem the amended order not as the adoption order itself, but as a confirmation that the State court had jurisdiction to make the original order when the court did so. Therefore, notice and amended order may be issued after a child's 16<sup>th</sup> birthday as long as the original adoption order took place before the child's 16<sup>th</sup> birthday (or 18<sup>th</sup> birthday in the case of a qualifying sibling).
- USCIS may deny a Form I-130 if the adoption order submitted fails to comply with the notice criteria or does not incorporate the response from the Central Authority of the child's COO that addresses habitual residence.
- If the petitioner(s) cannot obtain an amended order within the standard Request for Evidence ("RFE") response period:
  - They should submit all other requested evidence by the RFE response date, including a copy of the written notice provided to the Central Authority of the COO.
  - They may request in writing that USCIS administratively close the Form I-130 petition for up to one year. This request may or may not be granted, depending on the circumstances of the case and the evidence provided.
  - If the petition is administratively closed, once the petitioners obtain the amended order, they may ask USCIS to reopen the case administratively without being required to file a Form I-1290B, Notice of Appeal or Motion.
  - If the petitioner does not request to reopen the case within one year, USCIS will deny the petition.

- ☞ 2. The AFM **Transmittal Memorandum** button is revised by adding a revised entry, in numerical order, to read:

AD13-11 [DATE]	<b>Chapter 21.4(d)(5)(G)</b>	Provides guidance on habitual residence for children adopted from Hague Convention Countries, physically present in the United States.
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**Use**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

**Contact Information**

Questions regarding this PM should be addressed through appropriate channels to the Refugee, Asylum, and International Operations Directorate or Field Operations Directorate.