

INTERIM MEMO FOR COMMENT

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Comment period ends: 01-17-2014

This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

December 23, 2013

PM 602-0095

Policy Memorandum

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

Purpose

This policy memorandum (PM) clarifies the criteria to follow in determining whether or not 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 a Hague Adoption Convention country other than the United States. This PM supplements the U.S. Citizenship and Immigration Services (USCIS) guidance entitled *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.

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 adds a new section to the Adjudicator’s Field Manual (AFM), Chapter 21.4(d)(5)(G); AFM Update AD13-11.

Scope

Unless specifically exempted herein, this PM applies to and binds all USCIS employees adjudicating immediate relative petitions filed on behalf of an adopted child from a Hague Convention Country, physically present in the United States.

Authorities

- Immigration and Nationality Act (INA) section 101(b)(1)(E)
- 8 CFR 204.2(d)(2)(vii)

Background

The Hague Adoption Convention entered into force for the United States on April 1, 2008. 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”) by someone habitually resident in another Convention country (the “Receiving Country”). As implemented by the United States through the Intercountry Adoption Act, Pub. L. No. 106-279, at least one of the adopting parents

must be a citizen of the United States, habitually resident in the United States, for the Hague Adoption Convention to apply.

The Hague Adoption Convention applies if the child “has been, is being or is to be moved” from the COO to the Receiving Country on the basis of the adoption. Hague Adoption Convention, Article 2(1). To guard against circumvention of the Hague Adoption Convention protections, Department of Homeland Security regulations, 8 CFR 204.2(d)(2)(vii)(F) and 204.303(b) provide that a child who is a citizen of a Hague Adoption Convention country, other than the United States, who is present in the United States based on an adoption, should generally be deemed to be habitually resident in the child’s country of citizenship, even if the child is already in the United States. Thus, petitioners generally must adopt the child by following the Hague Adoption Convention process in order for the child to acquire lawful permanent residence on the basis of the adoption.¹ However, under 8 CFR 204.303, 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 the Central Authority or another competent authority of the country in which the child has his or her actual residence.

Accordingly, the USCIS October 31, 2008 Memo noted 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.”

Specifically, AFM 21.4(d)(5)(F) advised USCIS officers that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130 if, prior to the adoption, the prospective adoptive parents (the petitioners in the Form I-130, Petition for Alien Relative, process) obtain a written statement from the Central Authority of the COO indicating that:

- a. It is aware of the child’s presence in the United States;
- b. It is aware of the proposed adoption; and
- c. It has determined that the child is not habitually resident in the COO.

Under that guidance, the adoption order that is submitted with the Form I-130 must expressly state that such written statement from the Central Authority in the child’s COO was filed with the court finalizing the adoption. Also, a copy of the written statement must be submitted with the Form I-130. In cases where the written statement from the Central Authority in the child’s COO is not obtained until after the adoption was finalized, petitioners would have to submit an amended order that contains the required language, as well as the written statement.

The guidance did not completely resolve the problem it was intended to resolve. In some instances, the Central Authority in the COO either cannot or will not take a position concerning whether the child is still habitually resident in the COO. Thus, the adoptive parent(s) may be unable to establish either that the Hague Adoption Convention did not apply to the adoption, or

¹ 8 CFR 204.309(b)(4) specifically provides that a Form I-800A and 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.

that the adoption was completed in accordance with the Hague Adoption Convention process. In light of this development, this PM provides additional guidance to USCIS officers on when USCIS can find that the Hague Adoption Convention does not apply to the adoption in the United States of a child, who is a citizen of another Hague Adoption Convention country.

Policy

It remains USCIS policy that USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130 if the adoption order (or amended order) expressly states that the Central Authority in the COO advised the adopting court that the Central Authority was aware of the child's presence in the United States, and of the proposed adoption and did not consider the child habitually resident in the COO. The written statement from the Central Authority must accompany the Form I-130 and the adoption order (or amended order).

In cases where the COO has a policy of not issuing statements of habitual residence, or where the petitioners show that they have attempted to obtain the statement of habitual residence from the COO for at least 6 months with no response, and the child was not paroled into the United States, USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130 if:

1. At the time the child entered the United States, the purpose of the entry was 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, confirms that the COO Central Authority was notified of the adoption proceeding in a manner satisfactory to the court and that the COO 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*).

Approval of a Form I-130 under this guidance will not always mean the child can acquire permanent residence through adjustment of status. Consistent with U.S. immigration law, a child who entered the United States without inspection or was admitted in certain visa categories may need to depart the United States to obtain an immigrant visa that would allow him or her to seek admission to the United States as a lawful permanent resident.²

² There are statutory limitations on an alien's ability to adjust to lawful permanent resident status. For example, INA section 245(d) limits the circumstances under which a conditional resident or an alien admitted in K status may adjust status.

Process

USCIS will consider the following criteria when adjudicating Form I-130 petitions relating to an adoption in the United States by U.S. citizen parent(s) of a child who is a citizen of another Hague Adoption Convention country where the petitioner is unable to obtain a statement of habitual residence from the prospective adoptive child's COO.

1. **Intent Criteria: entry for purposes other than adoption**

- Required Evidence
 - 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:
 - Court order;
 - Affidavit from the petitioning adoptive parent(s) ("AP(s)"); and/or
 - Any other evidence to support the statements made in the affidavit (i.e., informal consent documentation) or to document that the AP(s) did not intend to adopt the child when he or she entered the United States.
 - Affidavit from the petitioning adoptive parent(s), which should include:
 - Description of child's circumstances prior to child's entry to the United States (i.e., 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?).
 - 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, or any contact with the child's birth parents, or any adoption or child welfare agency or NGO (in the United States or abroad) related to the child that took place: (a) before the child came to the United States; or, (b) after the child's arrival but before a court placed the child with the AP(s).
 - Sworn statement from AP(s) stating under penalty of perjury that on the date of the child's entry into the United States the AP(s) did not intend to adopt the child nor intend to circumvent the Hague Adoption Convention procedures.
- Significant Other Factors for Consideration, if available
 - Court order containing findings related to the child's purpose for entering the United States, including, if applicable, a court's finding that the child entered the United States for a purpose other than adoption.
 - Results of U.S. Government system checks.
 - Entry with non-immigrant visa (NIV) or through visa waiver program (VWP) (i.e., not paroled into the U.S. or present without inspection (PWI)).
 - Visa records; stated purpose of travel to United States; no intent to immigrate.
 - Evidence that the child was a ward of a U.S. State or State court prior to the adoption. In this case, the required 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 for the purpose of adoption by the petitioner.

- 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.
- Adverse evidence:
 - A prior adoption in the COO by AP(s) in United States is a heavily weighted adverse factor, but not a bar.
 - 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**

- A child will be presumed to have actually 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, if the child was physically present in the United States for two years or more prior to the adoption.
- Absent such presumption, adjudicators must consider the length of time that the child has spent in the United States prior to the adoption and supporting evidence establishing the child's actual residence and compelling ties in the United States prior to the adoption.
 - Depending on the child's age, documentation from the time period prior to adoption may include:
 - Evidence of continuous medical care in the United States;
 - Statement from 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, guardian, or caretaker resided in the United States.
- Significant Other Factors for Consideration, if available.
 - Court order finding that the child actually resided in the United States for a substantial period of time, establishing compelling ties in the United States prior to the adoption.
 - Evidence that the child was a ward of the state or court prior to the adoption.
 - Adverse Evidence: Evidence that the child lived outside of the United States shortly before adoption.

3. **Notice Criteria: notification of COO; record non-objection to domestic adoption in adoption order**

- Required Evidence

- Evidence of notice to the COO Central Authority of the pending adoption providing the Central Authority 120 days to object. Notification should include the following language:
 - If you do not intend to object, please notify the court.
 - If you require additional time beyond 120 days, please notify the court.
- Evidence of the COO's non-objection must be incorporated into the language of the adoption order.
 - If AP(s) filed the Form I-130 with a court order that lacks the COO non-objection language, USCIS may RFE for an amended order. The petitioner(s) do not need to submit the actual statement from the COO, however USCIS may issue an RFE requesting it if necessary.

Implementation

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

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

In cases where USCIS has confirmed that the child's country of origin (COO) has a policy of not issuing statements of habitual residence, or where the petitioners can show that they have attempted to obtain the statement of habitual residence from the COO for at least 6 months with no response, and the child was not paroled into the United States, USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) does not preclude approval of a Form I-130 if:

- 1) At the time the child entered the United States the purpose of the entry was 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, confirms that the COO Central Authority was notified of the adoption proceeding in a manner satisfactory to the court and that the COO 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*).

Approval of a Form I-130 under this guidance will not always mean the child can acquire permanent residence through adjustment of status. Consistent with U.S. immigration law, a child who entered the United States without inspection or was admitted in certain visa categories, may have to depart the United States to obtain an immigrant visa that

would allow him or her to seek admission to the United States as a lawful permanent resident. (There are statutory limitations on an alien's ability to adjust to lawful permanent resident status. For example, INA section 245(d) limits the circumstances under which a conditional resident or an alien admitted in K status may adjust status.)

USCIS will consider the following criteria when adjudicating Form I-130 petitions relating to 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 of habitual residence from the prospective adoptive child's COO.

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 - Affidavit from the petitioning adoptive parent(s), which should include:
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 - 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, or any contact with the child's birth parents, or any adoption or child welfare agency or NGO (in the United States or abroad) related to the child that took place: (a) before the child came to the United States; or, (b) after the child's arrival but before a court placed the child with the AP(s).
 - Sworn statement from AP(s) stating under penalty of perjury that on the date of the child's entry into the United States the AP(s) did not intend to adopt the child nor intend to circumvent the Hague Adoption Convention procedures.
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- Evidence of birth parent's inability to provide proper care for the child.
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- Court order finding that the child actually resided in the United States for a substantial period of time, establishing compelling ties in the United States prior to the adoption.
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 - If AP(s) filed the Form I-130 with a court order that lacks the COO non-objection language, USCIS may RFE for an amended order. The petitioner(s) do not need to submit the actual statement from the COO, however USCIS may issue an RFE requesting it if necessary.

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

AD13-11 12/23/2013	Chapter 21.4(d)(5)(G)	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.