

# Implementing the Hague: USCIS rulemaking

American Academy of Adoption  
Attorneys

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U.S. Citizenship  
and Immigration  
Services

# Presenters

Michael J. Sheridan

Associate Counsel

Office of the Chief Counsel

U.S. Citizenship and Immigration Services

U.S. Department of Homeland Security

Karen M. Eckert

Adjudications Officer (Policy)

Refugee, Asylum & International  
Operations



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# Primary Sources

Convention on Protection of Children and Cooperation in  
Respect of Intercountry Adoption, signed at The Hague, May  
29, 1993, TIAS No. \_\_\_\_, S. Treaty Doc. 105-51.

Intercountry Adoption Act of 2000, Pub. L. 106-279, 114 Stat.  
825 (2000)



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# Primary sources

## USCIS Rule:

Classification of Aliens as Children of United States Citizens  
Based on Intercountry Adoptions Under the Hague Convention,  
8 CFR parts 103, 204, 213a, 299 and 322, 72 *Fed. Reg.* 56,832  
(10/4/2007).

## DOS Rules:

Final rule on accreditation/approval of adoption service  
providers, 22 CFR part 96, 71 *Fed. Reg.* 8064 (2/15/2006)



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# Primary Sources

Final rule on Preservation of Convention Records, 22 CFR parts 97 and 98, 71 *Fed. Reg.* 8161 (2/15/2006)

Final rule on Issuance of Convention Adoption Certifications, 22 CFR part 97, 71 *Fed. Reg.* 64,451 (11/2/2006)

Final rule on Reporting on Non-Convention and Convention Adoptions of Emigrating Children, 22 CFR part 99, 72 *Fed. Reg.* 9852 (3/6/2007)



# Primary Sources

Proposed rule on Consular Officer Procedures in Convention Cases, 22 CFR part 42, 71 *Fed. Reg.* 35847 (6/22/2006)



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# Overview

- I. Update on USCIS Regulation
- II. Cave! Hic Dragones! (What lawyers *can't* do)
- III. What is a Convention Country?
- IV. The Role of USCIS
- V. Important changes from orphan cases
- VI. Overview of Convention process (flow chart)
- VII. Determining suitability of adoptive parents
- VIII. Determining child's eligibility for adoption



# THE USCIS REGULATION

*72 Fed. Reg. 56832 (10/4/2007), adopting 8 CFR part 204, subpart C*

8 CFR 204.300 through 204.314

Entry into force: 11/5/2007

Comment period ends: 12/3/2007

Submit comments: [www.regulations.gov](http://www.regulations.gov)

Docket No. USCIS-2007-0008



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# The USCIS Regulation

“Once notice of proposed rulemaking has been issued, any agency or official or employee who is or may reasonably be expected to be involved in decisional process of rulemaking proceeding should refuse to discuss matters relating to disposition of rulemaking proceeding with any interested private party, or attorney or agent for such party, prior to agency's decision; and if *ex parte* contacts nonetheless occur, any written document or summary of any oral communication must be placed in public file established for each rulemaking docket immediately after communication is received so that interested parties may comment thereon.” Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 57 (D.C. Cir 1977)



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# The USCIS Regulation

So, please keep in mind:

- This presentation is *not* a proper forum for commenting on the rule, suggesting how to make it better, etc.
- We can answer general questions, of course.
- There is no capacity here to “record” what is said
- We cannot, and will not, consider anything said here at the final rule stage
- So please be sure to submit any comments in writing, as specified in the rule



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# USCIS Regulation

This presentation provides a general overview of key elements of the USCIS Convention Adoption rule. It is not a substitute for the actual laws and regulations, nor is it a comprehensive summary of the laws and regulations. In the case of any inconsistencies between this presentation and the laws and regulations, the language of the laws and regulations for the Hague Adoption Convention governs.



Keep in mind the Department of State rules, 22 CFR part 96, concerning who may provide “adoption services” in Convention cases.

Lawyers may continue preparing petitions and applications to be filed with USCIS, and representing adoptive parents before USCIS. *Cf.* 8 CFR part 292.

But if a lawyer will be providing (or facilitating) *any* of the activities defined as “adoption services” the lawyer *must* obtain authorization to do so under the DOS accreditation regulation. 22 CFR part 96.



Adoption service providers should not be providing legal services, unless they are authorized to do so. 8 CFR 204.302(b).

In particular, an adoption service provider should not be preparing, nor advising adoptive parents on the completion of, USCIS petitions and applications, unless the provider is also:

- An attorney (or supervised law student or graduate) or
- An accredited representative under 8 CFR part 292.

**NOTE: THIS IS NOT A NEW RESTRICTION**



# Role of USCIS

## *Article 14*

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

The U.S. Department of State is the Central Authority for the United States

IAA § 103, however, assigns to DHS the performance of the Article 14 duties concerning suitability to adopt



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# Role of USCIS

Under INA § 204(a) and (b), USCIS also has authority to adjudicate immigrant visa petitions in Convention cases

The role of USCIS in Convention cases will be very similar to the role of USCIS in orphan cases

Form I-800A – Application for suitability determination

Corresponds to the Orphan I-600A

Form I-800 – Visa petition

Corresponds to the Orphan I-600



# Changes from orphan cases

The requirement for orphan cases that the parents must have seen the child before or during the adoption *does not* apply to Convention cases.

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(Let that idea really sink in.)



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# Changes from orphan cases

As with orphan cases, the USCIS phase of a Convention case focuses on two issues:

- Suitability of the adoptive parents – Form I-800A
- Eligibility of the child for classification as an immediate relative – Form I-800



# Changes from orphan cases

A major change from orphan cases reflects the requirements of article 17:

The receiving State must determine that the parents are suitable *before a placement*.

The country of origin must then determine that the child qualifies for intercountry adoption.

The actual adoption is not to happen until the receiving State has determined that the child will be eligible to immigrate.



# Changes from orphan cases

This means that:

- USCIS must find the parents suitable for adoption *before* the country of origin proposes an adoption placement
- Once a placement is proposed and accepted, the adoption may be completed *only* if the child will be eligible to immigrate



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# Changes from orphan cases

In all Convention cases, therefore, Form I-800A must be filed *and approved* before there is an adoption placement

Once that Form I-800A is approved, and a placement is proposed, the Form I-800 must be filed and provisionally approved *before* the adoption or grant of custody

8 CFR 204.309(b)(1) requires denial of the Form I-800, if the child is adopted before provisional approval.



# Changes from orphan cases

A major change: the adopting citizen parent must be “habitually resident” in the United States.

Article 2, article 14, and INA § 204(d)(2) all express this provision.

The Convention does not define the concept of “habitually resident.”



# Changes from orphan cases

U.S. Citizen is deemed habitually resident in the US if:

- Domiciled here – even if living *temporarily* abroad
- Not domiciled here, but will be by the time of the child's admission
- Not domiciled here, and living abroad permanently, *if* the child will be brought to the US after adoption for naturalization under section 322

8 CFR 204.303(a).



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# Changes from orphan cases

Child is deemed habitually resident in the country of citizenship

OR

In another country in which the child resides, *if* the Central Authority determines that child's status in that country permits that country to exercise jurisdiction over the child's adoption

As with orphan cases, child is not “habitually resident” in a country if the child is there only temporarily or as a prelude to adoption



# Change from orphan cases

Article 29 restricts contact between the prospective adoptive parents and the child's parent(s) or other custodian(s), except for inter-family adoption or cases in which the country of origin permitted the contact.

8 CFR 204.309(b)(2) requires denial of the Form I-800, if the case involves prohibited contact.

8 CFR 204.309(b)(2) also defines the relationship(s) that would make the case qualify as an “intra-family” adoption.



# Convention Process Overview

Actors	PAP/ASP	DHS	PAP/ASP C of O	PAP/ASP	DHS/DOS	DOS
<b>Action</b>	File Form I-800A with Home Study and other evidence specified in 8 CFR 204.310	Adjudicates Form I-800A – approved if USCIS finds PAP eligible and suitable to adopt.	-Pap gets notice of approval Adoption Service Provider transmits approval and same home study to C of O -C of O accepts PAP -Match established -C of O transmits report on child-	-Files Form I-800 with art. 16 report, b/c, releases verified by C of O PAPS statement no contact nor custody/ adoption	-Form I-800 adjudicated; provisionally approved if proposed adoption appears to make child eligible as Convention adoptee	If child eligible, DOS annotates visa application



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**ASP**-Adoption Service Provider  
**C of O**-Country of Origin  
**DHS**-Department of Homeland Security  
**DOS**- Department of State  
**PAP**-Prospective Adoptive Parent

# Convention Process overview

Actors	DOS	CofO	PAP/ASP	DOS	PAP/ASP	DHS
<b>Action</b>	“Article 5 letter”: Notification to C of O of Art. 5 Determination (parental suitability, counseling, ability to enter/reside)	Adoption or guardianship completed in C of O local court.	Visa application interview at post abroad, with adoption/custo dy decree	Issuance of Convention Certificate to Adoption or Custody order; Final approval of I-800 and visa application; visa issuance	Child travels to the United States as a Convention Child Adopted Abroad or Convention Child Coming to Be Adopted	Inspection and Admission -Convention child adopted abroad auto. Citizen -Convention Child coming to be adopted LPR until adoption complete



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**Index:**

ASP-Adoption Service Provider  
C of O-Country of Origin  
DHS-Department of Homeland Security  
DOS- Department of State  
PAP-Prospective Adoptive

# Suitability of adoptive parents

The Form I-800A/home study stage will be quite similar to the existing rule for orphan cases.

Some significant changes:

1. Home study must be reviewed and approved by an accredited agency/temporarily accredited agency (unless prepared by a public domestic authority).

8 CFR 204.311(t)(2)



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# Suitability of adoptive parents

2. Home Study must address eligibility/suitability of parents to meet special requirements of child's country, if made known to the Secretary of State.

IAA §§ 102(b)(3) and 203(b)(1)(ii) & 8 CFR 204.311(q)

Important note: USCIS will not deny Form I-800A based on the other country's requirements.

Application of the requirements is for that country to determine.

8 CFR 204.312(c)(4)



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# Suitability of adoptive parents

3. Orphan home study must include a “summary of counseling.” 8 CFR 204.3(e)(5). In Convention cases, this will require “at least ten hours (independent of the home study) of preparation and training.” Home study must include a summary.

22 CFR 96.48 & 8 CFR 204.311(c)(8)

4. Child’s country must be known, and identified, in the home study.

Can ask for approval with respect to more than one country. 8 CFR 204.311(c)(1)



# Suitability of adoptive parents

5. Adoptive parents have an on-going “duty of candor.” 8 CFR 204.311(d)(1).
  1. Must disclose all adverse criminal history, specifically including convictions that have been expunged, sealed, pardoned, etc.
  2. Must answer truthfully all questions concerning physical, mental and emotional health



# Suitability of adoptive parents

3. Duty is on-going, because the parents must continue to disclose any new events or information concerning which disclosure is required.
4. Rehabilitation, successful treatment, and other factors may support approval of a Form I-800A, even with “adverse” facts
5. The important point is that USCIS must assess all relevant facts, and so must be apprised of them.



# Suitability of adoptive parents

6. Home study preparer must sign home study “under penalty of perjury under United States law.” 8 CFR 204.311(f)
  1. Purpose of this requirement is to stress the importance of the home study as evidence in a legal proceeding.
  2. Must attest that factual statements are true, to the best of the preparer’s knowledge, information and belief.
  3. Must also specify that the preparer advised the parents of their “duty of candor”



# Suitability of adoptive parents

## 7. Home study preparer must complete home study:

“with the professional diligence reasonably necessary to protect the best interests of any child whom the applicant might adopt.” 8 CFR 204.311(f)(1)

1. This requirement reflects the guiding principle of article 1(a) of the Convention: best interest of the child
2. Probably means the home study preparer should tend to think of the (as yet unknown) child as the actual “client”



# Suitability as adoptive parent

8. Approval period for Form I-800A will be *15* months, rather than *18* months for orphan cases
  1. Ties the approval period to the standard validity period for fingerprint clearances
  2. Form I-800A, Supplement 3, created for use in requesting an extension or a change of country, or to submit an updated home study.
  3. *First* extension request is free; otherwise, the fee is \$340.



# Suitability of adoptive parents

9. Country of origin must receive the *same* home study as the one submitted to USCIS. 8 CFR 204.312(d)(2).
10. If an updated or amended home study is needed, the *original* home study must accompany it, and the new preparer must certify that he or she is aware of the contents of the original. 8 CFR 204.311(u)(2).



# Classification as immediate relative

INA § 204(a) and (b) give authority to adjudicate a visa petition to USCIS

As with orphan cases, DOS will adjudicate some cases by delegation from USCIS – if the visa petition is filed while the petitioner is physically present in the Convention country and no USCIS office is there

A visa petition that is “not readily approvable” would be referred to USCIS for adjudication



# Classification as an immediate relative

8 CFR 204.313 governs adjudication of the Form I-800

Form I-800 would be submitted with the following evidence:

1. The “article 16” report from the other Central Authority

-- Evidence that the required consents have been freely given

Should include copies of consents, unless other country’s law prohibits disclosure

If not included, other Central Authority must certify they exist



# Classification as immediate relative

- Determination that consents were freely given, and not improperly induced
- Reason for the determination that intercountry adoption is in the child's interests
- The child's background report, as described in 22 CFR 96.49.



# Classification as an immediate relative

Background report provided for in 22 CFR 96.49(d) should address:

Medical, social, family history issues,

The basis for finding that the child's 2 living birth parents are not capable of providing care,

Information about possible medical inadmissibility.

3. Primary provider's certificate that the article 16 report that is submitted is the actual article 16 report that the Central Authority made.



# Classification as an immediate relative

4. A post-placement plan, if the child will be adopted in the US.
5. A waiver application for any ground of inadmissibility known or believed to exist
6. A Form I-864W – affidavit of support exemption or, if not exempt, a Form I-864, affidavit of support



# Classification as an immediate relative

If the *visa petition* is provisionally approved, the parent(s) would then file the child's *visa application* with the appropriate consulate.

If the DOS officer reviewing the visa application finds that “it appears . . . that the child would not be ineligible . . . for a visa” the DOS officer will annotate the visa application.

Proposed 22 CFR 42.24(h)

The Department of State officer will then notify the other Central Authority that, under article 5, the adoption may proceed.

Proposed 22 CFR 42.24(i).



# Classification as an immediate relative

Once the adoption (or grant of custody) is completed, the Department of State officer will review the order

If the adoption (or grant of custody) complies with the Convention and the IAA, the Department of State officer will affix the certificate provided for under INA § 204(d)(2)



# Classification as an immediate relative

The Department of State officer would then, on behalf of USCIS, grant final approval to the visa petition.

If, however, the Department of State officer finds that the visa petition is not readily approvable, the Department State officer must return it to USCIS for decision.

Next, the Department of State officer would adjudicate the visa application.



# Child Citizenship Act

As with orphan cases, a child admitted as an LPR on the basis of a Convention adoption will acquire naturalization by operation of law, as specified in INA § 320 –

- Admission as an LPR
- Residing in the US with the citizen parent
- Before the child's 18<sup>th</sup> birthday
- Relevant adoption requirements met



# Child Citizenship Act

If the child is adopted abroad, the child will become a citizen as of the date the child becomes an LPR and starts “residing” in the US with the citizen parent

If the child is adopted in the US, the citizenship will begin, after admission as an LPR, when the adoption is made final, if the child is not yet 18 and is residing in the US with the citizen parent.





# U.S. Citizenship and Immigration Services