



# Immigration Law Advisor

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The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

## Intercountry Adoption Processes and Their Continuing Complexities

by Robyn Brown

*The legal framework for international adoptions has changed considerably in the last two decades through the implementation of international agreements designed to protect the parties involved. But that framework may be tested as uncommon circumstances present challenges to its interpretation. For example, do the options differ for a United States citizen seeking to adopt from abroad if the prospective parent is also living abroad? Can the framework accommodate the adoption of a child from another country who is already living in the United States with relatives when a family tragedy occurs? What factors will be relevant as prospective parents, attorneys, and adjudicators address these situations?*

Intercountry adoption is widely hailed as a compassionate response to the plight of orphans, but the complex legal process and unique personal circumstances in each adoptive situation can present numerous complications. Factors that can affect the recognition of an intercountry adoption for immigration purposes include the citizenship and residence of both the child and prospective adoptive parent(s), the timing of the adoption, and the intended future country of residence. While this article will not provide specific answers to the questions posed above, it will highlight important considerations that practitioners and adjudicators of immigration law may encounter in real situations.

This article begins with a brief history of transnational adoption law in this country and provides an overview of the development and implementation of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention"), May 29, 1993, 1870 U.N.T.S. 167. The article then describes the eligibility requirements for three distinct routes to intercountry adoption—the Hague process, the orphan process, and the immediate relative visa petition process (referred to in this article as the "I-130 process" after the Form I-130 (Petition for Alien Relative) that is filed). The article discusses whether a child and prospective adoptive parent are

“habitually resident” in two different countries that are parties to the Hague Convention, thus requiring compliance with the convention. It also looks at an exemption from Hague Convention requirements for cases in which the prospective adoptive parent did not intend to adopt the child at the time the child traveled to the United States. Finally, the article examines the continuing development of transnational adoption law, including a recent holding by the Board of Immigration Appeals addressing nunc pro tunc adoptions.

### *Intercountry Adoption Law Prior to the Hague Convention*

Prior to World War II, the United States did not have immigration provisions specifically governing intercountry adoptions. Transnational adoptions were rare, so the adoption laws enacted by individual States applied only to children born within the United States.<sup>1</sup> After World War II, public sympathy for children orphaned by war and the interest in U.S. military personnel in bringing these children home led to the enactment of the Displaced Persons Act, Pub. L. No. 774, 62 Stat. 1009 (1948). This 2-year measure provided for the immigration of 3,000 orphans, but it had no requirement that the children actually be adopted, and it provided only for the immigration of children located in certain regions of Germany, Austria, and Italy.<sup>2</sup> Additional temporary legislation continued to provide for the limited transnational adoption of European children through the following decade, and international adoption agencies arose to help facilitate adoptions.<sup>3</sup>

In the early 1950s, the United States experienced an increased demand for adoptable children, including children orphaned as a result of the Korean War.<sup>4</sup> Emergency legislation in 1953 allowed for the adoption of up to 500 non-European children by U.S. military personnel and Government employees.<sup>5</sup> The Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 (1953), removed national origin restrictions and allowed U.S. citizens to qualify as adoptive parents even if they were not employed by the Government. From 1957 to 1960, Congress enacted other temporary measures to provide for transnational adoption.<sup>6</sup> In 1961, the Immigration and Nationality Act (“the Act”) was amended to include permanent provisions for adoptable children. Specifically, an “eligible orphan” was defined in then-section 101(b)(6) of the Act, 8 U.S.C. § 1101(b)(6), as:

any alien child under the age of fourteen at the time at which the visa petition is filed pursuant to section 205(b) [of the Act, 8 U.S.C. § 1155(b)] who is an orphan because of the death or disappearance of both parents, or because of abandonment, or desertion by, or separation or loss from, both parents, or who has only one parent due to the death or disappearance of, abandonment, or desertion by, or separation or loss from the other parent, and the remaining parent is incapable of providing care for such orphan and has in writing irrevocably released him for emigration and adoption.

Act of Sept. 26, 1961, Pub. L. No. 87-301, § 1, 75 Stat. 650, 650. Another addition clarified that no natural or prior adoptive parent of an eligible orphan shall “by virtue of such parentage, be accorded any right, privilege, or status under [the Act].” Section 101(b)(1)(F) of the Act (1964); Pub. L. No. 87-301, § 2, 75 Stat. at 650. Amendments to section 205(b) of the Act, 8 U.S.C. § 1155(b) (1964), provided eligibility requirements for the approval of a visa petition for a child adopted abroad or coming to the United States for adoption. Pub. L. No. 87-301, § 3, 75 Stat. at 650–51 (1961).

### *Development and Overview of the Hague Convention*

As intercountry adoption became more widespread in the late 1980s and early 1990s, so did the potential for trafficking, exploitation, and abuse within the system. The global community recognized a growing need to protect the children, birth parents, and prospective adoptive parents involved in the process. In 1988, the Hague Conference on Private International Law announced a forthcoming convention on international cooperation for intercountry adoption.<sup>7</sup> A Special Commission began this work in 1990, and the Hague Convention was introduced for comments on May 28, 1993.<sup>8</sup> The Hague Convention came into force on May 1, 1995. To date, 96 countries have ratified the Hague Convention and 2 others have signed but not ratified it.<sup>9</sup>

The Hague Convention aims “to prevent the abduction, the sale of, or traffic in children” and ensure that intercountry adoption is “in the best interests of the child and with respect for his or her fundamental

rights.” Hague Convention, 1870 U.N.T.S. at 182–83. It requires each party to the Hague Convention to establish a Central Authority for the country. The Central Authority serves as an authoritative source of information and point of contact for the country, helping to administer the international adoption framework. *See id.* at 184–89. The treaty provides for formal international recognition of an adoption to ensure that the adoption is recognized in other party countries. *Id.* at 189–90. Because the Hague Convention is not self-executing, each participating country must enact its own laws and regulations to implement and enforce the treaty obligations.

### *Implementation of the Hague Convention in the United States*

Although the United States signed the Hague Convention on March 31, 1994, its enacting domestic legislation was slow to take effect.<sup>10</sup> Several years after signing the Hague Convention, and several years before ratifying it, Congress enacted the Intercountry Adoption Act of 2000 (“IAA”), Pub. L. No. 106-279, 114 Stat. 825 (codified at 8 U.S.C. §§ 14901–14952). The IAA was enacted to address concerns that adoptive children were arriving in the United States with undiagnosed medical and psychological problems, that adoption facilitators were charging exorbitant fees, and that prospective adoptive parents had no recourse against unscrupulous adoption agencies.<sup>11</sup> Section 302 of the IAA amended the Act by adding section 101(b)(1)(G) (defining a “child” under the Hague Convention) and section 204(d)(2) of the Act, 8 U.S.C. § 1154(d)(2) (providing for the approval of a visa petition filed on behalf of a child adopted under the Hague Convention). The IAA also expanded the Federal Government’s role in facilitating international adoptions by establishing the administrative framework for implementing the Hague Convention’s provisions, such as designating the Department of State as the Central Authority. *See* IAA §§ 101–104, 42 U.S.C. §§ 14911–14914. The Office of Children’s Issues within the Department of State, Bureau of Consular Affairs, Overseas Citizens Services, is responsible for day-to-day implementation of the Hague Convention. *See* Vol. 7, Foreign Affairs Manual § 011(e) (CT: CON-427 Dec. 10, 2012).

The IAA also set the standards for the accreditation of adoption service providers and maintenance of their accreditation. IAA § 203, 42 U.S.C. § 14923. Under

these standards, the providers must comply with the Hague Convention and other applicable law, such as maintaining nonprofit status, a State license to provide adoption services, and the capacity to provide adoption services. *Id.* The adoption service providers must also ensure that social service functions are provided by appropriately qualified personnel and that home studies comply with Hague Convention and Federal and State requirements. *Id.* Moreover, the standards require providers to meet specific criteria concerning record maintenance, liability insurance, the employment and payment of personnel, the provision of medical records to prospective adoptive parents, the training of prospective adoptive parents, and the disclosure of policies, placement rates, and fees. *Id.*

The next domestic law affecting intercountry adoption was the Child Citizenship Act of 2000 (“CCA”), Pub. L. No. 106-395, 114 Stat. 1631 (effective Feb. 27, 2001). The CCA further amended the Act to automatically extend United States citizenship to certain foreign-born children of U.S. citizens, including those adopted abroad by U.S. citizens. CCA § 101; section 320 of the Act, 8 U.S.C. § 1431. The CCA also amended the Act to provide for the expeditious naturalization of foreign-born children who reside outside the United States. CCA § 102; section 322 of the Act, 8 U.S.C. § 1433. In 2001, the Board considered the retroactivity of the automatic citizenship provisions of section 320 of the Act as amended by the CCA, holding that such provisions do not apply to an individual who was already over 18 years of age when the CCA became effective. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

On December 12, 2007, Congress formally ratified the Hague Convention, and it became effective for the United States on April 1, 2008.<sup>12</sup> Subsequently, Congress enacted several other laws affecting intercountry adoptions. The International Adoption Simplification Act, Pub. L. No. 111-287, 124 Stat. 3058 (2010), amended section 101(b)(1)(G) of the Act to allow the birth sibling of an adopted child to qualify as a Hague Convention adoptee after the birth sibling’s 16th birthday but prior to the birth sibling’s 18th birthday (harmonizing the section with the sibling adoption provisions contained at section 101(b)(1)(E) of the Act). The Intercountry Adoption Universal Accreditation Act of 2012, Pub. L. No. 112-276, 126 Stat. 2466 (effective July 14, 2014), requires that adoption service providers acting on behalf of prospective adoptive parents in cases involving the orphan

process adhere to the same accreditation or approval procedures as under the Hague process. Most recently, section 7083 of the Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, amended the definition of “child” at section 101(b)(1)(F) of the Act, changing the application of the pre-adoption visitation requirement to “at least 1” adoptive parent.

### *Three Routes to Processing Intercountry Adoptions*

The United States now has three distinct processes for intercountry adoptions in cases filed on or after April 1, 2008: the Hague, orphan, and I-130 processes.<sup>13</sup>

#### The Hague Process

The Hague process applies where a child is “habitually resident” in one Hague Convention country and is being adopted by a U.S. citizen who is “habitually resident” in another Hague Convention country and the child “has been, is being or is to be moved” from the country of origin to the receiving country on the basis of the adoption. Hague Convention, art. 2(1); section 101(b)(1)(G) of the Act; *see also* 8 C.F.R. §§ 204.2(d)(2)(vii)(F), 204.303(b). Under the Hague process, the petitioner must choose a Hague-accredited adoption service provider, obtain an authorized home study, and file Form I-800A (Application for Determination of Suitability to Adopt a Child from a Convention Country) with U.S. Citizenship and Immigration Services (“USCIS”). 8 C.F.R. § 204.310. When the I-800A is approved and the Central Authority has proposed placing a child with the petitioner, the petitioner must file Form I-800 (Petition to Classify Convention Adoptee as an Immediate Relative) before adopting or obtaining custody of the child. 8 C.F.R. § 204.313(a). The petitioner must apply for a visa to bring the child to the United States. 8 C.F.R. § 204.313(b).

#### The Orphan Process

If a U.S. citizen wishes to adopt a child who does not habitually reside in a Hague Convention country, the orphan process may apply. See section 101(b)(1)(F) of the Act; 8 C.F.R. § 204.3. Under the orphan process, the petitioner must establish that the child he or she intends to adopt is an “orphan,” as defined by the Act, and that he or she will provide proper parental care. 8 C.F.R. § 204.3(a)(1). An “orphan” is a foreign-born

child who does not have any parents “because of the death or disappearance of, abandonment or desertion by, separation or loss from, both parents or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption.” Section 101(b)(1)(F) of the Act. The petitioner must also establish that he or she will adopt the child in the United States or, if the child was adopted abroad, that at least one of the adoptive parents personally saw and observed the child prior to the adoption proceedings. *Id.*

Unlike the Hague process, a petitioner’s eligibility as an adoptive parent under the orphan process need not be established before the petitioner is matched with a child. If the petitioner has already identified a child for adoption or has already adopted the child, the petitioner may file Form I-600 (Petition to Classify Orphan as an Immediate Relative) with USCIS for concurrent review of the petitioner’s eligibility as an adoptive parent and the child’s status as an orphan. 8 C.F.R. § 204.3(d)(3). If a specific child has not been identified, a petitioner under the orphan process may begin by filing Form I-600A (Application for Advance Processing of an Orphan Petition) and then file Form I-600 after a child is identified. 8 C.F.R. § 204.3(d)(1). The petitioner must apply for a visa to bring the child to the United States.

#### The I-130 Process

For intercountry adoptions that do not fall under either the Hague process or the orphan process, the I-130 process may be available. See section 101(b)(1)(E) of the Act; 8 C.F.R. § 204.2(d)(2)(vii). To qualify for the I-130 process, the adopting parent must provide evidence of a full and final adoption and satisfy the 2-year legal custody and joint residence requirements before the adoption may be the basis for an immediate relative visa petition. Section 101(b)(1)(E) of the Act; 8 C.F.R. § 204.2(d)(2)(vii)(A)–(C).

The I-130 process is not limited to children who have been or will be adopted by U.S. citizens, so an adopted child who meets the requirements may qualify as a child of the adoptive parent for purposes of “accompanying or following to join” the parent, whether as a preference immigrant, refugee, or asylee. See sections 203(d), 207(c)(2)(A), 208(b)(3)(A) of the Act, 8 U.S.C. §§ 1153(d), 1157(c)(2)(A), 1158(b)(3)(A). Additionally,

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR MARCH 2016

*by John Guendelsberger*

The United States courts of appeals issued 267 decisions in March 2016 in cases appealed from the Board. The courts affirmed the Board in 235 cases and reversed or remanded in 32, for an overall reversal rate of 12.0%, compared to last month's 11.8%. There were no reversals from the First, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.

The chart below shows the results from each circuit for March 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	40	38	2	5.0
Third	10	8	2	20.0
Fourth	10	10	0	0.0
Fifth	13	13	0	0.0
Sixth	8	7	1	12.5
Seventh	5	5	0	0.0
Eighth	2	2	0	0.0
Ninth	169	144	25	14.8
Tenth	4	2	2	50.0
Eleventh	4	4	0	0.0
All	267	235	32	12.0

The 267 decisions included 142 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 58 direct appeals from denials of other forms of relief from removal or from findings of removal; and 67 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	142	128	14	9.9
Other Relief	58	44	14	24.1
Motions	67	63	4	6.0

The 14 reversals or remands in asylum cases involved nexus (4 cases), credibility (2 cases), internal

relocation (2 cases), level of harm for past persecution, well-founded fear, corroboration, persecutor bar, Convention Against Torture, and particular social group.

The 14 reversals or remands in the "other relief" category addressed obstruction of justice as an aggravated felony (4 cases), application of the categorical approach (2 cases), perjury as a crime involving moral turpitude, identity theft as a crime involving moral turpitude, retroactivity of a change in law regarding eligibility for adjustment of status, the stop-time rule for cancellation of removal, abandonment of an application for relief, marriage bona fides, good moral character, and admission of returning lawful permanent residents.

The four motions case involved whether the Department of Homeland Security could reopen for consideration of previously available evidence, a motion to reopen to reissue a Board decision, certification of a late appeal from an Immigration Judge's decision, and a motion to present additional corroborating evidence.

The chart below shows the combined numbers for January through March 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	12	10	2	16.7
Ninth	331	277	54	16.3
Tenth	13	11	2	15.4
Third	29	25	4	13.8
Sixth	16	14	2	12.5
Second	112	105	7	6.3
Fourth	25	24	1	4.0
Fifth	29	28	1	3.4
First	8	8	0	0.0
Eleventh	14	14	0	0.0
Eighth	22	22	0	0.0
All	611	538	73	11.9

## FEDERAL COURT ACTIVITY

Last year's reversal rate at this point (January through March 2015) was 14.6%, with 403 total decisions and 58 reversals or remands.

The numbers by type of case on appeal for the first 3 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	340	298	42	12.4
Other Relief	136	113	23	16.9
Motions	135	127	8	5.9

*John Guendelsberger is a Member of the Board of Immigration Appeals.*

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### RECENT COURT OPINIONS

#### **Sixth Circuit:**

*Zheng v. Lynch*, No. 15-3758, 2016 WL 1359265 (6th Cir. Apr. 6, 2016): The Sixth Circuit dismissed the petition for review from a denial of asylum from China where the petitioner stated that she feared being arrested for practicing Christianity. The Immigration Judge based the denial on an adverse credibility finding, which the Board affirmed on appeal. On review, the court concluded that the record did not compel reversal of the adverse credibility finding. The court found that the Immigration Judge properly relied on discrepancies between the testimony of the petitioner and her son regarding whether the latter informed authorities of the petitioner's Christian faith during his interrogation while detained and whether the two belonged to the same church group. The court concluded that the Immigration Judge properly considered the petitioner's lack of knowledge concerning Christianity in evaluating her religious persecution claim. These discrepancies were not minor, the court found, since they went to the heart of the petitioner's claim and "concerned the very reason why she feared persecution and fled." But the court continued that, even if minor, such discrepancies would have been sufficient to support the adverse credibility finding under the REAL ID Act. The court noted that the Immigration Judge correctly went on to examine the petitioner's corroborating evidence and properly found it insufficient to meet the petitioner's burden of proof. The petitioner also raised due process arguments, asserting that the Immigration Judge lacked impartiality by questioning

her about three fraudulent visa applications that she had submitted to come to the United States. The petitioner also alleged that the Immigration Judge erred in admitting the visa applications into evidence. However, the court concluded that the petitioner did not demonstrate that she suffered any prejudice due to the alleged violations.

#### **Ninth Circuit:**

*Valenzuela Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877 (9th Cir. Mar. 31, 2016): The Ninth Circuit granted the petition for review of the Board's precedent decision in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). The petitioner had been found removable as an aggravated felon under section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S), as an alien convicted of a crime "relating to the obstruction of justice." The petitioner had pled guilty to the crime of accessory to a felony under section 32 of the California Penal Code. In light of the Ninth Circuit's decision in *Trung Thanh Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011), the Board exercised its sua sponte authority to reopen removal proceedings and reconsider the petitioner's removability. In its published decision, the Board held that "obstruction of justice" requires "the affirmative and intentional attempt, with specific intent, to interfere with the process of justice." It also held that the existence of an ongoing criminal investigation or trial "is not an essential element" of obstruction of justice. In light of this interpretation, the Board concluded that the defendant's conviction was an offense "relating to obstruction of justice." The Ninth Circuit stated that this interpretation conflicted with the Board's prior holding in *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999), in which the Board put forth an interpretation of obstruction of justice that the circuit had deferred to three times. The court stated that the Board has not clarified what is included in the "process of justice" where its latest holding acknowledged that not every crime that tends to obstruct justice qualifies as an "obstruction of justice" aggravated felony. The court agreed with the petitioner's argument that the decision therefore "raises grave doubts about whether [section] 101(a)(43)(S) is unconstitutionally vague." The Board's decision thus "eliminated the narrowing principle" of *Espinoza* that the court had previously found deserving of deference. The court remanded the case to the Board to either offer a new statutory construction, or to alternatively apply its earlier holding in *Espinoza* to the present case. The panel decision includes a dissenting opinion, which concluded that *Valenzuela Gallardo* is not a departure from Board precedent, but rather from the Ninth Circuit's

*interpretation* of Board precedent. The dissent would defer to the Board based on a “straightforward application” of the framework set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

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*Ledezma-Cosino v. Lynch*, No. 12-73289, 2016 WL 1161260 (9th Cir. Mar. 24, 2016): The Ninth Circuit granted the petition for review of the Board’s decision concluding that the petitioner was statutorily ineligible for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). The Board upheld the Immigration Judge’s determination that the petitioner could not establish the requisite period of good moral character based on the finding that he was a “habitual drunkard” as described in section 101(f)(1) of the Act. The record established that the petitioner had a 10-year history of alcohol abuse. The Board stated that it lacked jurisdiction to consider the petitioner’s constitutional challenge to the section 101(f)(1) bar. The court found that although the petitioner could not raise a due process argument relating to a discretionary form of relief because he lacked a protectable liberty interest as a non-citizen, he could raise a challenge on equal protection grounds, which require no such liberty interest. Under the equal protection clause, the Government must establish a rational relationship between its goal of excluding persons of bad moral character and its inclusion in that category of individuals suffering from the medical disease of chronic alcoholism (i.e. “habitual drunkards”). The court was not persuaded by the Government’s argument that the statute targets the symptoms (habitual and excessive drinking) rather than the status of having alcoholism. The court concluded that there is not a rational basis for the Government “to find that people with chronic alcoholism are morally bad people solely because of their disease.” Citing to case law, the court stated that “[l]ike any other medical condition, alcoholism is undeserving of punishment and should not be held morally offensive.” The court therefore found section 101(f)(1) to be unconstitutional, vacated the Board’s decision, and remanded for further proceedings. The panel decision contained a dissenting opinion, which notes that neither party raised the equal protection rationale espoused by the majority. The dissent would find that section 101(f)(1) passes the “very low bar” set by the rational basis test.

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*Linares-Gonzalez v. Lynch*, Nos. 12-71142, 12-73313, 2016 WL 1084735 (9th Cir. Mar. 21, 2016): The Ninth Circuit granted the petitions for review from the Board’s decisions (in two separate cases) involving convictions for identity theft under sections 530.5(a) and (d)(2) of the California Penal Code. The court found that the offenses defined in the two subsections do not categorically constitute crimes involving moral turpitude. The court noted that the federal generic definition of a crime involving moral turpitude is an offense that involves either fraud or vile, base, or depraved conduct that violates accepted moral standards. Further, the court observed that crimes involving moral turpitude that do not contain a fraudulent element almost always involve injury, an intent to injure, or a protected class of victim and an examination as to “whether the act is accompanied by an evil motive or a corrupt mind.” The court noted that neither of the subsections at issue contains a specific fraud element. The court was not persuaded by the Government’s argument that the crimes are inherently fraudulent because they involve “false statements that were made with the intent of inducing reliance.” According to California case law, identity theft may be committed without fraudulent intent and without obtaining a tangible benefit. The Ninth Circuit panel therefore concluded that the two subsections do not define categorical fraud crimes or crimes involving moral turpitude.

***Tenth Circuit:***

*Htun v. Lynch*, No. 15-9533, 2016 WL 1397612 (10th Cir. Apr. 8, 2016): The Tenth Circuit dismissed the petition for review from the Board’s decision affirming an Immigration Judge’s denial of asylum, withholding of removal, and protection under the Convention Against Torture. The Immigration Judge had granted asylum from Burma, but reopened proceedings on the Government’s motion to consider material evidence that had not been provided by the petitioner. The new evidence established that: (1) the petitioner had entered into a sham marriage with a United States citizen in order to obtain immigration benefits; and (2) that a material witness who testified in support of the petitioner’s asylum claim was an employee of the petitioner at the time he testified, a fact that was not previously disclosed. On remand, the Immigration Judge heard testimony on these two subjects and also heard additional testimony regarding the petitioner’s asylum claim. The Immigration Judge then made an adverse credibility finding based on discrepancies

relating to the petitioner's asylum claim. The Immigration Judge also denied asylum in the exercise of discretion based on the marriage fraud and non-disclosure of relevant information. The Board affirmed. The court concluded that the adverse credibility determination was supported by multiple instances of inconsistency and nondisclosure. The court further concluded that the discretionary denial was appropriate given the negative factors presented. Even assuming that the petitioner had presented credible testimony, the court found no reason to reverse the denial of withholding of removal where the petitioner did not establish that he had suffered past persecution, had entered and exited Burma several times without suffering harm after being politically active, and did not offer sufficient evidence to demonstrate that he would now suffer harm if returned to Burma.

## BIA PRECEDENT DECISION

In *Matter of Ruzku*, 26 I&N Dec. 731 (BIA 2016), the Board held that sibling-to-sibling DNA test results are entitled to probative value in determining whether a beneficiary of a visa petition is eligible for classification as the sibling of a petitioner. The petitioner had filed a visa petition on behalf of the beneficiary as his sister under section 203(a)(4) of the Act, 8 U.S.C. § 1153(a)(4), and submitted DNA test results performed between himself and the beneficiary. An accredited facility that performed the testing submitted a report indicating that there was a 99.8144 percent chance that the parties were full siblings.

The Board concluded that the Director of the U.S. Citizenship and Immigration Services ("USCIS") California Service Center erred in declining to give the DNA test results any probative value in adjudicating the visa petition. In supplemental briefing, USCIS cited to its recent policy memorandum stating that only DNA testing performed between children and a common parent would be considered in adjudicating sibling visa petitions. The policy memorandum indicated that because a precise relationship probability has not been established in sibling DNA testing, the possibility existed that DNA testing of actual siblings might, in some instances, indicate a less than 99.5 percent chance of a biological relationship.

While acknowledging USCIS's concern that DNA testing could return a "false negative" where actual siblings were shown to have a less than 99.5 percent probability of a full sibling relationship, the

Board concluded that such concerns did not justify excluding *positive* results indicating a 99.5 percent or higher probability of such a relationship. The Board noted that the record contained an expert opinion stating that, although a precise measurement of certainty for establishing a sibling relationship is not agreed upon, the statistical and mathematical methods used to evaluate the probability of sibling relationships are reliable, well established, and uniform throughout the DNA testing industry. Therefore the Board concluded that test results indicating a 99.5 percent or higher probability of a full-sibling relationship should be accepted and considered. However, noting that such test results alone would not necessarily be sufficient evidence to establish the claimed relationship, the Board stated that such results should generally be accompanied by additional evidence and the record should be considered in its entirety.

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### Intercountry Adoption Processes

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the I-130 route may be available to U.S. citizens who are domiciled in other Hague Convention countries but are not "habitually resident" in the United States. The I-130 process may also be available for adoptions involving children who are citizens, but not habitual residents, of Hague Convention countries.

#### *I-130 Exceptions to the Hague Process*

Determining eligibility for the I-130 process can be a complicated endeavor. The Board generally has appellate jurisdiction if a petitioner has pursued this route to intercountry adoption. When USCIS makes a determination on an I-130 application, the decision may be appealed to the Board, which reviews USCIS determinations de novo. 8 C.F.R. §§ 1003.1(b)(5), 1003.1(d)(3). For example, USCIS may find that the I-130 process is not available to a petitioner because the Hague convention applies to the adoption; the Board may review that determination on appeal. Below are several situations in which an adoption from a Hague Convention country could fall outside the scope of the Hague process.

#### Habitual Residence of the Child

In some cases, eligibility for the I-130 process may hinge on whether the adoptive parent or child is deemed to be "habitually resident" in a Hague Convention country.

Although he or she may be present in the United States and residing with an adopted parent or parents, a child who is a citizen of a Hague Convention country is still generally considered to be “habitually resident” in the child’s country of citizenship, and the adoption therefore must comply with the Hague process. See 8 C.F.R. §§ 204.2(d)(2)(vii)(F), 204.303(b); see also 8 C.F.R. § 204.309(b)(4) (providing for the Hague process even if a child is already in the United States). However, in some circumstances, a child living outside his or her country of citizenship may be deemed “habitually resident” in his or her actual country of residence. See “Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries,” USCIS, PM-602-0095 (Dec. 23, 2013) at 2; Adjudicator’s Field Manual (“AFM”), ch. 21.4(d)(5)(G). In order for the I-130 process to be available in such cases, the prospective adoptive parent must obtain a written statement from the Central Authority of the country of origin indicating that it is aware of the child’s presence in the United States and of the proposed adoption and that the child is not habitually resident in the country of origin. PM 602-0095 at 2–3.

However, obtaining such a statement is not always a straightforward process because some countries will not take a position on whether the child is habitually resident in the country. If the country of origin has a policy of not issuing statements of habitual residence, USCIS has indicated that it may still approve the I-130 if certain criteria are established. *Id.* at 3. These specific criteria include: (1) *intent*, that is, a showing that the child entered the United States for reasons other than the adoption; (2) *actual residence*, that is, the child has actually resided in the United States for a substantial period of time, establishing compelling ties; and (3) *notice*, that is, the adoption decree confirms that the Central Authority in the child’s country of origin was notified of the adoption proceeding and did not object within 120 days or the period determined by the court. *Id.*; AFM, ch. 21.4(d)(5)(G).

#### Habitual Residence of the Adoptive Parent

Even where the adopted child is habitually resident in a Hague Convention country, the I-130 process may be available if the U.S. 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)(D) (emphasis added). A U.S. citizen is deemed to have habitual

residence in the United States unless the child was in the legal custody of, and resided with, the adopting parent for at least 2 years *outside* the United States. See 8 C.F.R. § 204.2(d)(2)(vii)(E); see also section 101(b)(1)(E) of the Act. Under these provisions, it appears that a U.S. citizen habitually residing in another country that is also a party to the Hague Convention may proceed through the I-130 route for the adopted child if the 2-year custody and joint residence requirements have been met.<sup>14</sup>

An adoptive U.S. citizen parent in such a situation may prefer the I-130 process because a domestic adoption within the child’s country of origin can be significantly less expensive than the Hague process. However, the adoptive parent must reside outside the United States with the child while the 2-year custody and joint residence requirements are met, so an unforeseen situation that causes his return to the United States could significantly affect this process. Additionally, the adoptive parent may find himself without much guidance because the I-130 route is less common in comparison with the more straightforward Hague process, which is typically used in adoptions originating in Hague Convention countries.

Although U.S. expatriates habitually residing abroad are potentially exempt from Hague Convention compliance, a U.S. citizen domiciled in a Hague Convention country may nevertheless adopt through the Hague process rather than the I-130 process. To qualify for an adoption through the Hague process, a U.S. citizen domiciled abroad must establish either: (1) that he will have established a domicile in the United States on or before the date of the child’s admission to this country for permanent residence as a Hague Convention adoptee; or (2) that he intends to bring the child to the United States after an adoption abroad and before the child’s 18th birthday to apply for naturalization under section 322 of the Act. 8 C.F.R. § 204.303(a).

#### Intent at Time of Travel to the United States

Another factor relevant to the application of the Hague Convention is whether adoption was intended at the time of the child’s travel to the United States. For example, following the death of both parents, a child from a Hague Convention country might enter the United States to temporarily stay with a U.S. citizen relative. If that relative can establish that he did not intend to adopt the child at the time the child entered the United States

but later decided to adopt the child, the adjudicator may find that the child did not “emigrat[e] from [the] foreign state to be adopted in the United States”; thus, the Hague Convention would not apply. See section § 101(b)(1)(G) of the Act; see also Hague Convention art. 2(1) (providing that the Hague Convention applies where a child habitually resident in one Hague Convention country “has been, is being, or is to be moved” to another Hague Convention country either subsequent to an adoption or for the purpose thereof). In another hypothetical situation, a child from a Hague Convention country might enter the United States for the purpose of attending a private school while his single mother works abroad. After his mother is unexpectedly and permanently incapacitated, leaving her unable to care for the child, the child’s biological aunt might seek to adopt the child in accordance with the mother’s expressed wishes. In cases such as these, where a petitioner can establish that the child did not enter the United States for the purpose of adoption, the I-130 process may be available.

#### Intercountry Adoptions by Lawful Permanent Residents

Unless a U.S. citizen seeking to adopt a child from a Hague Convention country qualifies for an exception such as those mentioned above, the Hague process applies. However, a lawful permanent resident who is not married to a U.S. citizen may only adopt through the I-130 process since the Act specifies that the Hague and orphan processes apply only to “an unmarried United States citizen” over age 25 or a “U.S. citizen and spouse.” See section 101(b)(1)(F)(i), (G)(i) of the Act. Therefore, a lawful permanent resident who has adopted a foreign-born child meeting the requirements of a “child” in section 101(b)(1)(E) of the Act may apply for a family preference immigrant visa on behalf of the child through the I-130 process. See section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2); 8 C.F.R. § 204.2(d). However, as a result of numerical limitations, there may be significant wait times until a visa becomes available for the child. See Vol. 9, Foreign Affairs Manual § 503.4-2(A) (CT: VISA-2 Nov. 18, 2015) (discussing the allocation of visa numbers to unmarried children of lawful permanent residents).

#### *Nunc Pro Tunc Adoptions*

Besides the citizenship of the petitioner, the habitual residence of the parent and child, and the intent at the child’s time of travel to the United States, the age

of the child at the time of the adoption decree may also affect the recognition of an adoption for purposes of immigration benefits. To qualify as an adopted child under section 101(b)(1)(E)(i) of the Act, a beneficiary must be unmarried, under 21 years old, and adopted before his or her 16th birthday. 8 C.F.R. § 204.2(d)(2)(vii). In *Matter of R. Huang*, 26 I&N Dec. 627 (BIA 2015), the Board concluded that the phrase “adopted while under the age of sixteen years” is ambiguous with regard to retroactively effective adoption decrees. *Id.* at 628. The Board then held that a beneficiary of a visa petition who was more than 16 years old at the time of the State court adoption order qualified as an adopted child under section 101(b)(1)(E)(i) of the Act, where the adoption petition was filed before his 16th birthday and the State expressly allowed the adoption decree to be dated retroactively. *Id.* at 635. In so holding, the Board modified its blanket rulings in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982), which prohibited recognition of nunc pro tunc adoption decrees. *Matter of R. Huang*, 26 I&N Dec. at 630–31. However, the Board explained that it would be inappropriate to extend its limited holding in *R. Huang* to situations in which the effective date of the adoption decree *predates* the initiation of adoption proceedings, because such an expansion would undermine the important policy considerations of “fostering family unification and preventing ad hoc or fraudulent adoptions.” *Id.* at 629. The Fourth Circuit recently disagreed with the Board’s interpretation in *R. Huang*, holding that a child has been “adopted” for purposes of 101(b)(1)(E)(i) of the Act “on the date that a state court rules the adoption effective, without regard to the date on which the act of adoption occurred.” *Ojo v. Lynch*, 813 F.3d 533, 540 (4th Cir. 2016). Thus, the Fourth Circuit has articulated a broader recognition of nunc pro tunc adoptions than the Board. It remains to be seen whether other circuits will take a similarly expansive view.

#### **The Paths Ahead**

The continued availability of the I-130 process in certain intercountry adoptions is still relatively new territory since the Hague Convention became effective in the United States less than 8 years ago. As the United States continues to implement the Hague Convention and fortify its commitment to seeking “the best interests of the child,” it is expected that the Department of Homeland Security, the Department of State, and the Department of Justice will continue to clarify policies

and procedures, interpret immigration statutes and regulations, and adjudicate applications to strengthen all three intercountry adoption processes.

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1. See Richard R. Carlson, *Transnational Adoption of Children*, 23 Tulsa L.J. 317, 322–23 (1988).
2. Displaced Persons Act, §§ 2(c)–(e), 3, 62 Stat. at 1009–11.
3. Carlson, *supra* note 1, at 327.
4. *Id.* at 326–28.
5. Act of July 29, 1953, Pub. L. No. 83-162, 67 Stat. 229 (1953).
6. See Act of Sept. 11, 1957, Pub. L. No. 85-316, § 4, 71 Stat. 639 (1957); Act of Sept. 9, 1959, Pub. L. No. 85-253, § 2, 73 Stat. 490, 490–91 (1959); Act of July 14, 1960, Pub. L. No. 86-648, § 7, 74 Stat. 504, 505 (1960) (later repealed).
7. G. Parra-Aranguren, Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Dec. 31, 1993), ¶ 5, available at <https://assets.hcch.net/upload/expl33e.pdf>.
8. *Id.* at ¶¶ 9, 29.
9. *Status Table 33: Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, Hague Conference on Private International Law, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Apr. 8, 2016).
10. See Displaced Persons Act, *supra* note 2; Douglas Reid Weimer, Cong. Research Serv., RS21671, *Hague Convention on Intercountry Adoption: Status and Recent Developments* 4-5 (2008).

11. See, e.g., 146 Cong. Rec. H6395 (daily ed. July 18, 2000) (statement of Rep. William Delahunt) (discussing exorbitant fees exacted from prospective parents).

12. See Weimer, *supra* note 9, at 2.

13. The processes for “grandfathered” cases filed before April 1, 2008, are beyond the scope of this article.

14. The Board has discussed the 2-year legal custody and joint residence requirements in various precedential decisions. See *Matter of Marquez*, 20 I&N Dec. 160 (BIA 1990); *Matter of Cuello*, 20 I&N Dec. 94 (BIA 1989); *Matter of Repuyan*, 19 I&N Dec. 119 (BIA 1984).

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