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Immigration Laws, Procedures and Impediments Pertaining to Intercountry Adoptions

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I. INTRODUCTION

Adoption in America has long been a basic resource for establishing a permanent home for a child. However, recent years have

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brought a growing concern with overpopulation and a continuing decline in the number of caucasian babies available for adoption. This situation, in combination with an increased awareness of the plight of orphaned children in other countries, has led to a greater demand for intercountry adoptions.

Intercountry adoptions pose all the problems common to domestic adoptions. For example, the family's suitability for adopting a child must be determined; a child fitting their general desires must be found; legal and documentary requirements must be met; and a new family must be created. In addition, because the child is coming from a foreign country, he or she must enter the United States in accordance with its immigration laws.

The realm of immigration which pertains to foreign adoptions can be most complex and perplexing. Statutes, regulations and procedures are imposed and interpreted by the foreign countries, the United States, the Immigration and Naturalization Service (INS), the United States consulates overseas, the individual states, and the various state and county departments of welfare. At every level, the officials involved are vested with great discretionary power and can interpret rules in a myriad of ways to suit the individual official or case. These authorities may be most helpful and sympathetic, as the vast majority are, or they may be indifferent, unavailable, and excrutiatingly slow.

A further difficulty may arise as a result of the reluctance of many countries to give their children up to an alien country. Sometimes this is due to a lack of understanding of our culture and motives for adopting foreign children, or to an understandable fear that the relinquishment may be interpreted as an unwillingness or inability adequately to care for their own children. Sometimes it is due to an ethnocentric bias, a reaction little different from that which most Americans would display upon seeing our own orphaned children taken away to be raised in a non-American society.

These regulations, interpretations and feelings can occasionally result in difficult problems whose speedy solution can be crucial in determining whether a child will live long enough to get to the adopting parents. Unfortunately, overcoming these difficulties may not be easy, because the necessary information is not readily available.[1] This article will aggregate the present laws involved in the immigration-adoption process, delineate the more pervasive pitfalls, and indicate

1. Perhaps the most complete and up-to-date reference on the subject of immigration is the two-volume treatise, C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (1971, Cum. Supp. 1973) [hereinafter cited as GORDON & ROSENFIELD]. The reader may also wish to consult F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (2d ed. 1961, Cum. Supp. 1964). However, this text is now out of date in some respects.

some possible solutions. It will focus primarily on United States immigration laws and procedures and, to a lesser extent, on the effects of selected state requirements.

Adoptions initiated and completed through a licensed agency are generally thought to be more protective of the best interests of both the child and the adopting parents than are private adoptions. Furthermore, private adoptions by parents going abroad to select the child they want are actually contrary to policy in many countries, including Vietnam, where the practice was once quite prevalent.[2]

Major problems affecting intercountry adoptions may also arise out of regulations concerning severance and release of the child, and out of immigration and procedural requirements prescribed by the foreign state. These issues will be covered by this paper only in passing, because adequate coverage is far beyond the scope of this comment.

Two caveats should be kept in mind: (1) Some of the content of this article is not the official viewpoint of the Immigration Service or the Department of State; rather, it is based upon the working experience of many people who have been very active in foreign adoption. Their experiences may not always reflect the official policy. (2) Some sections may be incomplete and, therefore, misleading, as a result of modifications imposed by state or foreign requirements and interpretations. Since it is beyond the scope of this paper to cover all these modulations, it is suggested that the state laws be read carefully, and that the welfare and adoption agencies be consulted regarding any questions.

A. *Adopting a Child from Another Country*[3]

An overall summary of the adoption process may help the reader to understand how and where immigration problems can arise. The procedure outlined below was chosen primarily because it is the most

2. Interview with Wendy Grant, Director of Adoption, Friends for All Children. A theme recurrent in several letters received by the author from state departments of welfare (*e.g.*, Indiana, North Carolina, Wisconsin) is that procedural problems arise only very rarely when the placement is made through a licensed agency. Problems are quite common, however, when the parents attempt to secure a child through a private individual, or to complete the processing themselves without agency help. *See infra* notes 140, 141.

3. This section is based mainly upon unpublished material provided through the courtesy of the Foreign Adoption Center of Boulder, Colorado; J. Oltragge, Steps in Foreign Adoption, March, 1974; A. Renzo, I-600 Filing Procedure, April, 1974; Checklist of Steps in a Guatemalan Adoption Through the Foreign Adoption Center. A letter received from the Holt Adoption Program, Incorporated, July 16, 1974, in response to questions concerning procedures was also most helpful in analyzing the step-by-step procedure.

common.[4] Slight variations will occur with the use of other avenues of adoption.

A family seeking to adopt a child from abroad first applies to a licensed international adoption agency working in the country in which the family is interested.[5] The agency, or in some cases the state welfare department, conducts a "home study" of the potential adoptive parents and family;[6] on the basis of this home study, the agency may or may not approve the couple for adoption.

If it does approve the couple, the agency contacts them, as soon as it learns of the availability of a child who meets their general desires, and provides them with a social and medical history of the child. If the parents determine that they want to accept this child, they must agree to accept and care for the child as their own and must sign a power of attorney, which is sent to the United States consulate in the child's country.[7] They must satisfy all the preadoption requirements of their state, the United States and the foreign country[8] and should file an I-600 preliminary visa application as soon as possible, so that INS can begin processing them.

During this time, the agency, working in conjunction with the foreign attorney who has been given the power of attorney, obtains

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4. These procedures are for the I-600 Petition to Classify Orphan as an Immediate Relative (*i.e.*, to grant the orphan the status of a child of the adopting parents for purposes of adoption). The petition is currently available only to married United States citizens, although this may be changed shortly. *See infra* note 61.

5. Most international adoption agencies are licensed in only a few foreign countries and American states; in those states in which they are not licensed, they work through local agencies. The majority of these agencies are most active in Korea and Vietnam. Only the Foreign Adoption Center works actively in Latin America. A very few of the agencies which may be consulted are:

a. Pearl S. Buck Foundation, Incorporated, 2019 Delancey Place, Philadelphia, Pennsylvania 19103;

b. Foreign Adoption Center, Incorporated, P.O. Box 2158, Boulder, Colorado 80302;

c. Friends for All Children, 445 South 68th Street, Boulder, Colorado 80303;

d. Holt Adoption Program, Incorporated, P.O. Box 2420, Eugene, Oregon 97402;

e. WAIF, Children's Division, Travelers Aid International Social Service of America, 345 East 46th Street, New York, New York 10017.

6. If the state preadoption requirements do not include a home study, the Immigration Service will conduct one.

7. The power of attorney is given to an attorney in the foreign country and to the agency director or representative in that country. These people "stand in" for the parents. Interview with Suzanne Johnson, Assistant Director of Adoption, Friends for All Children.

8. Immigration and Naturalization Act §101(b)(1)(F) (1965) [hereinafter cited as I.N.A.], 8 U.S.C. §1101(b)(1)(F) (1965). These preadoption requirements are discussed briefly in III *infra*.

the child's birth certificate and forms releasing the orphan for adoption.[9] These documents, translated and notarized by the United States consulate, are sent to the adoptive couple. The couple takes the birth certificate, release form, and whatever supporting documents were not submitted with the I-600 petition to the INS office. The Service runs a criminal check on the parents, completes the processing, and sends all the documents to the consulate. The formal adoption process begins when these documents are received.

It should be pointed out that in most cases the child is actually adopted twice:[10] the foreign country usually requires that the child be adopted in the home country, before he or she will be issued an exit visa. This adoption is for the purposes of the foreign state and has little relationship to the subsequent adoption (or "readoption") in the United States.[11] Nevertheless, this requirement of an initial adoption overseas can greatly delay the child's trip to the United States, if the necessary forms are not sent early. Therefore, it will help if the parents send second originals of the notarized support documents directly to the foreign country, rather than waiting for the Immigration Service to process and send these papers.

In order to receive the visa necessary for entry into the United States, the orphan must undergo an "overseas check," including a medical examination, to determine whether he or she is admissible. This check was formerly conducted by an Immigration officer, who made only infrequent trips to some countries. However, it may now be made by a United States consular official in the country in which the child is living and, consequently, takes much less time.[12] In addition, the state of proposed residence must certify to Immigration that its preadoption requirements have been met and that the home has been approved for this particular child.

Once the visa is issued, the child's escort takes it and the child's passport and accompanies the child to the United States, where the visa is surrendered in exchange for a "border crossing identification card," designating the place of final destination. The stateside adoption or readoption takes place in the child's new state of domicile, according to its laws, and may be finalized in one month to one year,

9. The person having legal custody of the child (the natural parent(s) or the orphanage) must sign a document transferring the child into the custody of the agency, before the child can be adopted for emigration purposes.

10. This paragraph is based upon the Foreign Adoption Center paper on Guatemalan Adoption, *supra* note 4. *See* text at note 56 *infra*.

11. Upon finalization of this foreign adoption, the adoption papers are translated, notarized, and sent to the adoptive parents.

12. *See* text at note 2 *infra*; *see also* II(B)(2) *infra*. Form I-604, Request for and Report on Overseas Orphan Investigation, is filled out by the consular or Immigration officer in conjunction with this overseas examination.

depending on the state involved.[13]

This is the normal procedure and usually takes from two to five months from the time the home study is approved until the child arrives.[14] Complications will, of course, lengthen this time period.

B. *Visas and Visa Applications*

A brief discussion of the entry visa will obviate the necessity of mentioning these general steps and comments in each of the following sections.

Although a nonimmigrant visa may sometimes be used in certain emergency situations,[15] for adoption purposes the entry visa is nearly always an immigrant visa. In either case, the alien must submit a formal application for the visa.[16] Careful compliance with all the documentary requirements prescribed by the statutes and regulations is essential,[17]

> [f]or an alien who comes without documents or with defective documents may find the gates shut when he seeks entry. And if such a person succeeds in passing the portals, his right to continued residence may be undermined, and he may be amenable to expulsion.[18]

The primary responsibility for obtaining the necessary information and materials, maintaining the file, and completing the applications rests with the adopting parents.[19] The agency and Immigration will render whatever aid may be necessary, but the burden of proving facts and relationships claimed in the application is on the petitioner.[20]

As was noted earlier, the Immigration Service, or the consulate acting in its behalf, conducts an investigation of the child, to determine whether the child qualifies for the claimed status, whether he or she has any ailments or handicaps which will require special care or treatment, and whether there are any mental or physical afflictions which may make the child inadmissible. If it finds any problems, the Service notifies the petitioners, so that they can decide whether they still wish to continue their petition for this particular child.[21]

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13. Interview with Susan Evans, International Coordinator, Foreign Adoption Center.

14. *Id.*

15. *See* II(D) *infra*.

16. I.N.A. §222(a), (c), 8 U.S.C. §1202(a), (c) (1965).

17. It is impossible to present a detailed review of all these requisites within the limited confines of this paper. An applicant or a person seeking further information should consult the Immigration Service, the adoption agencies, and treatises on immigration, especially 1 GORDON & ROSENFIELD, *supra* note 1, §§2.29-.36.

18. 1 GORDON & ROSENFIELD, *supra* note 1, §2.29.

19. *Id.* §§3.7, 3.10, 3.11.

20. *Id.* §3.5g.

21. 1 GORDON & ROSENFIELD, *supra* note 1, §3.5e, at 3-27. The parents are usually apprised of any such problems by the agency before this time, however.

In many cases, the child may be in generally poor health, due to an inadequate diet and a lack of proper care and attention.[22] Usually the parents understand this and decide to accept the child, despite the problem. However, because the grounds for exclusion cannot be disregarded by executive officers or the courts,[23] the child may be excluded, regardless of the parents' willingness to take him or her "as is." Grounds for exclusion include mental retardation,[24] "dangerous contagious diseases,"[25] and an INS determination that the petitioners have not demonstrated that they will be able adequately to care for a child with this particular mental or physical handicap.[26]

One final comment: A child will not be granted a visa, unless it has been released by the foreign state, the natural parent, or the orphanage, and unless the applicable laws and procedures prescribed by the adoptive parents' state of domicile have been observed.[27]

II. AVENUES AVAILABLE FOR ADOPTION

The visas available for use in intercountry adoptions are commonly classified as "immediate relative" (the two kinds of immediate relative visas are the I-130 and the I-600), "nonpreference," "visitor," and "parole." The terms refer to both the visa itself and the preliminary visa application.

An I-130 petition to have an alien classified as a child of the adoptive parents is filed by petitioners who have legally adopted the child, while residing overseas. They may bring the child in under a simplified procedure. The usefulness of this petition is somewhat limited, however, due to custody and residency requirements.

The most often used petition for foreign adoptions is Form I-600. It is usually the most predictable method, results in the fewest delays and risks, covers the greatest number of cases, and provides the greatest safeguards for the child, the parents, and the agency. For these reasons, adoption agencies deal almost exclusively with it and resort to the following three types of visas only when they have no other choice.[28]

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22. It must be stressed that this poor health is in no way due to a lack of effort by the orphanage staff, who really do all they possibly can. However, they are greatly hampered by a lack of funds, by insufficient staff, and by a perennial shortage of even the most rudimentary "medicine cabinet" supplies.

23. 1 GORDON & ROSENFIELD, *supra* note 1, §2.32.

24. I.N.A. §212(a), 8 U.S.C. §1182(a) (1965).

25. *Id.*

26. 1 GORDON & ROSENFIELD, *supra* note 1, §3.5e, at 3-27. The basic reason behind these exclusionary provisions is a desire to avoid the spreading of disease or the bringing in of someone who will simply become a ward of the state.

27. *See* II(B)(2) *infra*.

28. E. Ratliff, Types of Visas Used in Intercountry Adoptions at 6 (unpublished paper provided courtesy of the Foreign Adoption Center, Inc.) [hereinafter cited as Ratliff].

Parents and children who do not qualify for an immediate relative visa must usually rely upon the nonpreference visa. The greatest single drawback of this method is the limited availability of such visas; extremely long waiting periods can thus be expected.

In an emergency, when speed is especially important, a parole or visitor visa may constitute the only practical or satisfactory method of bringing the orphan into this country. However, because both of these are nonimmigrant avenues, their use for purposes of adoption creates substantial risks for everyone involved. Consequently, the agencies are very reluctant to use them.

The following sections will analyze the five previously mentioned visa types, the circumstances under which each may or must be employed, and the risks and procedures involved in their use.

A. *Children Adopted by Parents Residing Abroad* (I-130)

Parents residing overseas may bring in a child whom they have adopted abroad, if that child has been adopted in accordance with the laws of the foreign state and meets the statutory requirements imposed by the Immigration and Naturalization Act.[29]

The Act provides that:

> immediate relatives, including the children of a citizen of the United States . . . who are otherwise qualified for admission as immigrants shall be admitted as such without regard to the numerical limitations in this Act.[30]

It further states that:

> [a]ny citizen of the United States claiming that an alien is entitled to . . . immediate relative status . . . may file a [preliminary visa] petition for such classification.[31]

The phrase "otherwise qualified for admission" means that, although immediate realtives do not have to wait for a visa number before applying for a visa, they still must satisfy the qualitative and documentary requirements found elsewhere in the Act, unless modifications are specifically prescribed.[32] Thus,

> a child adopted while under the age of fourteen years, if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years,

may be accorded immediate relative status as a child of a United States citizen.[33]

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29. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b. The form most commonly used is Form I-130, Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa.

30. I.N.A. §201(b), 8 U.S.C. §1151(b) (1965).

31. I.N.A. §204(a), 8 U.S.C. §1154(a) (1965).

32. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18a (Cum. Supp. 1973).

33. I.N.A. §101(b)(1)(E), 8 U.S.C. §1101(b)(1)(E) (1965).

Administrative decisions have interpreted this statutory language as meaning that the two-year residency does not have to *follow* the adoption. The requirement is satisfied, if the child lives with the adoptive parent or parents for such time prior to the adoption.[34] "However, the requisite two years of legal custody must follow the adoption."[35] This means that, where the parents must leave the foreign country before the custody requirement has been met, the child must remain behind for a period of time. However, because the legal custody tolls whether or not the child is in residence with the parent, he or she may come here, as soon as two years have elapsed from the date of the adoption.[36]

This avenue is available to single, as well as married parents;[37] and "where there are two adoptive parents, it is unnecessary that the child reside with both for two years."[38] Thus a divorce or separation does not preclude the use of this petition.

It is significant that, despite the statutory provision that the person using the immediate relative visa must be a United States citizen, the I-130 petition may also be filed by a "lawful permanent resident alien" of this country.[39] This is one of the few avenues available to non-citizens for intercountry adoption. Furthermore, the parents need not meet the preadoption requirements of the state of intended domicile,[40] since the child has already been legally adopted in accordance with our laws. A certified copy of the adoption decree must accompany the petition.[41]

The major disadvantages of this I-130 petition are: (1) except where the petitioner wants to keep a sibling group together, he or she may not file more than two such petitions;[42] and (2) this avenue is unavailable to parents of children over the age of fourteen at the time they were adopted,[43] or over twenty-one or married at the time the petition is filed.[44] However, the parents have several rather unsatisfactory options in cases like these.

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34. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, n. 71.

35. *Id.*

36. Interview with Robert B. Neptune, Supervisory Immigration Examiner, Denver, Colorado, District Office, United States Immigration Service.

37. *See* text at note 33 *supra*.

38. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, n. 71.

39. 8 C.F.R. 204.2; Form I-130, Instruction No. 1.

40. *See* text at note 33 *supra* (this provision makes no mention of preadoption requirements; *See* text at note 53 *infra*); North Carolina Department of Human Resources, Division of Social Services "Newsletter," August, 1973, at 8.

41. 8 C.F.R. 204.2(d)(F); Form I-130, Instruction No. 4(b)(6).

42. I.N.A. §204(c), 8 U.S.C. §1154(c) (1965).

43. *See* text at note 33 *supra*.

44. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, at 2-92; 8 U.S.C. §1101(b)(1) defines "child" as "an unmarried person under twenty-one years of age . . . ."

If the adopted child was under the age of fourteen at the time of the adoption, and if the custody-residency requirement has been met,[45] the parents may file an I-600 petition.[46] However, in order to use this petition, they must meet the further requirement of having gone abroad and personally seen the child.[47] Alternatively, if the child is a native of the Eastern Hemisphere, they may apply for a preference visa:[48] either first preference for "unmarried sons or daughters of citizens of the United States"; or second preference, for "unmarried sons or daughters of an alien lawfully admitted for permanent residence"; or fourth preference, for married sons or daughters of American citizens.[49] If the child was born in the Western Hemisphere, the parents may use the alternative avenue of a special immigrant (nonpreference) visa. In cases where the child was over fourteen years of age at the time of adoption, the parents have no alternative but to apply for a nonpreference visa.[50]

B. *Children Coming to the United States for Adoption* (I-600)

1. *Statutory Provisions Concerning an "Adoptable Child."*

The statutory provision granting American citizens special privileges for bringing their immediate relatives to the United States[51] applies not only to children adopted abroad, but also to children coming to America for adoption. However, to gain any real benefits under the 1965 Act by reason of adoption, the alien must qualify as a "child" within the statutory definition of that Act. This requirement is rather easily satisfied under the present statute, since "child" now includes an orphan who is:

> under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative . . . and who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States, and who has in writing irrevocably released the child for emigration and adoption;[52] who

45. 1 GORDON & ROSENFIELD, *supra* note 1, §2.27e; interview with Robert B. Neptune, *supra* note 38.

46. This petition is discussed in detail in II(B) *infra*.

47. *See* text following note 52 *infra*; interview with Robert B. Neptune, *supra* note 36. Some foreign states, such as Greece, require that the adopting parents go abroad to see and adopt the child, before they will allow the child to emigrate. Letter to the author from Elizabeth C. Taylor, Supervisor, Maryland Resource Exchange, Maryland Social Services Administration, September 23, 1974.

48. Preference categories are available only to non-Western aliens; Western Hemisphere natives fall into one large "special immigrant" category.

49. I.N.A. §203(a), 8 U.S.C. §1153(a) (1965). The other preference categories are inapplicable to children coming to the United States for adoption.

50. *See* II(C) *infra*.

51. *See* text at notes 29-31 *supra*.

52. However, the laws of the foreign state can significantly modify this require-

> has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence.[53]

Gordon and Rosenfield point out that, where a child is coming to this country for adoption:

> the United States citizen and spouse must furnish assurances satisfactory to the Attorney General that they will care for the orphan if he is admitted to this country and will [legally adopt the child]. It is the administrative view that the child can be adopted only by a United States citizen and spouse; [and] that both parents must be living and validly married . . . .[54]

As was noted previously,[55] if the parents do not go abroad to adopt the child themselves, the agency representative adopts the orphan for them by proxy. This proxy adoption is helpful in several ways. In addition to satisfying the exit visa requirements, it also gives the parents legal custody of the child during the months before the stateside adoption is finalized; without it, the child would be in a "legal limbo" during this iterim period.[56] The proxy adoption also provides the evidence of legal custody required by many states, before they will allow the child to enter the state. It alone is sufficient to get the child a social security number.[57]

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ment. For example, some countries (*e.g.*, Vietnam) provide that "a child placed in an orphanage will be regarded as abandoned, if the parents do not contribute to its support, or otherwise indicate that they have terminated their parental obligation to the child." 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b (Cum. Supp. 1973). In a case such as this, the orphanage has legal custody of the child, and a release by the orphanage is all that the foreign country requires; a release signed by the natural mother is unnecessary. Furthermore, many countries do not accord the natural father any rights with respect to the abandoned orphan. In Vietnam, for example, the father's name does not even appear on the birth certificate, unless the parents were married at the time of the child's birth; otherwise, the birth certificate is simply marked "father unknown." Interview with Wendy Grant, *supra* note 2.

These foreign laws should be accepted as binding upon American courts in an adoption proceeding. Nevertheless, several states still require that the adoptive parents obtain a declaration of release from the natural parent, as well as from the orphanage, before they will finalize an adoption decree. *See also* III *infra*.

53. I.N.A. §101(b)(1)(F), 8 U.S.C. §1101(b)(1)(F) (1965).

54. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, at 2-98.

55. *See* text at note 10 *supra*.

56. Interview with Susan Evans, *supra* note 13.

57. Interview with Wendy Grant, *supra* note 2. This type of proxy adoption is not the same as the "pure" proxy adoption, which is forbidden by Federal law. The Immigration Act, §101(b)(1)(F), 8 U.S.C. §1101(B)(L)(F) (1965), requires that the parents physically see the child prior to or during the adoption proceedings. Therefore, where an agency representative stands in for the parents during the overseas adoption, the parents must readopt in their state; an adoption without this subsequent readoption is a pure proxy adoption. This requirement means that the couple must first demonstate that readoption is permissible in their state. 8 C.F.R. 204.2(e)(3).

The child is then "readopted" in its new state of domicile, in a totally separate and unrelated proceeding. The primary purpose of the readoption is to gain a United States birth certificate and certain additional protection for the child, such as guarantees of inheritance rights. The child is then protected by the adoption laws of its new state and by the "full faith and credit" clause.[58]

There are two major shortcomings to this otherwise most helpful petition. The first is an arbitrary proviso that it may not be used by either a widowed or a single person.[59] They must fall back on the nonpreference visa, with its protracted waiting period, as their only legitimate avenue of adoption. This predicament is made even more vexacious by the fact that some states will rarely place foreign children with a single parent, because single parents do not qualify for immediate relative visas.[60] However, legislation is now pending in Congress to give single parents the same adoptive rights under I-600 as are available to married parents.[61]

The second deficiency is the equally arbitrary provision that:

> no more than two petitions may be approved for one petitioner in behalf of a child . . . unless necessary to prevent the separation of brothers and sisters.[62]

The restriction holds even if one of the two orphans dies immediately following entry into the United States.[63] A resolution now in Congress would grant immediate relative status to foreign orphans, regardless of the number of I-600 petitions previously submitted by the prospective parents, provided the state preadoption requirements have been met.[64] However, until such time as this restriction is properly interred, couples seeking to adopt their third foreign child must rely upon one of the following methods: (1) Use a nonpreference or other visa type which does not carry this restriction;[65] (2) have a private bill submitted in Congress to gain the privilege of bringing in the third

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58. Interview with Anne K. MacLaughlin, Esq., Colorado Springs, Colorado.

59. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, at 2-98. This restriction is especially unfortunate, because it is aimed at those people who most often adopt the older and handicapped children. Interview with Susan Evans, *supra* note 13.

60. Letter to the author from Martha Schurch, Agency Services Supervisor, Department of Health and Social Services, Division of Family Services (Adoption), Madison, Wisconsin, August 9, 1974.

61. The bill, H.R. 7555, 93d Cong., 1st Sess. (1973), is in the Senate Judiciary Committee. Letter to the author from Senator William Proxmire, August 13, 1974.

62. I.N.A. §204(c), 8 U.S.C. §1154(c).

63. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, n.84.

64. J. Buchmeier, Immigration Processing Time Cut in Half (unpublished paper provided courtesy of Organization for United Response, Minneapolis, Minnesota). The bill is H.R. 8096, 93d Cong., 1st Sess. (1973).

65. *See* II(C),(D) *infra*.

child.[66] Because of the amount of time involved, neither of these methods is really satisfactory.

Several unsuccessful attempts have been made to use a third method. Because the I-600 form provides for signatures by "petitioner" and "petitioner's spouse," in cases where both adoptive parents are United States citizens, it would seem possible that the husband could be the petitioner for two children, and the wife be the petitioner for two more. However, the Immigration Service has plugged this loophole by requiring that the petitioner be able to support the child himself or herself.[67] A subsequent attempt by two working parents who answered this requirement was thwarted by the interposition of the rule that the petitioner and spouse are considered to be one unit and cannot switch.[68] Thus it seems that this apparent loophole is really a mirage.

2. *Procedure for Filing the I-600 Form.*

It is appropriate to discuss in some detail the procedure for filing this important petition. The adopting parents should submit the Petition to Classify Orphan as an Immediate Relative to the district office of the INS as soon as possible after accepting a child.

The Petition supplies the Immigration Service with basic information regarding the residence, citizenship, and financial capabilities of the parents, the orphan's name, history and condition, and prior adoptions by the parents. A number of supporting documents must also be submitted. These include:

1. proof of United States citizenship of petitioner;
2. proof of marriage of petitioner and spouse;
3. proof of age of the orphan;
4. evidence that petitioner and spouse are able to support and care for the orphan;
5. certified copy and translation of adoption decree, if the child has been lawfully adopted abroad; or if the child is coming to the United States for adoption, evidence that any preadoption requirements have been met, and a statement that the couple will adopt the child in the United States.
6. evidence that the natural parent has irrevocably released the orphan for emigration and adoption, or that the child has been unconditionally abandoned to an orphanage which has so released him or her.
7. completed fingerprint cards, one for the petitioner and one for petitioner's spouse.[69]

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66. Ratliff, *supra* note 28, at 3,8 (includes instructions for applying for a special bill).

67. Interview with Arden Buck, Director, Foreign Adoption Center; interview with Suzanne Johnson, *supra* note 7.

68. Interview with Karen Ratliff, International Liaison, Foreign Adoption Center.

69. 8 C.F.R. 204.2(e); Form I-600 Instructions; A. Renzo, I-600 Filing Procedure, April, 1974 (unpublished material provided courtesy of the Foreign Adoption Center). *See also* III(A) *infra*.

It should be noted that the new form (revised April 1, 1974) does not require a "biographic data form" for criminal and employment checks on the applicants. Furthermore,

> The INS can now begin the criminal check prior to receiving all the supporting documents for the I-600, but needs as a minimum the form, the fees and as many supporting documents as possible. Minimum documents could be (for example) fingerprints, proof of citizenship and marriage, and [evidence of] ability to support the orphan. In cases where the parents must go to the foreign country personally to adopt the child, the INS will conduct this check in advance, given only the fingerprints and a letter of explanation.[70]

Because of these changes, once all the required documents have been submitted, the ideal processing time (the time needed for a case with no special problems) may be decreased from two months to three or four weeks.[71]

Once the petition has been approved the Immigration Service forwards it to the consulate in the child's country, where it is used as a part of the visa application.

C. *Nonpreference and Special Immigrant Visas*

Every immigrant is presumed to be a nonpreference or special immigrant, until that person establishes to the satisfaction of the immigration and consulate officers that he or she is entitled to an immediate relative or preference status.[72] Alien minors who do not qualify as "children" within the statutory definition of that term (because they are to be adopted by a single parent, or because they are already over fourteen years of age, for example) cannot be brought here as immediate relatives and thus must come in via another method, either immigrant or nonimmigrant. The immigrant avenues are the "nonpreference" and "special immigrant" visas, usually covered by the single term "nonpreference."[73] The nonimmigrant child enters the United States via a visitor, a student, or a parole visa.

Alien minors coming to the United States on a nonpreference visa are governed by the same rules which apply to the immigration of any other immigrants. They must, therefore, meet the general admissibility requirements of filing documents and taking mental and physical examinations. They are subject to no controls, restrictions, or requirements which do not apply to all other general immi-

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70. J. Buchmeier, *supra* note 64, Immigration Processing Time Cut in Half. *See also* note 166 *infra*.

71. *Id.*

72. I.N.A. §203(d), 8 U.S.C. §1153(d) (1965); 1 GORDON & ROSENFIELD, *supra* note 1, §2.27i.

73. Technically, however, the term "nonpreference" applies only to visas for natives of the Eastern Hemisphere; natives of the Americas are classified as "special immigrants."

grants.[74] "The special safeguards designed to protect the 'adopted child' and the 'eligible orphan' do not apply in these cases,"[75] and there is no requirement of prior adoption or even of intent to adopt.[76]

Preliminary visa applications are not required for special or nonpreference immigrants, since they are not trying to prove a relationship to a citizen or lawful resident alien. Thus the parent or agency deals directly with the Department of State and the United States consulate in the child's country in seeking these visas, rather than with the Immigration Service.[77] Early application for these visas is vital, because the number of visas available is limited, and the order in which the applications are processed is governed by the rule of "first come, first served."[78]

The use of a nonpreference visa may be preferable or even essential in situations:

1. where little or no waiting list exists,
2. where no home study exists,
3. where single parent adoption is anticipated,
4. where the child is over fourteen years of age,
5. where both adoptive parents are alien
6. where the allotted two "immediate relative petitions" have already been used.[79]

The adoptive parent or parents are required to submit an affidavit of support, in duplicate, accepting the full financial responsibility for the child; a notarized statement, also in duplicate, from the parents' employer(s), setting forth work and salary prospects; a statement from a recognized school indicating that the child can be accepted as a full-time day student; and a financial statement from the applicants' bank.[80] The special and nonpreference visas do not require a home study; however, the inclusion of one may well increase the chances of a favorable review of the application, as well as speed up the process. "The application may be further fortified with letters of recommendation, especially if there is no home study,"[81] and with a statement showing that the parents' insurance policies will fully cover the child.[82]

The parents must also obtain papers showing that the child's

74. F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES, ch. 12, §6(a) (2d ed. 1961, Cum. Supp. 1964); Z. Jackson, *America's Changing Immigration Policy*, 4 LINCOLN L. REV. 72,74 (1969).

75. F. AUERBACH, *supra* note 74, ch. 12, §6(b).

76. Ratliff, *supra* note 28, at 4.

77. 1 GORDON & ROSENFIELD, *supra* note 1, §3.5a; Ratliff *supra* note 30, at 1.

78. 1 GORDON & ROSENFIELD, *supra* note 1, §3.7a.

79. Ratliff, *supra* note 28, at 6.

80. *Id.* at 4.

81. *Id.*

82. Interview with Doris Besikof, Friends for All Children. It is important that the

surviving natural parent or parents, and/or the orphanage to which the child has been surrendered, have released him or her for emigration and adoption.[83] Full compliance with these requirements and suggestions can prevent much anxiety and delay.

Once the consulate has approved the application, the child is issued a visa, if there is no waiting list. However, since there are usually more applicants than available visa numbers, the applicant must await his or her turn in accordance with the date of filing the visa.[84] This waiting period may last from twelve to twenty-seven months, depending largely on the hemisphere of the child's origin —the Western Hemisphere visa usually takes much longer.[85]

1. *The Eastern Hemisphere and Nonpreference Visas.*

The 1965 Immigration and Naturalization Act provides that no more than 170,000 immigrants, exclusive of immediate relatives, may be admitted into the United States during any fiscal year from nations other than the independent countries of the Western Hemisphere. Although the number of immigrants from any single country is limited to 20,000, the annual quota of 170,000 is otherwise established on a worldwide, rather than a country-by-country basis.[86]

The Act sets up seven "preference categories" for these immigrants, based on special relationships to American citizens or permanent residents, or on special skills. Visa numbers for Eastern Hemisphere applicants are made available in the order of preference class and in the order of application within each class.[87]

However, even qualification as a member of a certain category does not assure the immigrant of immediate consideration, since within a category or country the demand for visas may be greater than the supply.[88] Such a class or country is deemed to be "oversubscribed." The "cut-off date" for an oversubscribed category is the filing or "priority" date of the first applicant who was unable to get a visa. Only those who have a priority date earlier than the cut-off date may be issued visas. All others are put on a waiting list. Visas are made available in the lower preference categories only after the

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parents actually read the policies, to determine whether they will cover the child and, if so, when that coverage begins; they should not rely upon the word of their insurance agent. *See* text at note 161 *infra*.

83. Ratliff, *supra* note 28, at 4; *see supra* note 52 and accompanying text.

84. 1 GORDON & ROSENFIELD, *supra* note 1, §§2.27i, 3.7a.

85. Interview with Robert B. Neptune, *supra* note 36. *See infra* note 93.

86. I.N.A. §§201(a), 202(a), 8 U.S.C. §1151(a), 1152(a) (1965); 1 GORDON & ROSENFIELD, *supra* note 1, §2.27a. The limitation of 20,000 immigrants per country per year applies to the Western Hemisphere, as well.

87. I.N.A. §203(a)-(c), 8 U.S.C. §1153(a)-(c) (1965).

88. 1 GORDON & ROSENFIELD, *supra* note 1, §3.7a.

demand in the higher categories has been satisfied.[89]

Nonpreference applicants are those who have no claim to a preference and thus do not fall into any of the seven preference categories. Eastern Hemisphere children who do not satisfy the statutory definitions of "adopted child" or "eligible orphan" must, consequently, come in as nonpreference immigrants. They must simply wait their turn, in the chronological order in which they qualify, for any portion of the "worldwide annual quota" which is not used by the preference groups.[90]

The problem confronting the parents and agencies is that this worldwide quota is all too often fully used by the preference categories. Nothing is left for those who were forced into the nonpreference category by rules prohibiting prospective single or alien parents from filing immediate relative petitions, and limiting otherwise eligible parents to only two such petitions. The long waiting period inherent in the nonpreference method can lead to much anxiety, frustration, and trauma, especially if the child dies before getting here. This problem is also felt to an even greater extent by parents seeking a child from this hemisphere.

2. *Western Hemisphere Special Immigrants.*

Aliens born in any independent country of the Western Hemisphere or in the Canal Zone are given special immigrant status, and fall within an annual quota of 120,000 which is entirely separate from the worldwide annual quota prescribed for all other immigrants.[91]

The statute imposes no preferences or priorities on applicants for special immigrant visas. All applicants, including children, are simply considered in the order of their registration for visas.[92] Because of the vast number of Mexican, and Central and South American natives who seek entry into the United States each year, parents seeking to adopt a child from this hemisphere can expect to wait as long as two years before their child can obtain an entry visa.[93]

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89. Department of State Bureau of Security and Consular Affairs, Availability of Immigrant Visa Numbers for December 1973 (provided courtesy of the Foreign Adoption Center). The current waiting period is about eighteen months. Interview with Robert B. Neptune, *supra* note 36.

90. I.N.A. §203(a)(8), 8 U.S.C. §1153(a)(8) (1965); 1 GORDON & ROSENFIELD, *supra* note 1, §§2.27i, 3.7a. Normally, a nonpreference immigrant is required to obtain from the Secretary of Labor a certification stating that the immigrant's coming to the United States will not adversely affect American labor. However, this certification need not be filed for a child, as he or she will be supported by the adoptive parents.

91. 1 GORDON & ROSENFIELD, *supra* note 1, §2.20. The alien must actually be born in the Western Hemisphere; special immigrant status is not acquired by naturalization.

92. *Id.* §3.7a.

93. Interview with Robert B. Neptune, *supra* note 36. Any advantage which may otherwise have accrued from the absence of any preference categories has been offset by the lower number of immigrant visas available in a fiscal year.

Once established, a Western Hemisphere priority date, like a nonpreference priority date, is retained by the alien even after he or she makes a formal visa application by some means other than that by which the priority date was originally established.[94] This means that parents may apply for a nonpreference visa and, subsequently, for a nonimmigrant or immediate relative visa. Since the child's "rightful place in line" is retained despite this second petition, he or she may still come in on a nonpreference visa, if one suddenly becomes available.[95]

D. *Nonimmigrant Visas.*

According to the Immigration and Naturalization Act, every alien is:

> presumed to be an immigrant, until he establishes to the satisfaction of the consular officer . . . and the immigration officers . . . that he is entitled to a nonimmigrant status

within one of the ten nonimmigrant classes provided by this statute,[96] or until the alien is "paroled" into the United States via a special dispensation which grants no legal resident status.[97]

The major advantage of the nonimmigrant avenues is that there are no restrictions on the number of nonimmigrants that may enter this country each year;[98] thus getting such a visa is relatively easy, if the documentary requirements are met. In several instances they have been successfully used in intercountry adoptions. However, there are several significant drawbacks: The visas are temporary, rather than permanent; they are not issued in accordance with normal INS procedure and are subject to the interpretation of individual State Department and Immigration Service officials; and most important, they are not designed for purposes of adoption—they skirt the boundaries of illegality and, consequently, should be used in emergencies only.[99]

However, because of the long waiting periods that are often entailed in the use of nonpreference visas, in cases where getting the child into America as quickly as possible is the most important consideration (for example, an actual or potential medical emergency),

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94. Department of State Bureau of Security and Consular Affairs, Availability of Immigrant Visa Numbers for December 1973 (provided courtesy of the Foreign Adoption Center).

95. Interview with Robert B. Neptune, *supra* note 36.

96. I.N.A. §§101(a)(15), 214(b), 8 U.S.C. §§1101(a)(15), 1184(b) (1965). Unless a different meaning is indicated, the term "nonimmigrant" contemplates a visitor, student, or parole status; the term "visitor" generally includes both student and "visitor for pleasure" visas.

97. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54.

98. *Id.* §2.56.

99. Ratliff, *supra* note 28, at 1,7.

it may be best to use a visitor, or parole visa. Once here, the child's status can be adjusted by petition to an immigrant visa. The parent or parents should apply for a nonpreference visa number, as soon as the child arrives.[100] Thus these two avenues may, under certain circumstances, present an alternative means of adoption for prospective parents who cannot submit an immediate relative petition.

All nonimmigrants must conform to certain prescribed conditions. They are limited in the time they are allowed to stay and must depart within the authorized time period, or when the Attorney General determines that the reason for their parole no longer exists. (Of course, they may generally be granted extensions of their stay). They must maintain their nonimmigrant status and may not engage in any activities (such as employment) which are inconsistent with that status. And they may be required to post a "departure bond," to insure that they will leave when required.[101]

1. *Visitor Status.*

Of the ten statutorily prescribed nonimmigrant categories, only two can be made applicable to purposes of adoption. A visitor visa may be granted to "an alien . . . who is visiting the United States temporarily for pleasure."[102] This visa is issued by the consul at his or her discretion. A student visa is available to:

> an alien . . . who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States solely for the purpose of pursuing such a course of study at an established institution of learning . . . approved by the Attorney General.[103]

In both cases, the visitor must be the resident of a "foreign country which he has no intention of abandoning."[104] Both these visa types are issued by the United States consul abroad at his or her discretion.

Getting a standard visitor's visa requires little time or documentation. The procedures for getting a student visa are slightly more involved. Both the school and the student must file petitions and supporting documents.[105] However, the Act sets no age limitation,

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100. Interview with Anne K. MacLaughlin, *supra* note 58. Applying before the child arrives will result in a denial of the petition for parole status. *See* text at notes 107 and 114 *infra*.

101. 1 GORDON & ROSENFIELD, *supra* note 1, §§2.6b, 2.54.

102. I.N.A. §101(a)(15)(B), 8 U.S.C. §1101(a)(15)(B) (1965).

103. I.N.A. §101(a)(15)(F), 8 U.S.C. §1101(a)(15)(F) (1965).

104. 8 U.S.C. §1101(a)(15)(B),(F) (1965).

105. 1 GORDON & ROSENFIELD, *supra* note 1, §2.12b,d. The school must file a petition for approval of the student; the prospective student (or the parents) must demonstrate that he or she is entitled to the status, is otherwise admissible, has been accepted by the school and has sufficient resources to attend, and that he or she has whatever language skills are deemed necessary. *See also* 7 C.F.R. 214.3; 22 C.F.R. 41.45; Form FS-257.

does not prescribe any minimum number of semester hours, and does not elaborate on what is meant by "a full course of study." Furthermore,

> the school itself normally determines and certifies whether a full course of study is being undertaken, and this determination will not be questioned, unless it is manifestly unrealistic.[106]

Thus a student visa may also be obtained fairly easily.

However, because of the strong temptation to use these visas, it must be reiterated that neither is legally available to a child who is really coming here to be adopted. The visa applicant must necessarily misrepresent the reasons for the entry and the lack of any intention to abandon the native country, as the actual purpose is to immigrate. Thus there is a certain degree of risk involved in the use of a visitor visa, since the misrepresentation may constitute the ground for denial of a request for adjustment of status, for the deportation of the child, and for the bringing of criminal charges against the parents.[107] Nevertheless, the visa may be obtained in an emergency situation, if the consular officials are sympathetic.[108]

2. *Parole Visas.*

Parole status may be granted a child in emergencies or for humanitarian reasons, such as to enable the child to receive medical treatment which is unavailable in the child's native country. Although the child is able to enter the country, it is important to note that he or she receives no immigrant or legal resident status.[109] In rare cases, the period of parole may be extended to a full two years; the parents will then be able to fulfill the residency and custody conditions required for filing an immediate relative petition. Otherwise the adjustment of status must be completed by means of a nonpreference visa.[110]

The power to grant parole and to fix appropriate conditions is discretionary and is vested in the Attorney General, who usually delegates it to the INS district directors. The power is broad but not unlimited, and where it appears that it was arbitrarily exercised or withheld, it may be subjected to judicial review.[111]

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106. 1 GORDON & ROSENFIELD, *supra* note 1, §2.12c.

107. *See* II(D)(3),(4) *infra*.

108. K. Sreedhar, Immigration Laws Concerning Adoption, November, 1973 (unpublished paper provided courtesy of the Foreign Adoption Center); interview with Robert B. Neptune, *supra* note 36.

109. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54; K. Sreedhar, Immigration Laws Concerning Adoption, *supra* note 108. Polio does not constitute a ground for exclusion; parole visas are generally available to polio victims. Interview with Doris Besikof, Friends for All Children. *See* text at note 26 *supra*.

110. Interview with Robert B. Neptune, *supra* note 36.

111. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54.

Parole must be granted in advance of the child's departure for the United States, since any carrier bringing an alien to a port of entry without a proper visa is subject to a penalty.[112] Form I-512, Authorization for the Parole or Conditional Entry of an Alien into the United States, setting forth the reasons parole is being requested and the reasons a nonimmigrant visa cannot be obtained, must be submitted as a petition for parole status. Upon approval, the child is issued Form I-94, which states the method and period of admission.[113]

It is important to note that a child may not legally use a parole visa to come in for the purpose of a subsequent adjustment. The same risks discussed in reference to visitor visas are applicable here, as well.[114] So if the only problem is an anxious, frustrated parent or couple, the parole avenue should not be used. The legislation pending in Congress should soon eliminate most of the need for these nonimmigrant visas, although it will do nothing to improve the situation of prospective adopting parents who are both aliens.

3. *Adjustment of Status.*

According to §245(a) of the Immigration and Naturalization Act,[115] a nonimmigrant child may adjust his or her status to that of an alien lawfully admitted for permanent residence, if the child meets certain prescribed qualifications. Natives of the Eastern Hemisphere may complete the adjustment during their nonimmigrant residence in the United States. This privilege is not available to Western children, who must physically leave this country and return on an immigrant visa. However, they may arrange to obtain the visa in Canada or some other adjacent country.[116]

An alien seeking adjustment must file a formal application. He or she must be "eligible to receive an immigrant visa" and "admissible for permanent residence" in the same way as any other immigrant.[117] In addition, an immigrant visa must be "immediately available" at the time the application is approved.[118] In practice, this means that the child must be eligible for immediate relative status, or that a preference or nonpreference visa will be available within 90 days of approval. Where the child must apply for a preference or nonpreference visa, he or she must receive an immigrant visa number from the Department of State, before the application will be ap-

112. Interview with Robert B. Neptune, *supra* note 36.

113. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54 at 107 (Cum. Supp. 1973).

114. Interview with Robert B. Neptune, *supra* note 36; *see* II(D)(3),(4) *infra*.

115. 8 U.S.C. §1155(a) (1965).

116. *Id.* §1155(c); 2 GORDON & ROSENFIELD, *supra* note 1, §7.7b; Z. Jackson, *America's Changing Immigration Policy*, 4 LINCOLN L. REV. 72,79 (1969).

117. I.N.A. §245(a), 8 U.S.C. §1155(a) (1965); 2 GORDON & ROSENFIELD, *supra* note 1, §7.7b, at 7-61.

118. I.N.A. §245(a), 8 U.S.C. §1155(a) (1965).

proved.[119] Thus the parents should wait until just before a number is available to file the petition for adjustment.

The procedure for adjusting a non-Western child's status is essentially the same as that involved in any other application for an immigrant visa. The application is submitted on Form I-485, Application for Status as Permanent Resident. A preliminary visa application for immediate relative or preferred status must be approved, before a visa will be made available. The parents must also submit all the supporting documents usually required for admission as an immigrant.[120] If the child has not previously been inspected in conjunction with the issuance of the nonimmigrant visa, he or she must be given a medical examination by an officer of the United States Public Health Service.[121]

A Western Hemisphere child must go to a United States consulate in a foreign country and make formal application for readmission as an immigrant. The procedural and documentary requirements for either immediate relative or special immigrant status are otherwise similar to those outlined for a non-Western child.

4. *Discretion, Misrepresentation and Deportation.*

The mere fact that the child meets the qualifications discussed in the preceding subsection does not entitle him or her to an automatic change of status. Adjustment is at the discretion of the Attorney General (ie, the Immigration Service)[122] and is granted only in meritorious cases; but it will not ordinarily be denied in the absence of adverse factors. The burden of proving merit is on the petitioner.[123]

The case of a child coming here on a nonimmigrant visa for purposes of adoption raises many difficult issues. The statute provides that:

> [a]ny alien who seeks to procure or has sought to procure a visa or other documentation, or seeks to enter the United States, by fraud or by willfully misrepresenting a material fact,

shall be barred from admission.[124] The provision applies to both im-

119. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7e. Lists of quota availability are issued monthly by the Visa Office of the United States Department of State. The parents may obtain the current priority date and waiting period from the Immigration Service, in order to determine when a visa will be available.

120. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7e; Form I-485, Instructions. Required documents include passport, temporary entry permit (Form I-94), birth certificate, fingerprint chart, affidavit of support, and Biographic Information Form G-325A, if the child is over fourteen years of age.

121. 2 GORDON & ROSENFIELD, *supra* note 1, §§7.7b, at 7-56.

122. I.N.A. §245(a), 8 U.S.C. §1155(a) (1965).

123. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7d.

124. I.N.A. §212(a)(19), 8 U.S.C. §1182(a)(19).

migrants and nonimmigrants.[125] Because misstatements concerning a child's purposes in coming obviously have a direct bearing on his or her admissibility, they could well lead to the deportation of the child and the prosecution of the parents and the adoption agency. In fact, official U.S. immigration policy dictates that nonimmigrant visas may never be used for intercountry adoptions. A child coming to the United States in this manner will be here illegally from the very beginning and, therefore, will not be granted an adjustment of status.[126]

However, "the Attorney General is given broad discretionary power to waive the substantive grounds for the exclusion of nonimmigrants,"[127] and extenuating circumstances will be taken into account in a review of the child's case. Such things as the child's health (past, present and predicted), the need for immediate medical attention at the time the nonimmigrant visa was obtained, the very long waiting period involved with nonpreference visas, and the humanitarian intention of giving a good home to an orphaned child, may weigh heavily in favor of allowing the child to remain permanently in the United States.[128] At the same time, deliberate and repeated violations by the parents or agency will also be taken into account[129] and may operate to exclude the child; and continued use of these nonimmigramt avenues may result in the elimination of the sympathetic consular officials who are necessary to their successful utilization.

III. THE EFFECT OF STATE LAWS ON INTERCOUNTRY ADOPTIONS

A. *State Laws as Impediments to Immigration*

Most foreign adoptions initiated and completed through a licensed agency go very smoothly and without any significant problems or delays. The occasional difficulties that do arise are rarely ascribable to the laws themselves.[130] Usually they result from the varied administrative interpretations of these laws and procedural requirements.[131] For example, although United States immigration law determines which documents must be submitted before the processing of an I-600 petition can be completed, it is the INS district offices

125. GORDON & ROSENFIELD, *supra* note 1, §§2.32b, 7.7d. A fact is "material" if disclosure of the truth would have required the denial of the visa.

126. Letter from Walter V. Edwards, District Director, United States Immigration Service, to Susan Evans, International Coordinator, Foreign Adoption Center, August 27, 1974.

127. 1 GORDON & ROSENFIELD, *supra* note 1, §2.53b.

128. Interview with Robert B. Neptune, *supra* note 36.

129. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7d.

130. Two notable exceptions to this statement are the provisions restricting the use of the I-600 petition to married American citizens, and restricting the number of such petitions to two.

131. Interview with Wendy Grant, *supra* note 2.

that determine which documents must be submitted before they will begin processing the application. Some of these officials impose very minimal requirements. Others, despite the new policy,[132] may require the submission of most or even all the documents before they will initiate the investigation. This can delay the child's entry by as much as two to three weeks.[133]

Similar delays can occur in areas which have no INS office. If Immigration for some reason (perhaps because the office has had insufficient dealings with a particular welfare department) refuses to accept an otherwise valid home study, they will not approve the visa application, until they have sent a representative to interview the family.[134] This may take several additional weeks. However, problems resulting from actions of the Immigration Service are extremely rare.

The major problems encountered by the international adoption agencies concern the release of the child for adoption and the consent of the state to the adoption. If these problems arise before the child enters the United States, they delay the immigration; if they arise afterward, they affect the finalization of the adoption decree. This section is concerned only with the former situation.

The ease with which the documents are obtained by the adopting parties depends largely upon how the individual state department of welfare[135] construes the United States immigration laws and the state preadoption requirements. The state will not consent to the adoption, and the child will not receive an entry visa, until welfare is satisfied that the appropriate requirements have been met.

Wisconsin for several years provided an almost classic example of how a state law and the construction of a federal law can delay an orphan's entry for want of a consent to adopt. Federal law provides that the state preadoption requirements must be met in the case of an orphan "who is coming to the United States for adoption."[136] The parents and the Wisconsin Department of Health and Social Services were in a dilemma: Welfare felt unable to certify that the preadoption requirements had been met, since if the child had already been lawfully adopted abroad, it could not be coming here for adoption, and there were no longer any such requirements to meet. Since Wisconsin had no provision allowing the readoption of a child adopted in another country, it held that the parents would have to be licensed as

132. *See* text at note 70 *supra*.

133. Interview with Arden Buck, *supra* note 67.

134. Interview with Suzanne Johnson, *supra* note 7.

135. In states which require a preadoption court hearing, the construction given by the presiding judge is determinative. *See* note 149 *infra* and accompanying text.

136. I.N.A. §101(b)(1)(F), 8 U.S.C. §1101(b)(1)(F) (1965); *see* text at note 53 *supra*.

foster parents. Immigration said that if the overseas adoption was valid, that was enough for them; but the parents wanted to readopt, in order to better protect themselves and their child.[137]

The impasse was finally resolved when Social Services realized that, since the overseas adoption is not consummated until long after the child arrives in the United States, there really is no adoption abroad, and the parents would be adopting, rather than readopting, in Wisconsin.[138] This change in policy was facilitated by an amendment to the Wisconsin Children's Code, which reads:

> A child whose adoption would otherwise be valid . . . may be readopted . . . if such readoption is necessary under Federal law to permit the child to enter this country.[139]

Preadoption requirements are imposed in order to insure that the necessary documents are in order, that adoption will be possible, and that the parents will have "the capacity to parent a child not born to them."[140] Nearly all states who have preadoption requirements require a home study, a medical and social report on the child, the child's birth certificate, proof that the child is free for adoption, and the consent of the state department of welfare (or of an agency acting in its behalf) for the adoption of the child in question.[141]

The home study is intended to verify that the parents will be able properly to care for the child. The specific documentary requirements vary from state to state and county to county;[142] home study documentation may include a physical examination of the parents,[143] information on the parents' finances,[144] and an indication that the parents will be able to accept the child's culture and help the child

137. Interview with Martha Schurch, Agency Services Supervisor, Wisconsin Department of Health and Social Services, Division of Family Services (adoption).

138. *Id.*

139. Wisconsin Children's Code §48.97, WIS. STAT. ANN. §48.97 (1971).

140. Letter to the author from Jane Stepich, Social Services Consultant, Indiana Department of Public Welfare, July 29, 1974; letter to the author from Ava Snook, Adoption Consultant, Colorado Department of Social Services, September 9, 1974.

141. This section is based primarily upon letters to the author from: Jane Stepich, *supra* note 140; Sue Howard, Adoption Specialist, Kentucky Department for Human Resources, July 25, 1974; Robin Peacock, Supervisor of Adoptions, North Carolina Department of Human Resources, August 9, 1974; Martha Schurch, *supra* note 60.

142. Interview with Karen Ratliff, *supra* note 68. Because of economic and personnel considerations, the adoption agency will rarely conduct the home study itself. In Colorado, as in many other states, the investigation is usually completed by either a county department of social services, or by a voluntary agency, such as the Lutheran Service Society. However, some states (*e.g.*, California) permit only the state department of welfare to conduct the study. Interview with Ava Snook, Adoption Consultant, Colorado Department of Social Services.

143. Letter from Jane Stepich (Indiana), *supra* note 140.

144. Letter from Sue Howard (Kentucky), *supra* note 141.

"retain or obtain a knowledge of and pride in that culture."[145] A few states still make some efforts to match the child's and the parents' religious faiths.[146]

Several states have child importation laws, with or without the provision that a "bond of indemnity" be posted by the parents or agency.[147] However, these laws usually cause few problems in agency adoptions, since the bond either does not apply or may be waived in the case of licensed child-placing agencies.[148] A few states hold a "preadoption court hearing," designed to ascertain the family's fitness to adopt, in cases where a preadoptive home study has not been completed by an approved agency.[149]

Delays may result from a judgment by the state department of welfare that the agency report on the child's medical and social history is incomplete; the department will not send its certification to the Immigration Service, until it gets more information. However, in many cases this is impossible, because so little is known about the child's origin or early history. The state must then be satisfied with the agency and consulate evaluation of the child's present state of health and prospects for the future. Almost all the states now understand this, and the problem is far less acute than it was even a year ago.[150]

Recently, the major problems surrounding immigration have centered around the question of whether the child has been properly released for adoption. Sometimes a declaration of release for emigration and adoption has been obtained from the natural mother and the orphanage, but the state wants a release from the child's father, as well.[151] As was noted earlier, this is often impossible to obtain.[152]

The more common problem involves satisfying the state department of welfare that the declaration of release is valid, or that the person signing it has the proper authority to release children for adop-

145. Letter from Robin Peacock (North Carolina), *supra* note 141; letter from Sue Howard (Kentucky), *supra* note 141.

146. *See e.g.*, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, NEW YORK STATE LEGISLATION ON ADOPTION, Social Services Law §373, at 38 (3d ed. 1972).

147. *See e.g.*, Wisconsin Children's Code §48.98(2)(a), WIS. STAT. ANN. § 48.98(2)(a) (Supp. 1974), *amending* WIS. STAT. ANN. § 48.98(2)(a) (1957); KEN. REV. STAT. §199.350 (1972).

148. *See e.g.*, Wisconsin Children's Code §§48.63, .98, WIS. STAT. ANN. §§48.63, .98; KEN REV. STAT. §199.370 (1972).

149. *See e.g.*, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, *supra* note 146, Domestic Relations Law §112, at 13. Ohio and Michigan have similar procedures. Interview with Wendy Grant, *supra* note 3.

150. Interview with Karen Ratliff, *supra* note 68; interview with Suzanne Johnson, *supra* note 7.

151. Interview with Karen Ratliff, *supra* note 68.

152. *See supra* note 52.

tion. This difficulty can usually be overcome by a statement, signed and sealed by a government or consular official, attesting that the person named therein has the authority to sign these declarations.[153]

The underlying source of most of these problems is an unwillingness on the part of some states to apply to foreign adoptions, standards and criteria different from those prescribed for domestic adoptions. These states may want complete histories on the child or releases signed by all who have an interest in the child. Two approaches have been employed to avoid the delays and frustration that often result from these stiff demands: either the states have reformed their laws or modified their construction of the laws to take into account the needs and capabilities of the agencies and parents; or the agencies have somehow satisfied the states that they have met at least the essential requirements of the state laws, so that the states can feel justified in giving their consent to the adoption.[154]

B. *Eliminating Obstacles, Delays and Frustrations*

The time required for the transfer and completion of paperwork varies greatly from state to state and even from county to county, and is dependent upon such factors as laws, policies, the amount of money and number of personnel available for adoption work, and the degree of interest exhibited by these personnel.[155] This section represents a brief survey of the Colorado welfare and adoption system.[156] It is designed only to outline some of the elements which have helped to eliminate past problems and to make Colorado a state in which foreign adoptions are readily accomplished. It is not meant as an alchemical formula for success.

An obvious first requisite is the presence of "good" laws. In Colorado there are few problems with release and consent, because the law imposes no significant barriers on the courts' or the department of welfare's acceptance of legal documents from foreign jurisdictions. In addition, the absence of a child importation law means that Colorado requires no extensive written report on the child; children who are otherwise admissible are not kept out for want of a detailed life history.[157] However, it also means that virtually anyone may bring a child into the state. Therefore, it is essential that the Colorado De-

153. Interview with Martha Schurch, *supra* note 137.

154. Interview with Arden Buck, *supra* note 67; interview with Suzanne Johnson, *supra* note 7.

155. Interview with Wendy Grant, *supra* note 2.

156. This section is based upon a series of interviews with: Wendy Grant, *supra* note 2; Suzanne Johnson, *supra* note 7; Burr Ringsby, Foreign Adoption Center and Supervisor of Substitute Care, Boulder County Department of Social Services, Colorado; Ava Snook, Adoption Consultant, Colorado Department of Social Services.

157. The Interstate Compact on the Placement of Children has augmented or replaced the importation laws of about one-half the states. It is designed to assure

partment of Social Services work very closely with the Immigration Service and the international adoption agencies, in order to insure good placements. The following discussion will explain how this cooperation is achieved.

Even more important than the laws themselves, in determining the ease with which foreign adoptions are completed, is the role played by those people who interpret the laws and formulate the policy. As suggested in the preceding section, this function is most often performed by the state welfare department.

Colorado has a rather unique system which can best be described as a "state-supervised, county-administered" program. Two "adoption consultants" serve in a dual capacity as supervisors of child placement policy, and as liaisons between the state and county departments of social services, the intercounty adoption agencies, and the Immigration Service.

Under this arrangement, the Colorado Department of Social Services sets the fundamental policy but leaves most of its implementation to the county departments who, in turn, strive to keep their involvement in the actual adoption process to a minimum.[158]

The adoption consultants also serve as conduits for complaints and questions from the agencies and county departments to the district INS office in Denver. This reduces the number of individual communications and helps to maintain the Immigration Service's great willingness to facilitate adoptions, by keeping at a tolerable level the increased immigration workload which has resulted from the burgeoning demand for foreign children.

It may be said with some accuracy that the Colorado program recognizes that intercountry adoptions pose unique problems which often intertwine two distinct legal and cultural systems, and that it actually creates a separate legal and procedural system, designed to eliminate what are recurrent difficulties in certain other states. The adoption process moves smoothly, because major responsibilities are placed in the hands of experienced, competent agencies, and because interdepartmental overlap and tension are minimized. At the same time, the system incorporates the safeguards which are so essential, if the parents, the child, and the state are to be adequately protected.

IV. RELATED NOTES AND COMMENTS.

This section will deal very briefly with several issues raised by the foregoing discussion. The treatment given these topics is by no

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uniformity in child placement laws from state to state and to protect and keep track of children, as they cross state lines. The Compact is effective only in dealing between two or more Compact states; it has not yet been adopted in Colorado.

158. *See supra* note 142.

means exhaustive; much may depend upon the state, the foreign country, and other circumstances involved in each case.

A. *Legal Responsibility*

The question of who has legal custody of and responsibility for the child during the trip to the United States is of some concern to all parties involved. The child remains a citizen of its home country until such time as he or she is naturalized as an American citizen.[159] However, legal custody of the child is transferred from the orphanage to the agency, and then from the agency to the parents. Generally, the agency will "pick up the tab," if anything happens to the child between the time he or she leaves the foreign country and the time the parents take custody at the airport.[160] After that, the child is the responsibility of the adopting parents. Because the child will almost always require medical treatment, it is important that the couple determine whether their insurance policies will protect the child from the time he or she first arrives, or only after the adoption is completed.[161]

B. *Unidentified Children*

"Unidentified child" can have two connotations. In its broader context, it refers to almost all foreign-born orphans, because many are abandoned and have no name or early history. These children are examined by an orphanage or village official, who guesses at the date of the child's birth and makes up a name. The name and "birthdate" are then entered in a "birth judgment," the equivalent of a birth certificate.[162] If the parents want a United States birth certificate for the child, or if their state requires one, they must apply to Immigration for a search of INS records. Immigration has the birth judgment in its files and uses it to draft and certify a new birth certificate.[163]

The term can also refer to instances where one or both of the adopting parents go abroad to select and adopt a child. Before leaving the United States, the parents submit the usual I-600 supporting documents to the Immigration Service, which processes them and sends the results of its investigation to the American consulate in the foreign country. After selecting and adopting an orphan according to the laws of that country, the parents complete the Form I-600 by filling in the child's name and any remaining information.[164] The

159. Interview with Robert B. Neptune, *supra* note 36.

160. Interview with Suzanne Johnson, *supra* note 7. Of course, acceptance of this liability depends on the agency involved.

161. *See supra* note 82.

162. Interview with Susan Evans, *supra* note 13.

163. Interview with Robert B. Neptune, *supra* note 36. Form N-585, Application for a Search of the Records of the Immigration and Naturalization Service, is used to obtain both a new birth certificate and a verification of birth status.

164. Ratliff, *supra* note 28, at 9.

child's visa is then issued at the discretion of the American Consul or an Immigration official.[165] This avenue is available only to parents who actually go overseas, since only they can enter the child's name and file the petition.[166]

C. *Naturalization*

Because most parents want their children to become United States citizens, it should be pointed out that citizenship is never conferred by adoption; it is acquired only by blood, place of birth, or formal naturalization proceedings. Therefore, the child must be naturalized according to United States law. The Immigration and Naturalization Act[167] provides that the child must be a permanent resident alien in the full legal custody of its parents for two years, before it can be naturalized. This means that the stateside adoption must be finalized two years prior to the filing of the petition; and if the child came here as a nonimmigrant, the two years is tolled from the date his or her status is adjusted to permanent resident status. At least one of the parents must be a United States citizen.[168]

If the child is under the age of fourteen, its good moral character is presumed; if the child is over fourteen, such character must be demonstrated. Furthermore, regardless of the child's age, certain documents must be submitted, the child must appear for an interview, two witnesses must appear in behalf of the child, and the child must wait thirty days after the fulfillment of all other requirements before he or she can be sworn in as an American citizen.[169]

D. *Costs and Tax Rebates*

The cost of an intercountry adoption can range from as little as $250.00 to as much as $1200.00 exclusive of transportation, depending upon the country and the agency involved.[170] Federal tax laws and the tax laws of many States consider adoption to be a personal expense. Consequently, there are no deductions for legal fees, medical and transportation costs, or any other expenses incurred during the adoption process.[171]

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165. *Id.*

166. Interview with Robert B. Neptune, *supra* note 36. An interesting question might be whether this is not violative of equal treatment provisions, since only those wealthy enough to afford the trip can take advantage of this law.

167. I.N.A. §323(a), 8 U.S.C. §1434(a) (1965); interview with J. Patrick Vandello, General Attorney (Naturalization), United States Immigration and Naturalization Service. The parents sponsor the child and take the oath for him or her.

168. Interview with J. Patrick Vandello, *supra* note 167.

169. I.N.A. §323(b),(c), 8 U.S.C. §1434(b),(c) (1965).

170. Current Information on Foreign Adoption, January, 1974 (unpublished material provided courtesy of the Foreign Adoption Center).

171. Letter to the author from Sue Howard, *supra* note 141.

V. CONCLUSION

The growing interest in foreign adoptions and the humanitarian concerns expressed by parents and by general United States immigration policy are resulting in an easing of the requirements imposed upon both parents and children. Not only are the laws themselves being liberalized (for example, the Wisconsin readoption law and the I-600 restrictions), but the administrative interpretations of these laws are increasingly taking account of the different laws and customs prevalent in the foreign countries.

Nevertheless, problems still arise, either because the relevant laws are too restrictive, or because an individual state or court applies a too narrow construction to a law or procedural regulation. It is hoped that this article will help to alleviate both types of difficulties.

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