

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 103, 204, 213a, 299, and 322

[CIS No. 2098-00; DHS Docket No. USCIS-2007-0008]

RIN 1615-AA43

### Classification of Aliens as Children of United States Citizens Based on Intercountry Adoptions Under the Hague Convention

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule amends Department of Homeland Security (“DHS” or “the Department”) regulations relating to intercountry adoptions by U.S. citizens. First, to facilitate the ratification of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, signed at The Hague on May 29, 1993 (“Convention”), the rule establishes new administrative procedures for the immigration of children who are habitually resident in Convention countries and who are adopted by U.S. citizens. Second, the rule makes other amendments to DHS regulations relating to the immigration of adopted children to reflect the changes to those provisions necessary to comply with the Convention. The Senate consented to ratification of the Convention in 2000 conditioned on the adoption of the necessary implementing regulations. Accordingly, this rule is necessary to establish the regulations necessary for the United States to ratify the Convention.

**DATES:** *Comment date:* Written comments must be submitted on or before December 3, 2007 to assure consideration.

*Effective date:* This rule is effective November 5, 2007.

**ADDRESSES:** You may submit comments to DHS, identified by DHS Docket No. USCIS-2007-0008, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS-2007-0008 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.

- *Hand Delivery/Courier:* Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. Contact Telephone Number (202) 272-8377.

**FOR FURTHER INFORMATION CONTACT:** Michael Valverde, Chief, Children’s Issues, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., 3rd floor, Washington, DC 20529, telephone (202) 272-9176.

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#### I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the rule. DHS also invites comments that relate to the economic, environmental, or federalism effects of this rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

*Instructions:* All submissions received must include the agency name and docket number (USCIS-2007-0008) for this rulemaking. All comments received (including any personal information that may be included in the comment) will be posted without change to <http://www.regulations.gov>.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected at the Regulatory Management Division, U.S.

Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529.

#### II. Background

The Immigration and Nationality Act (“the Act”), 8 U.S.C. 1101, *et seq.*, provides three distinct provisions under which an adopted child may be considered, for immigration purposes, to be the child of his or her adoptive parents.<sup>1</sup> Section 101(b)(1)(E) of the Act, 8 U.S.C. 1101(b)(1)(E), relates to adoptions in general, and provides that an adopted child is considered the adoptive parent’s child if certain custody and residence requirements are met. Section 101(b)(1)(F) of the Act, 8 U.S.C. 1101(b)(1)(F), facilitates the immigration of aliens who qualify as “orphans,” if they are adopted, or are coming to the United States to be adopted, by U.S. citizens. Section 101(b)(1)(G) of the Act, 8 U.S.C. 1101(b)(1)(G), added by section 302 of the Intercountry Adoption Act, Public Law 106-279, governs the immigration of children who are adopted, or are coming to the United States to be adopted, by U.S. citizens under the Convention. This background discussion provides an overview of each of these provisions.

##### A. Section 101(b)(1)(E) Adoptions

The first provision of the Act relating to adopted children is section 101(b)(1)(E). Under this provision, an adopted child is the adoptive parent’s child for immigration purposes, if:

- The adoptive parent adopted the child before the child reached the age provided in that section, and
- The child has lived with, and been under the legal custody of, the adoptive parent for at least 2 years.

This two-year period of legal custody and joint residence can be satisfied by periods of legal custody and joint residence that pre-date the adoption. 8 CFR 204.2(d)(2)(vii)(C).

Until December 7, 1999, the definition in section 101(b)(1)(E) made immigration benefits available only to a child who had been adopted before the child’s sixteenth birthday. Section 1(a)(1) of the Act of December 7, 1999, Public Law 106-139, however, amended

<sup>1</sup> The Reviser of Statutes has informally codified the Act as title 8 of the United States Code. Title 8, however, has not been enacted as positive law. For this reason, this rule will refer to each particular statutory provision by its section number in the Act itself. For ease of reference, the first reference to a particular section of the Act will include the corresponding citation in title 8, United States Code. Subsequent citations will be to the relevant section of the Act itself.

section 101(b)(1)(E) to extend the benefit to a child who was adopted after the child's sixteenth birthday, but before the child's eighteenth birthday. A child qualifies under this amendment if the child is the birth sibling of another adopted child who:

- Qualified for immigration under section 101(b)(1)(E) based on the child's adoption, while under the age of 16, by the same adoptive parent(s), or
- Qualified for immigration under section 101(b)(1)(F) of the Act based on an approved visa petition filed by the same adoptive parent(s).

Section 101(b)(1)(E) of the Act can be the basis of the approval of an immigrant visa petition filed by a U.S. citizen or an alien lawfully admitted for permanent residence on behalf of an adopted child whose adoption meets the requirements of section 101(b)(1)(E). However, section 101(b)(1)(E) also applies to adopted children in other situations. For example, under section 203(d) of the Act, 8 U.S.C. 1153(d), the child of an alien who qualifies for an immigrant visa under section 203(a) (family-based immigrants), section 203(b) (employment-based immigrants), or section 203(c) of the Act (diversity immigrants) is generally eligible for an immigrant visa in the same visa classification as the parent, if the child accompanies the parent to or follows to join the parent in the United States. An adopted child whose adoption met the requirements of section 101(b)(1)(E) of the Act is eligible to accompany or follow to join his or her parent under section 203(d). The same principle would apply in determining whether the adopted child could accompany, or follow to join, a nonimmigrant alien who is admitted as a student, temporary worker, exchange alien, or as any other nonimmigrant in a classification that permits spouses and children to come to the United States with the principal nonimmigrant alien.

The current regulations for the approval of immigrant visa petitions under section 101(b)(1)(E) of the Act are found at 8 CFR 204.2(d)(2)(vii). This rule does not discuss section 101(b)(1)(E) adoptions further, since it does not revise those requirements, except to reflect the upcoming ratification of the Convention.

### B. Orphan Adoptions

The second provision of the Act relating to adopted children is section 101(b)(1)(F) of the Act, 8 U.S.C. 1101(b)(1)(F). This provision is designed specifically to permit the immigration of alien children who qualify as "orphans," as defined by section 101(b)(1)(F), on the basis of their

adoption by United States citizens. The two year legal custody and joint residence requirements of section 101(b)(1)(E) of the Act do not apply to orphan cases. That is, if the child qualifies as an orphan, the child can immigrate immediately either upon adoption abroad or even before adoption, if the adoptive parents intend to complete the adoption in the United States. The current regulations for approval of immigrant visa petitions on behalf of alien orphans are found at 8 CFR 204.3. This rule will not discuss section 101(b)(1)(F) adoptions further, since it does not revise those requirements, except to reflect the upcoming ratification of the Convention.

### C. Convention Adoptions

Developed under the auspices of The Hague Conference on Private International Law, the Convention was opened for signature on May 29, 1993. A copy of the Convention is available on the Hague Conference Web site at <http://www.hcch.net>. The text of the Convention is also available on the public docket for this rule at <http://www.regulations.gov>, DHS Docket No. USCIS-2007-0008.

The Convention provides a framework of safeguards for protecting children and families involved in intercountry adoption. The Hague Conference on Private International Law makes available at <http://www.hcch.net> the current list of countries that have become Parties to the Convention. According to this Web site, 74 States have become Parties to the Convention. This Convention is one of the most widely-embraced and broadly-accepted conventions developed by the Hague Conference.

The Convention is the first multilateral international instrument to recognize that intercountry adoption could "offer the advantage of a permanent home to a child for whom a suitable family cannot be found in his or her state of origin." (S Treaty Doc. 105-51, at 1). Some countries involved in the multilateral negotiations on the Convention sought to prohibit intercountry adoptions even for those children eligible for adoption for whom a permanent family placement in the child's country of origin could not be arranged. On the other hand, proponents of intercountry adoption at the Hague Conference believed that the best interests of a child would not be served by arbitrarily prohibiting a child in need of a permanent family placement from being matched with an adoptive family simply because the family resided in another country. The

Convention reflects a consensus that an intercountry adoption may well be in an individual child's best interests.

If the Convention is in force between two countries, then any adoption of a child habitually resident in one country by a person habitually resident in the other country must comply with the requirements of the Convention. The objectives of the Convention are:

- To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for the child's fundamental rights as recognized in international law;
- To establish a system of cooperation among contracting States to ensure that those safeguards are respected and thereby prevent the abduction, sale of, or traffic in children; and
- To secure the recognition in contracting states of adoptions made in accordance with the Convention.

The Convention also requires all parties to act expeditiously in the processing of intercountry adoptions.

To accomplish its goals, the Convention makes a number of significant modifications to current intercountry adoption practice, including three particularly important changes. First, the Convention mandates close coordination between the governments of contracting countries through a Central Authority in each Convention country. In its role as a coordinating body, the Central Authority is responsible for sharing information about the laws of its own and other Convention countries and for monitoring individual cases. Second, the Convention requires that each country involved make certain determinations before an adoption may proceed. The sending country must determine in advance: That the child is eligible to be adopted; that it is in the child's best interests to be adopted internationally; that the birth parents or other individuals, institutions or authorities who must, under the law of the country of origin, consent to the adoption have freely consented to the adoption in writing; and that the consent of the child, if required, has been obtained. The sending country must also prepare a background study on the child that includes the medical history of the child as well as other background information. Third, the receiving country must determine in advance: that the prospective adoptive parent(s) are eligible and suited to adopt; that they have received counseling and training, as necessary; and that the child will be eligible to enter and reside permanently in the

receiving country. The receiving country must also prepare a home study on the prospective adoptive parent(s). These advance determinations and studies are designed to ensure that the child is protected and that there are no obstacles to completing the adoption.

The United States signed the Convention on March 31, 1994. The Senate gave its consent to ratification on September 20, 2000. 146 Cong. Rec. S8866–8868 (daily ed. September 20, 2000). This consent was conditioned on the adoption of the necessary implementing legislation, and the completion of any steps that would enable the United States to carry out all the obligations of the Convention, as required by the implementing legislation. *Id.* at S8868, Resolution of Ratification at sections (a)(1) and (b)(1). Under article 46(2) of the Convention, the Convention will enter into force for the United States on the first day of the month that begins three months after the United States deposits the instrument of ratification. The Secretary of State will give notice in the **Federal Register** of the date on which the Convention enters into force for the United States. *See* 22 CFR 96.17.

In 2000, Congress passed the implementing legislation, the Intercountry Adoption Act (IAA), Pub. L. 106–279, 114 Stat. 825. Section 302 of the IAA enacted new section 101(b)(1)(G) of the Act, to be codified as 8 U.S.C. 1101(b)(1)(G). Section 101(b)(1)(G) of the Act, which will take effect when the Convention enters into force for the United States, provides for the classification of a Convention adoptee as the child of the U.S. citizen adoptive parent(s). By its terms, the Convention applies to any adoption by a person “habitually resident” in the United States of a child “habitually resident” in another Convention country, if the child “has been, is being or is to be moved” to the United States either after the adoption or for purposes of the adoption. Convention, article 2(1). Under section 101(b)(1)(G) of the Act, however, only a married U.S. citizen whose spouse also adopts the child, or an unmarried U.S. citizen who is at least 25 years old, may file an immigrant visa petition on behalf of a Convention adoptee. For this reason, it will not be possible for anyone who is habitually resident in the United States, but who is not a United States citizen, to bring a child habitually resident in another Convention country to the United States on the basis of a Convention adoption.

Classification as a child under section 101(b)(1)(G) of the Act is somewhat similar to classification as an orphan under section 101(b)(1)(F) of the Act.

First, the child’s adoption must be sought either by a United States citizen and the United States citizen’s spouse, jointly, or by an unmarried United States citizen who is at least 25 years old. The visa petition must be filed before the child’s sixteenth birthday. As with orphan cases, the two year legal custody and joint residence requirements of section 101(b)(1)(E) of the Act will not apply to Convention cases. Finally, as with orphans, a Convention adoptee may be adopted abroad, but may also be brought to the United States for the purpose of adoption.

There are, however, some notable differences. First, as a matter of jurisdiction, section 204(d)(2) of the Act, as amended by section 302(b) of the IAA, makes clear that section 101(b)(1)(G) of the Act relates only to adoptions in which the adopting parent is habitually resident in the United States, and the child is habitually resident in another country that is a Party to the Convention. Second, unlike sections 101(b)(1)(E) and (F) of the Act, section 101(b)(1)(G) applies only if the visa petition is filed before a child’s sixteenth birthday, with no provision to allow the immigration of an older sibling adopted by the same parent(s). Third, the child does not have to be an “orphan,” as defined in 101(b)(1)(F) of the Act. The primary criteria for classification under section 101(b)(1)(G) of the Act are:

- The child’s birth parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, or the child’s abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, must have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child’s emigration and adoption; and
- In the case of a child placed for adoption by his or her two living birth parents, the birth parents must be incapable of providing proper care for the child.

The Department notes that section 101(b)(1)(G) of the Act, like sections 101(b)(1)(E) and (F), use the term “natural parents” to describe the individuals to whom an adopted child was born. Adoption professionals generally recommend using the term “birth parents,” as some birth and adoptive parents consider “natural parent” offensive or insensitive. *See, e.g.,* “Positive Adoptive Language,” (Adoptive Families of America), available online at [\*PositiveLanguage.pdf\*. Since “birth parent” and “natural parent” are synonymous, this rule uses the term “birth parent.”](http://www.adoptivefamilies.com/pdf/</a></p>
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#### *D. USCIS Forms Used for Adoption Cases*

Section 103(a)(3) of the Act, 8 U.S.C. 1103(a)(3), authorizes the Secretary of Homeland Security to prescribe the forms and other papers to be used in the administration of the Act. A U.S. citizen begins the immigration process for the citizen’s alien child by filing a petition under section 204(a)(1)(A)(i) of the Act, 8 U.S.C. 1154(a)(1)(A)(i). Note that different immigrant visa petition forms are used for different types of adoption cases. The Form I–130, Petition for Alien Relative, is used for cases filed under section 101(b)(1)(E) of the Act and many other family-based petition cases. Form I–600A, Application for Advance Processing of Orphan Petition, is used for orphan cases, to give the prospective adoptive parents the option of seeking to establish their suitability as adoptive parents before they are actually matched with a specific child. Parents also have the option, under current 8 CFR 204.3, to file just a Form I–600, the Petition to Classify an Orphan as Immediate Relative. If they do so, then their suitability as adoptive parents and the child’s eligibility for classification as an orphan are adjudicated in the same proceeding.

USCIS intends to create two similar forms, the Form I–800A and Form I–800, for Convention adoption cases. The new Form I–800A, Application for Determination of Suitability as Adoptive Parent(s) for a Convention Adoptee, corresponds to the Form I–600A for orphan cases. The Form I–800A includes three supplements. Form I–800A Supplement 1 will be used to identify additional adult members of the prospective adoptive parent(s)’s household. A prospective adoptive parent may complete Form I–800A Supplement 2 if he or she wants to give consent under the Privacy Act of 1976 for DHS to disclose information about the prospective adoptive parent’s case to the adoption service provider. Form I–800A Supplement 3 may be used to obtain an extension of the approval of a Form I–800A, if no Form I–800 has yet been filed, as well as to submit an updated or amended home study after the Form I–800A has been approved. The Form I–800, Petition to Classify Convention Adoptee as Immediate Relative, corresponds to the Form I–600 for orphan cases.

Unlike the current practice for orphan cases, 8 CFR 204.3(d)(3), this rule requires a prospective adoptive parent

seeking to adopt a child from a Convention country to always file the Form I-800A first. Only once the Form I-800A is approved will the prospective adoptive parents file the Form I-800. This change is consistent with the requirements of article 5 of the Convention, as discussed later in section IV(C) of this **SUPPLEMENTARY INFORMATION**.

Note that the **SUPPLEMENTARY INFORMATION** section of this Preamble refers to the U.S. citizen (and his or her spouse, if any) seeking to adopt a Convention adoptee as the prospective adoptive parent(s). This term is used in the Supplementary Information because the same person (or couple) is the "applicant" at the Form I-800A stage, and the "petitioner" at the Form I-800 stage. The text of the new 8 CFR part 204, subpart C, however, uses the more precise terms, referring as appropriate to the "applicant" at the Form I-800A stage and the "petitioner" at the Form I-800 stage. Because the spouse of a married U.S. citizen must always sign the Form I-800A and Form I-800, and must also adopt the Convention adoptee, the singular terms are used to refer to both the U.S. citizen and to his or her spouse, if any.

### III. The Purpose of This Rule

To facilitate the ratification of the Convention, this rule proposes to amend DHS regulations to provide for the adjudication of Convention adoption cases. This rule also makes amendments to the orphan provisions that govern cases under section 101(b)(1)(F) of the Act and to the regulations governing section 101(b)(1)(E) cases to reflect the new Convention procedures.

### IV. The Changes Made by This Rule

#### A. Section 101(b)(1)(E) Cases

Under article 2 of the Convention, the Convention applies to any adoption, or proposed adoption, if:

- The child is habitually resident in one Convention country; and
- The adoptive parent(s) is (are) habitually resident in another Convention country; and
- The child has immigrated, or will immigrate, to the parent's country as a result of, or for purposes of, the adoption.

The only change that this rule makes to 8 CFR 204.2(d), as it relates to adopted children under section 101(b)(1)(E) of the Act, is to clarify when a child who is habitually resident in a Convention country and who is adopted by a U.S. citizen may be eligible to immigrate under section 101(b)(1)(E) of the Act, rather than

under section 101(b)(1)(G) of the Act. For example, a U.S. citizen may have adopted a child from a Convention country while habitually resident in that Convention country, and without any present intention to bring the child to the United States. Some time after the adoption, the adoptive parent may decide to bring the child to the United States. In this situation, the adoption would not be subject to the Convention, since the child's immigration was not directly the result of the child's adoption by someone habitually resident in the United States. If the adoptive parent satisfies the two-year custody and residence requirement of section 101(b)(1)(E) of the Act by living with the child outside the United States, USCIS may approve the parent's Form I-130 for the child. Thus, the child will be eligible for classification under section 101(b)(1)(E) of the Act if the child meets those requirements, and it will not be necessary to comply with the requirements of section 101(b)(1)(G) of the Act.

If the adoptive parent seeks to bring the child to the United States without first satisfying the two-year custody and residence requirement, however, the adoptive parent will need to comply with the Convention, the IAA, and the regulations implementing the IAA, including this interim rule and the rules promulgated by the Department of State. Similarly, the rule addresses the case of a child from a Convention country who is already in the United States, whether as a nonimmigrant, parolee, or even without inspection and admission, but whose habitual residence was in a Convention country immediately before the child came to the United States. Such a child will still be deemed under this rule to be habitually resident in the other Convention country. If the adoptive parent seeks to adopt the child in the United States, it will still be necessary to comply with the Convention. Note that article 2(1) continues to apply to the adoption of a child habitually resident in another Convention country, even if the child already "has been \* \* \* moved to another Contracting State."

#### B. Orphan Cases

This rule does not propose any major revisions to the processing of orphan cases that are filed under section 101(b)(1)(F) of the Act. The chief purpose of this rule is to establish procedures for Convention cases.

This rule does make one change to the orphan regulations that is necessary to reflect the implementation of the Convention. As noted, once the

Convention enters into force for the United States, the Convention and section 101(b)(1)(G) of the Act will govern the immigration to the United States of any child who is habitually resident in a Convention country and who is adopted, or will be adopted, by a U.S. citizen who is habitually resident in the United States. It will no longer be possible for a child who is habitually resident in a Convention country and who is, or will be, adopted by a U.S. citizen habitually resident in the United States, to immigrate under section 101(b)(1)(F) of the Act. The adoptive parents will, instead, have to use the Convention procedures under section 101(b)(1)(G) of the Act and new 8 CFR part 204, subpart C. New 8 CFR 204.3(a)(2) incorporates this principle into the current orphan regulation. If, however, the prospective adoptive parent(s) filed the Form I-600A or Form I-600 before the date on which the Convention enters into force, section 505(b)(1) of the IAA provides that the case will continue to qualify as an orphan case even after the Convention enters into force. This rule also makes minor changes to 8 CFR 204.3(a)(1) and (a)(2) to remove unnecessary language, to delete non-binding procedural requirements, and to improve readability.

#### C. Convention Adoption Cases

##### 1. Filing Fees

In orphan cases, the prospective adoptive parent(s) pay(s) one filing fee, either upon the filing of the Form I-600A or upon the filing of the Form I-600 if no Form I-600A was filed. 8 CFR 103.7(b)(1). For cases initiated with a Form I-600A, a new filing fee was required only if the Form I-600 was filed after the Form I-600A approval period expired or if the prospective adoptive parent(s) filed more than one Form I-600, for children who were not birth siblings. *Id.*

Convention adoption cases will not follow the traditional practice from orphan cases. A Form I-800A will be required in every case, and must be approved before the Form I-800 may be filed. This change will assist the Department in ensuring that the requirements of articles 5(a) and 17 of the Convention will be satisfied. Under articles 5(a) and 17, the receiving country must find that the prospective adoptive parent(s) is (are) suitable and eligible to adopt before the sending country matches them for adoption.

The rule retains the practice under which the Form I-800A filing fee reflects the cost of adjudicating both the Form I-800A and I-800. There will be

no filing fee when the prospective adoptive parent(s) file(s) one Form I-800 after approval of a Form I-800A. As with orphan cases, the cost of adjudicating one Form I-800 is included in the Form I-800A filing fee. If the prospective adoptive parent(s) file more than one Form I-800, a separate fee will be required for the second, and any subsequent, Form I-800. If the beneficiaries of the multiple Forms I-800, however, are already siblings before the proposed adoptions, then one filing fee will cover each sibling's Form I-800.

Because USCIS anticipates that the adjudication process and the workload for Convention cases will be essentially similar to orphan cases, this rule sets the filing fee at the same rate that applies for orphan cases. On February 1, 2007, DHS published the notice of proposed rulemaking, "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule" proposing a rule that would establish a comprehensive revision of USCIS filing fees. 72 FR 4888. That rule proposed a fee of \$670 for filing Form I-600A, Application for Advance Processing of Orphan Petition, and Form I-600, the Petition to Classify an Orphan as Immediate Relative. DHS published the fee adjustments as a final rule on May 30, 2007, at 72 FR 29851. This rule sets the Form I-800A and I-800 filing fees at the same amount as the proposed Form I-600A and I-600 fees.

## 2. New Subpart C to 8 CFR Part 204

The rule re-designates the current provisions in 8 CFR part 204 as subpart A to part 204, and adds new subparts B and C to 8 CFR part 204. This rule reserves subpart B. Subpart C governs Convention adoption cases. Each specific provision is discussed below. Before dealing with the details of the provisions, however, DHS is providing a summary of how the Convention adoption process is likely to work.

Under article 5 of the Convention and section 101(b)(1)(G)(i) of the Act, a U.S. citizen who wants to adopt a child habitually resident in a Convention country must first obtain a determination that he or she (and his or her spouse, if married) will provide proper care to a Convention adoptee. USCIS has the authority to make the determination that the prospective adoptive parent(s) is (are) suitable for adoption. The most critical item of evidence in making this determination is the home study. The first step that the prospective adoptive parent(s) should take is to work with an adoption service provider to obtain a home study. The home study must recommend that

USCIS should find that the prospective adoptive parent(s) is (are) suitable for adoption. The home study preparer must be authorized under Department of State regulations at 22 CFR part 96 to complete home studies for Convention cases. He or she must also be authorized to conduct home studies under the law of the jurisdiction in which the home study is conducted. He or she must prepare the home study according to the standards specified in new 8 CFR 204.312. Moreover, if the home study preparer is not, under 22 CFR part 96, an accredited agency or temporarily accredited agency, then an accredited agency or temporarily accredited agency must review and approve the home study before it can be submitted to USCIS. This review requirement does not apply if a public domestic authority, as defined in 22 CFR 96.2, prepared the home study.

Once the prospective adoptive parent(s) has (have) obtained a favorable home study, the next step is to file Form I-800A with USCIS. In addition to the home study, the prospective adoptive parent(s) would submit proof of citizenship, marital status, age (if not married) and other evidence as described in new 8 CFR 204.310. In addition to the Form I-800A filing fee, the prospective adoptive parent(s) would also submit the standard biometrics fee for the applicant, his or her spouse, and for each adult member of the household. The definition of "adult member of the household" is discussed more fully in the discussion of new 8 CFR 204.301. USCIS would then arrange for the collection of fingerprints and other biometric information from these individuals. Once the fingerprint results are received, USCIS will weigh the evidence to determine whether to approve the Form I-800A. USCIS will approve it if the prospective adoptive parent(s) has (have) established, based on the evidence of record, that any child whom the prospective adoptive parent(s) may adopt will receive proper care. If USCIS denies the Form I-800A, the prospective adoptive parent(s) may appeal the denial to the Administrative Appeals Office, except in a narrow class of cases, discussed later in this rule, in which no appeal is permitted.

If USCIS approves the Form I-800A, the prospective adoptive parent(s) may arrange for the submission of the approval notice, the home study and other supporting evidence, to the Central Authority of the Convention country in which they hope to adopt a child. Note that the Convention permits the governmental entity that a Convention country designates as the

Central Authority to delegate some Central Authority functions to other governmental or non-governmental entities. In this Preamble and in the rule itself, "Central Authority" refers not only to the country's designated Central Authority, but also to any individual or entity delegated Central Authority functions. If the Central Authority proposes a child for an adoption placement, the Central Authority will prepare a report addressing the factors that make the child eligible for adoption as a Convention adoptee. Once the prospective adoptive parent(s) have received this report and have decided to accept the placement, they would file Form I-800, with the report and other evidence specified in new 8 CFR 204.313. The Form I-800 must be filed *before* the prospective adoptive parent(s) have actually adopted or obtained legal custody of the child.

The office with which the prospective adoptive parent(s) files the Form I-800 may vary from case to case, or country to country. For example, the prospective adoptive parent(s) may file the Form I-800 with USCIS in the United States before traveling to the Convention country. In this situation, the parent(s) would file the Form I-800 and supporting evidence with the local USCIS office in the area where the parent(s) live. The prospective adoptive parent(s) may alternatively choose to file the Form I-800 after arrival in the Convention country, and while still physically present there. In such cases, the prospective adoptive parent(s) may file the Form I-800 either with an overseas USCIS office, or, if there is no USCIS office in the country, at the visa-issuing post at which he or she (they) will file the child's visa application. A Department of State officer will adjudicate a Form I-800 filed with a visa-issuing post, unless the Form I-800 is not clearly approvable. The Department of State will refer any Form I-800 that has been filed with a Department of State officer and that is not clearly approvable to a USCIS office for adjudication.

Whether it is a USCIS or a Department of State officer who adjudicates the Form I-800, the issue is fundamentally the same: Does the evidence show that the child qualifies for classification under section 101(b)(1)(G) of the Act, and will the proposed adoption or grant of custody be in compliance with the Convention? If so, the USCIS or Department of State officer will grant a provisional approval of the Form I-800. If USCIS grants the provisional approval, it would then forward the case to the Department of State officer at the visa issuing post. If the Department of

State officer grants the provisional approval, the Department of State officer will retain the Form I-800 for further action after the prospective adoptive parent(s) has (have) adopted or obtained custody of the child.

Once provisional approval is granted, the prospective adoptive parent(s) may file a visa application for the child with the visa issuing post with jurisdiction over the child's country of residence. The Department of State published in the **Federal Register** on June 22, 2006, at 71 FR 35847, a proposed rule that, once adopted as a final rule, will govern the adjudication of the visa application. If it appears to the Department of State officer that, based on the available information, the child would not be ineligible to receive an immigrant visa, the Department of State officer will annotate the visa application to reflect this conclusion. If the consular office is not aware of any ground(s) of inadmissibility that would preclude the child's admission to the United States following the adoption or grant of custody, the Department of State officer will then notify the Central Authority of the Convention country that the prospective adoptive parent(s) may proceed with the adoption, or with obtaining the grant of custody for purposes of adoption. If the Department of State officer becomes aware that the child may be subject to a ground of inadmissibility that was not already waived when the Form I-800 was provisionally approved, the Department of State officer will advise the prospective adoptive parent(s) concerning whether a waiver is available, and how to apply for it. The prospective adoptive parent(s) will then either complete the adoption in the Convention country or else obtain custody of the child for the purpose of bringing the child to the United States for adoption. Once this step is accomplished, the Department of State officer will, as required by section 301(a)(1)(B) of the IAA, perform a final verification of compliance with the Convention and the IAA. If the adoption or grant of custody complies with the Convention and the IAA, the Department of State officer will affix to the adoption or custody order a certification that the adoption or custody has been obtained in compliance with the requirements of the Convention and the IAA. The Department of State officer would then, on behalf of USCIS, grant final approval of the Form I-800. The Department of State officer would also issue the appropriate visa, unless the Department of State officer determines that the child

is ineligible for a visa and inadmissible to the United States on a ground for which no waiver has been approved. Department of State regulations concerning the issuance of visas are codified at 22 CFR parts 40 through 42.

Once the Department of State officer issues the visa, the prospective adoptive parent(s) may bring the child to the United States. An adopted child who is admitted under section 101(b)(1)(G) of the Act, and who, after admission for permanent residence, actually resides in the United States with the adoptive parent(s) will acquire United States citizenship through naturalization by operation of law if the requirements of section 320 of the Act, 8 U.S.C. 1431, are met by the child's 18th birthday.<sup>2</sup> If the child will not actually reside in the United States, the child's lawful admission would facilitate the child's naturalization under section 322 of the Act, 8 U.S.C. 1433. Unlike section 320 of the Act, naturalization under section 322 of the Act does not occur by operation of law; a formal application for naturalization must be filed.

This rule retains for Convention cases the current practice described in the orphan provisions, 8 CFR 204.3(h)(11), that allows a Department of State officer to approve a petition, but not to deny. As under current practice, a Department of State officer will be required to forward to USCIS any Form I-800 that is not clearly approvable. If USCIS denies the Form I-800, the prospective adoptive parent(s) may appeal the denial to the Administrative Appeals Office, except in a narrow class of cases, discussed later in this rule, in which no appeal is permitted.

#### New 8 CFR 204.300—Scope of Subpart C

Section 204.300 defines the scope of new subpart C, which will apply to any Form I-800A or Form I-800 that is filed on or after the date the Convention enters into force for the United States. For orphan cases, if either the Form I-600A or Form I-600 was filed before that date, 8 CFR 204.3 will continue to apply.

New 8 CFR 204.300(b) makes clear that, once the Secretary of State gives notice as specified in 22 CFR 96.17 that the Convention has entered into force for the United States, this rule, section 101(b)(1)(G) of the Act, and the provisions of new subpart C will be the only way that an alien child who is habitually resident in a Convention

country may immigrate to the United States as a direct result of an adoption by a U.S. citizen who is habitually resident in the United States. Even if the child may also qualify as an orphan under section 101(b)(1)(F) of the Act, the adoptive parents will be required to comply with the Convention procedures. Immigration under section 101(b)(1)(F) of the Act will be available to a child habitually resident in a Convention country only if the prospective adoptive parent(s) filed either the Form I-600A, or the Form I-600 before the Convention and this rule enter into force. New 8 CFR 204.2(d)(vii), discussed earlier in this Supplementary Information, addresses the circumstances under which a child habitually resident in a Convention country may immigrate under section 101(b)(1)(E) of the Act.

#### New 8 CFR 204.301—Definitions

New 8 CFR 204.301 provides the definitions that will apply in the adjudication of Convention adoption cases. For the most part, the new definitions replicate the definitions currently found in 8 CFR 204.3. USCIS added new definitions for "Central Authority," "Convention adoptee," "Convention adoption," "Convention," "Convention country," "Irrevocable consent," and "Legal Custodian." These definitions will apply only to Convention adoption cases, not to orphan cases under 8 CFR 204.3. The definitions in 22 CFR 96.2 will also apply to Convention cases.

There are a number of definitions under the new section that warrant explanation. First, new 8 CFR 204.301 includes a definition of "adoption." To qualify as an "adoption," a custody order that is alleged to be an adoption must create the legal parent-child relationship between a minor and someone who is not already the minor's legal parent, and terminate the legal parent-child relationship between the minor and any prior legal parent(s). The definition is not actually new, but a codification of the Board of Immigration Appeals decisions in *Matter of Mozzeb*, 15 I&N Dec. 430 (BIA 1975), and *Matter of Kong*, 14 I&N Dec. 649 (BIA 1974). The new definition also corresponds to the definition the Department of State has adopted at 22 CFR 96.2.

Some countries allow for "simple" or "semi-plena" adoptions, or a similar child custody arrangement that may be called "adoption," but do not create a permanent legal parent-child relationship between the child and the custodian. Similarly, the Board of Immigration Appeals has noted that in countries that follow traditional Islamic

<sup>2</sup> Section 320 does not, itself, use the term "naturalization." But "naturalization" encompasses any grant of citizenship that occurs after a person's birth. See INA section 101(a)(23), 8 U.S.C. 1101(a)(23).

law "adoption" in the sense required by the Act does not exist. *See, e.g., Matter of Mozeb, supra*; and *Matter of Ashree, Ahmed and Ahmed*, 14 I&N Dec. 305 (BIA 1973). The Board has also noted the distinction, under Burmese law, between Kittima adoption, which does create a legal parent-child relationship, and Appatittha adoption, which does not. *Matter of Kong, supra*. USCIS may not approve a Form I-800 based on one of these alternative custody arrangements, unless the alternative custody arrangement is cited, not as proof of the child's adoption, but as proof that the custodian has authority to bring the child to the United States for adoption here.

This rule also makes changes to the definition of an "additional adult member of the household." The home study requirements for orphan cases, 8 CFR 204.3(e), require a home study preparer to address the presence in the household of adults other than the prospective adoptive parent(s). The orphan regulations define "adult member of the household" to include anyone over the age of 18 whose principal or only residence is the same as the residence of the prospective adoptive parent(s). 8 CFR 204.3(b). Someone who was under 18 when the Form I-600A is filed can also be considered an "adult" member of the household if "the director has a specific reason, based on the facts of the particular case, for requiring an evaluation by a home study preparer and/or fingerprint check." This rule generally follows that practice; however, there are two significant changes. First, the reference to a person's "principal or only" residence has been revised. The new definition includes any person 18 years or older who has the same principal residence as the applicant. By removing the term "only" the definition is meant to clarify that it includes those individuals who may have another residence, such as an adult son or daughter who is away at college for most of the year, but who maintains the home being evaluated as their principal residence. Second, the current definition does not directly address the presence in the home of child care workers, or other household employees, who do not actually live there. To improve the ability to protect the best interests of adopted children, the revised definition has been expanded to specifically include as an "additional adult member of the household" any person who does not live in the home but whose regular presence in the home is relevant to the suitability of the prospective adoptive parents as the

parents of a Convention adoptee. While this definition does expand the potential scope of the home study, the expansion will provide information that could be very relevant to the adjudication of the Form I-800A.

New 8 CFR 204.301 also includes a specific definition of "custody for purposes of emigration and adoption" that will apply to Convention cases, if the child will be adopted in the United States, rather than abroad. The prospective adoptive parent(s) will have to show that the prospective adoptive parent(s), or someone acting on behalf of the prospective adoptive parent(s), has (have) obtained "custody for purposes of emigration and adoption." This definition is different from the provisions in 8 CFR 204.3(d)(iv)(B)(1) and (2), which apply only to orphan cases, under which the orphan's prospective adoptive parent(s) had to: (i) Show that he or she (they) had custody of the child, and that (ii) the individual or entity who had custody immediately before he or she (they) acquired it has "released" the child for emigration and adoption. This two-step requirement can prove unwieldy and somewhat unnecessary. Once the prior custodian no longer has custody, it is not clear why that former custodian should be in a position to permit or object to the child's emigration. Under this rule, it will be sufficient for the prospective adoptive parent(s) to show that whatever court or entity granted custody also expressly authorized the custodian to bring the child to the United States for adoption. This authorization may be included in the same order that granted custody, but may also be included in a separate order.

Current 8 CFR 204.3(b) specifies who may complete a home study for an orphan case. The new definition of "home study preparer" for Convention adoption cases is significantly different. Only an individual who, or agency that, is authorized to do so under 22 CFR part 96 may complete a home study for a Convention case. In addition to meeting the requirements of 22 CFR part 96, the home study preparer must also hold any license or other authorization that may be required to conduct adoption home studies under the law of the jurisdiction in which the home study is conducted. For example, if the home study is conducted in the United States, the preparer must hold whatever license or authorization which the law of the State may require home study preparers practicing in that State to have. If the home study is conducted outside the United States, the preparer must hold any license or authorization that may be

required under the law of that country to conduct home studies there.

Under section 101(b)(1)(G) of the Act, if consent for the child's adoption is given by both of the child's birth parents, the prospective adoptive parent(s) must establish that the birth parents are incapable of providing proper care for the child. This rule adopts the same definition of "incapable of providing proper care" that is used in orphan cases under 8 CFR 204.3. In an orphan case, the "incapable of providing proper care" issue arises only if a sole or surviving parent releases the child for adoption. By contrast, in Convention cases this issue applies only if the child is placed for adoption by both birth parents. Under current USCIS policy for orphan cases, an officer is not limited to considering economic or financial concerns. Rather, the adjudicating officer should consider the entirety of the circumstances to determine whether, under the local standards of the country of the child's habitual residence, the child's birth parents were incapable of providing proper care. The revised definition incorporates this principle.

The rule uses, for Convention cases, a definition of "irrevocable consent." Article 4(c)(4) of the Convention provides that a mother's consent to a child's adoption can be given only after the child's birth. This definition reflects that requirement. Further, the rule is actually broader than article 4(c)(4), in that the rule provides that in addition, a legal custodian who is not the child's birth parent may not give consent before the child's birth. This broader provision is simply the logical extension of article 4(c)(4), in that the mother would necessarily be required to terminate the legal parent-child relationship before any other legal custodian could properly consent to an adoption placement. As the child's mother cannot give this consent prior to the child's birth, no other individual or entity will have the authority to consent to an adoption placement until after the child's birth. Note, however, that this provision does not preclude a birth father from giving consent to the termination of his legal relationship to the child before the child's birth if the birth father is permitted to do so under the law of the country of the child's habitual residence.

Section 101(b)(1)(G)(i)(II) of the Act provides that the custodian must consent to the child's emigration and adoption. The definition of "irrevocable consent" does not specifically include this element, since it could prove impossible for a person to comply with it. For example, if a birth parent

surrendered his or her rights to the custody of a child long before the possibility of an intercountry adoption arose, it may not be possible to find the birth parent at the time the placement is made in order to obtain a more specific consent. But if the birth parent surrendered his or her custody rights, and those rights were terminated, the birth parent would no longer have a basis to object to the child's adoption. Under this rule, the fact that the Central Authority of the other Convention country permitted the prospective adoptive parent(s) to adopt or obtain custody of the child will be taken as sufficient to establish that the necessary consent to the child's emigration has been obtained from the relevant custodian. That is, if the Central Authority specifies that all the necessary consents have been obtained, it will be presumed that the consent was sufficient to establish the statutory requirement of consent to emigration and adoption.

In orphan cases, the term "sole parent" is defined by 8 CFR 204.3(b) strictly to include only the mother of a child born out of wedlock who has not been legitimated. Section 101(b)(1)(G) of the Act defines the term more broadly. For a Convention adoption, a child is deemed the child of a sole parent if the other parent has abandoned or deserted the child, or has disappeared from the child's life. This rule reflects this broader understanding of "sole parent." A child will be deemed to be the child of a sole parent if the child has only one legal parent, based on the competent authority's determination that the other legal parent has either abandoned or deserted the child, or has disappeared from the child's life.

New 8 CFR 204.301 also incorporates an interpretation relating to stepparents that USCIS has adopted for orphan cases. See Adjudicator's Field Manual 21.5(d)(4). Under section 101(b)(2), a stepparent qualifies as a child's "parent" if the marriage creating the stepparent relationship occurred before the child's eighteenth birthday. For most situations, this provision is of great benefit, since it permits intact families to remain together. In the context of a Convention adoption petition, however, section 101(b)(2) can have an adverse impact. In some countries, a stepparent does not have a legal parent-child relationship with a stepchild. Thus, the stepparent may not have any right or duty to care for a child, and consequently, may not be able to perform any action terminating the non-existent rights and duties. Under the policy that USCIS has adopted, and that is incorporated into the definition of

"parent," a stepparent would not be considered a child's parent for purposes of approval or denial of a Convention adoption petition, if the prospective adoptive parent(s) establish(es) that, under the law of the child's habitual residence, a stepparent has no legal parent-child relationship to a stepchild. This exception would not apply if the stepparent actually adopted the stepchild as specified in section 101(b)(1)(E) of the Act, or if under the law of the child's habitual residence, the marriage between the parent and stepparent is itself enough to create a legal parent-child relationship between the stepparent and stepchild. If marrying the child's mother or father makes the stepparent, under the law of the Convention country, the child's legal parent, or if the stepparent adopted the child, it may be necessary to obtain the stepparent's consent. Consistent with the provisions concerning a sole or surviving parent, this consent would not be needed if the stepparent abandoned or deserted the child, or if the stepparent has disappeared from the child's life. Further, if it is established that the stepparent did not know of the child's existence, this fact may warrant a finding that the stepparent has disappeared from the child's life. Note that this definition does not restrict the ability to file an alien relative visa petition (Form I-130) based on a stepparent/stepchild relationship if the requirements of section 101(b)(1)(B) of the Act are met.

This rule also establishes a definition of "suitability as adoptive parents." Section 101(b)(1)(G)(i)(I) of the Act requires that USCIS be "satisfied that proper care will be furnished the child," before USCIS may approve a child's immigration as a Convention adoptee. The Convention, in turn, requires a finding of their "suitability" as adoptive parents. As the concept of "suitability as an adoptive parent" has essentially the same meaning as the concept that USCIS be "satisfied that proper care will be furnished the child," this rule provides that the Convention requirement of "suitability" is met if the evidence establishes the statutory requirement of "proper care."

#### New 8 CFR 204.302—Use of Adoption Service Providers

Most U.S. citizens seeking to complete an intercountry adoption use the services of an adoption agency. This assistance benefits both the prospective adoptive parents and USCIS since it is more likely that the home study will be properly prepared and that other necessary requirements will be properly met. New 8 CFR 204.302(a) makes clear

that prospective adoptive parents may use such service providers. In Convention cases, however, certain adoption services may only be provided by individuals who, or agencies that, are authorized under 22 CFR part 96 to provide these services. An individual who, or agency that, is not authorized to do so under 22 CFR part 96 may not provide any of these six services, as listed in section 3(3) of the IAA:

- Identifying a child for adoption and arranging an adoption;
- Securing necessary consent to termination of parental rights and to adoption;
- Performing a background study on a child or a home study on a prospective adoptive parent, and reporting on such a study;
- Making non-judicial determinations of the best interests of a child and the appropriateness of adoptive placement for the child;
- Post-placement monitoring of a case until final adoption; and
- Where made necessary by disruption before final adoption, assuming custody and providing child care or any other social service pending an alternative placement.

In some cases, USCIS has observed that it has appeared that an adoption service provider has prepared the Form I-600A or Form I-600 or other legal documents, and submitted them to USCIS. New 8 CFR 204.302(b) makes clear that an adoption service provider must be authorized under 8 CFR Part 292 to practice before USCIS if the adoption service provider will be "representing" the prospective adoptive parent(s) before USCIS. In order to engage in the regular practice of giving legal advice concerning what USCIS forms to complete and how to complete them, an individual must be an attorney (or supervised law student or graduate) or the accredited representative of a not-for-profit agency that has been authorized by the Board of Immigration Appeals to practice before USCIS. See 8 CFR 1.1(i), (j) and (k) and 8 CFR 292.1. An individual must also be an attorney (or supervised law student or graduate) or accredited representative in order to file a properly completed notice of appearance (Form G-28) (which must be filed by anyone claiming to represent a petitioner or applicant before USCIS), and to submit USCIS Forms to USCIS as the representative of the prospective adoptive parent(s). Someone who is not an attorney (or supervised law student or graduate) or accredited representative may only assist "in the completion of blank spaces on printed [USCIS] forms." 8 CFR 1.1(k). Pursuant to section 201 of the IAA, new 8 CFR 204.302(b) also



makes clear that an attorney's or accredited representative's legal services may not include the provision of any of the six specific adoption services specified in section 3(3) of the IAA, unless the attorney or accredited representative, in addition to being authorized to practice law before USCIS, is also authorized to provide these services in Convention cases.

Furthermore, at least one of the prospective adoptive parent(s) must always be a U.S. citizen, who is therefore entitled to protection under the Privacy Act, 5 U.S.C. 552a. New 8 CFR 204.302(c) clarifies that, under the Privacy Act, USCIS will not disclose information about a Convention adoption case to an adoption service provider without the written consent of the prospective U.S. citizen adoptive parent(s). If the prospective adoptive parent(s) want(s) to give this consent, the prospective adoptive parent(s) may sign Form I-800A Supplement 2 and submit the Supplement 2 to DHS. Signing the Supplement 2, however, does not mean the service provider can act as the prospective adoptive parent(s)'s legal representative before DHS; it means only that DHS may provide information to the service provider that would otherwise be protected from disclosure by the Privacy Act. As with other records protected by the Privacy Act, the consent of the citizen adoptive parent(s) is not required in order for DHS to disclose information in a manner that qualifies as a routine use.<sup>3</sup>

#### New 8 CFR 204.303—Habitual Residence

The Convention and section 101(b)(1)(G) of the Act apply to the adoption of a child "habitually resident" in a Convention country by a U.S. citizen "habitually resident" in the United States. Neither the Convention nor section 101(b)(1)(G) of the Act defines this critical term. This interim rule gives this term an expansive scope. Any U.S. citizen who is actually domiciled in the United States is habitually resident here. Equating "habitual residence" with "domicile," however, would unduly narrow the availability of the benefits of the Convention. In many cases a U.S. citizen will be residing abroad temporarily, and yet be seeking to bring

an adopted child to the United States when the United States citizen returns here. To permit broad availability of the Convention procedures, new 8 CFR 204.303(a)(2) provides that, in addition to U.S. citizens who are actually domiciled in the United States, a U.S. citizen who has been living abroad will also be deemed to be "habitually resident" in the United States if the U.S. citizen will be returning to establish a domicile in the United States on or before the date of the child's admission with an immigrant visa. The U.S. citizen who is living abroad will also be considered to be habitually resident in the United States, for purposes of a Convention adoption, if the United States citizen will be bringing the child to the United States after the child's adoption and before the child's eighteenth birthday, so that the child may be naturalized under section 322 of the Act.

For the child whose adoption is sought, the child will, ordinarily, be deemed under new 8 CFR 204.303(b) to be habitually resident in the country of the child's citizenship. If the child lives in a country other than the country of citizenship, the child will be considered habitually resident there only if the child's status in that other country is sufficiently stable for that country properly to exercise jurisdiction over the child's adoption or custody. In the case of a child living outside the country of citizenship, USCIS will defer to the determination of that other country's Central Authority concerning whether the child's status in that country is sufficiently stable to permit that country to exercise jurisdiction over the child's adoption. Additionally, proposed 8 CFR 204.303(b) retains the provision in the definition of "foreign sending country," in current 8 CFR 204.3(b), that precludes a child from being considered habitually resident in a country where the child is present only on a temporary basis, or "to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States." If the child's presence in a country other than the country of citizenship is only temporary, so that that country will not exercise jurisdiction, the child will be deemed to be habitually resident in the country of citizenship.

#### New 8 CFR 204.304—Improper Inducement Prohibited

Current 8 CFR 204.3(i) requires denial of a Form I-600 or Form I-600A if the prospective adoptive parent(s), or someone acting for the prospective adoptive parent(s), "have given or will

give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child." Article 4, paragraphs (c)(3) and (d)(4) of the Convention also precludes inducing any consent to adoption "by payment or compensation of any kind." But note, this rule does not preclude paying legitimate expenses in connection with an adoption.

New 8 CFR 204.304(a) provides a clear statement of what 8 CFR 204.3(i) and article 4 are intended to prevent. The decision of a parent or other custodian to release a child for adoption must be a free act for the adoption to be valid. Any payment or other consideration, no matter how small, will lead to denial of the Form I-800 if the evidence of record establishes that the payment or other consideration was given specifically to induce the child's release.

New 8 CFR 204.304(b), in turn, identifies the type of payments that may generally be considered appropriate. This paragraph is modeled on the 1994 edition of the Uniform Adoption Act, as recommended by the National Conference of Commissioners on Uniform State Laws. The text of the Uniform Adoption Act is available on line at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uac94.htm>. Certain payments to a prior parent may be proper, such as expenses related to the birth of the child, or to care of the child, or to care of a birth mother while pregnant and immediately after the child's birth. Any payment for any service related to an adoption will be reasonable only if it is permitted under the law where the payment is made, and if the amount is commensurate with the costs or living standards of the country in which the related service was provided. The new Form I-800 will require the petitioner to disclose the fees and other expenses paid in relation to the adoption.<sup>4</sup>

#### New 8 CFR 204.305—State Pre-Adoption Requirements

Rather than completing a Convention adoption abroad, a U.S. citizen may also bring a Convention adoptee to the

<sup>3</sup>Routine uses for information collected under this rule can be found in the current DHS Privacy Act System of Records Notice that applies generally to the DHS Central Index System (72 FR 1755, January 16, 2007) and in the DHS System of Records Notice for the DHS/USCIS-005 Inter-country Adoptions system (72 FR 31086, June 5, 2007).

<sup>4</sup>Note that new 8 CFR 204.304 does not exhaust the regulatory provisions relating to adoption fees. Article 32 of the Convention provides generally that only "reasonable" fees may be paid in connection with a Convention adoption. Article 32 also bars improper financial or other gain from Convention adoptions. The accreditation regulation adopted by the Department of State, at 22 CFR part 96, gives the broader regulatory framework for adoption service providers. New 8 CFR 204.304 only addresses the actual payment of an inducement to obtain consent to the child's adoption.

United States for purposes of completing the adoption in the United States. If the child will be adopted in the United States, section 101(b)(1)(G) of the Act requires that the prospective adoptive parents satisfy any pre-adoption requirements that apply to adoptions in the State where the child will be adopted. This requirement should ensure that the prospective adoptive parents will not be precluded from adopting the child, once the child is here. New 8 CFR 204.305 restates the pre-adoption requirements from current 8 CFR 204.3(f).

#### New 8 CFR 204.306—General Overview of Convention Adoption Cases

New 8 CFR 204.306 provides a general overview. As stated in section 204.306, a child may immigrate to the United States based on a proposed Convention adoption only if the adoptive parents establish that they are “suitable and eligible to adopt” and that the child qualifies as a Convention adoptee. The requirement of “suitability and eligibility to adopt” reflects the statutory requirement that DHS must be satisfied that the prospective adoptive parent(s) is (are) eligible to file a Form I-800 (a married couple adopting jointly or a single person who is at least 25 when the petition is filed) and that the child will receive proper care. A finding that these statutory requirements are met will also satisfy the requirements of article 5(a) of the Convention. New 8 CFR 204.306(b) reflects articles 5(a), 17(d) and 19(1) of the Convention, under which a Convention adoption may go forward only after the competent authorities of the State to which the child will move have determined that the prospective adoptive parent(s) is (are) “eligible and suitable to adopt.” Thus, unlike the current orphan procedure under 8 CFR 204.3(g)(4)—which allows for the “concurrent” filing of the Form I-600A by filing a Form I-600 supported by a home study and other evidence that would be filed with a Form I-600A—the prospective adoptive parent(s) in a Convention adoption case must file a Form I-800A, and may file the Form I-800 only if the Form I-800A is approved.

#### New 8 CFR 204.307—Who May File Form I-800A or I-800

Under section 101(b)(1)(G) of the Act, a Convention adoptee may be brought to the United States if the child has been adopted by a U.S. citizen and his or her spouse, jointly, or by an unmarried U.S. citizen who is at least 25 years old. This provision corresponds to the requirements under section 101(b)(1)(F) of the Act for orphan petitions. As

required by statute, new 8 CFR 204.307(b) permits an unmarried applicant to file the Form I-800 only after he or she is 25 years old. Section 101(b)(1)(G) of the Act, like section 101(b)(1)(F), does not set a minimum age for the filing of a Form I-800A. Currently, USCIS regulations at 8 CFR 204.3(b) permit the unmarried U.S. citizen to file a Form I-600A, but only if the person is at least 24 years old. This interim rule, 8 CFR 204.307(a), applies this provision to Convention cases. As with orphan cases filed under section 101(b)(1)(F) of the Act, permitting the unmarried citizen who wants to complete a Convention adoption to file the Form I-800A on or after his or her 24th birthday is simply an accommodation. Because section 101(b)(1)(G) of the Act specifically requires that an unmarried citizen must be at least 25 years old in order to file an immigrant visa petition, an unmarried citizen cannot file the Form I-800 before his or her 25th birthday, even if USCIS approves the Form I-800A before that date.

New 8 CFR 204.307(c) is a provision that strengthens the provisions of 8 CFR 204.309(a) and (b)(3), discussed below, relating to the mandatory denial of a Form I-800A or Form I-800 based on specific types of misconduct. Under new 8 CFR 204.307(c), if USCIS denies a Form I-800A or a Form I-800 based on one of these grounds, the prospective adoptive parent(s) must wait at least one year before the prospective adoptive parent(s) may file a new Form I-800A or Form I-800. This one-year period, similar to current 8 CFR 204.3(h)(4), begins when the prior denial becomes final. If the prospective adoptive parent(s) appealed the prior denial, the one-year period will end one year after the Administrative Appeals Office affirms the denial, and the filing of a new Form I-800A or I-800 will also be barred while the appeal is pending. If there is no appeal, the one-year period begins on the date of the original denial. Even once this one-year period expires, USCIS may consider the prior misconduct in determining whether to approve a subsequent Form I-800A or Form I-800. The prospective adoptive parent(s) will be required to establish that the subsequent Form I-800A or Form I-800 should be approved, despite the prior misconduct. The prospective adoptive parent(s) may not use the later Form I-800A or Form I-800 as a vehicle to re-litigate whether the prior misconduct actually occurred.

New 8 CFR 204.307(c) is rooted in the requirement under section 101(b)(1)(G)(i)(I) of the Act that the Secretary must be satisfied that, if

allowed to immigrate, a Convention adoptee will receive proper parental care. If the prospective adoptive parent(s) has (have) already engaged in improper conduct that was sufficiently great to warrant the denial of an earlier Form I-800A or Form I-800, USCIS must take note of this fact in any subsequent case.

#### New 8 CFR 204.308—Where to File Forms I-800A and I-800

Current 8 CFR 204.3(g) provides a detailed, and somewhat complex, framework for determining where to file a Form I-600A or a Form I-600 in orphan cases. New 8 CFR 204.308 is the corresponding jurisdictional provision for this rule. In more recent years, however, USCIS has not specified which office had jurisdiction to adjudicate a petition or application in the regulations governing adjudication of the petition or application. Rather, USCIS has used the form instructions to specify the correct jurisdiction. See, e.g., 8 CFR 103.2(b)(6). This practice makes it possible for USCIS to adopt “Direct Mail” filing procedures and other improvements by changing the form instructions, rather than having to adopt a formal amendment to a regulation. New 8 CFR 204.308 follows this practice.

USCIS is studying the feasibility of allowing for electronic filing of orphan cases. To prepare for this possible change, proposed 8 CFR 204.308(d) provides that, if electronic, internet-based, or other digital filing becomes available, the submission of the information and evidence required for Form I-800A and Form I-800 cases through the digital filing protocol will be the equivalent to paper filing.

USCIS anticipates that, at least initially, the jurisdictional provisions relating to the filing of Forms I-800A and I-800 will closely follow current practice for orphan cases under section 101(b)(1)(F) of the Act. A flowchart showing the anticipated processing path of a Convention adoption case is included in the docket for this rule at <http://www.regulations.gov>, DHS Docket No. USCIS-2007-0008.

As with orphan cases under section 101(b)(1)(F) of the Act, both USCIS officers and Department of State officers will have jurisdiction to adjudicate a Form I-800. If the prospective adoptive parent(s) live in the United States or Canada and file the Form I-800 before traveling abroad to complete the child's adoption, the prospective adoptive parent(s) will file the Form I-800 with the USCIS office that has jurisdiction over the actual or, for those in Canada, intended place of residence in the

United States. If the prospective adoptive parent(s) live(s) in the United States, but travel abroad before filing the Form I-800, the Form I-800 may be filed with a USCIS office in the child's country of habitual residence, if the prospective adoptive parent(s) is (are) physically in that country at the time of filing. If the prospective adoptive parent(s) live(s) abroad, and USCIS has an office in the country in which they reside, the prospective adoptive parent(s) may file the Form I-800 with that office, although the prospective adoptive parent(s) may also file it with the USCIS office in the United States that has jurisdiction over the intended place of residence in the United States.

Filing the Form I-800 with a Department of State officer would be appropriate if: (i) The prospective adoptive parent(s) is (are) actually physically present in the consular district at the time of filing, and (ii) there is no USCIS office in that country.

There is one significant change from the practice that has been followed in orphan cases with respect to the way a Form I-800 will be adjudicated. Under article 5 of the Convention, a Convention adoption should not occur until the receiving State has determined that the child will be authorized to immigrate. USCIS, in consultation with the Department of State, has determined that a two-step approval process is needed in order to ensure compliance with the Convention. Thus, a Form I-800 will have to be provisionally approved before the prospective adoptive parent(s) actually adopt(s) or obtain(s) custody of the child. If the Form I-800 is filed with USCIS, the USCIS officer will decide whether to grant provisional approval. The Department of State officer will make this decision if the Form I-800 is filed with the Department of State officer and the Department of State officer finds that the Form I-800 is clearly approvable. Under this rule, the decision to grant final approval of a Form I-800 will generally be made by the Department of State officer who adjudicates the related visa application, rather than a USCIS officer. Regardless of where the Form I-800 is filed, it will, upon provisional approval, be forwarded to the appropriate Department of State officer for final approval. As with orphan cases, however, a Department of State officer will not have authority to deny a Form I-800. If the Department of State officer finds that he or she cannot clearly grant provisional or final approval, the Department of State officer will forward the case to the appropriate USCIS office for decision.

#### New 8 CFR 204.309—Factors Requiring Denial of a Form I-800A or I-800

As noted, current 8 CFR 204.3(e)(2)(iii)(D) permits USCIS to deny a Form I-600A or Form I-600 if the prospective adoptive parents conceal material facts or fail to cooperate in the completion of the home study. This principle is carried forward in new 8 CFR 204.309(a). Under the current rule, the question of whether to deny a Form I-600A or Form I-600 based on one of these improprieties is discretionary. New 8 CFR 204.309(a), by contrast, makes denial mandatory. Under section 101(b)(1)(G)(i)(I) of the Act, DHS may approve prospective adoptive parent(s) for intercountry adoption only if DHS is satisfied that any child that may be adopted will receive proper care. DHS is not willing to make this finding in any case in which the prospective adoptive parent(s) has (have) failed to disclose all facts concerning issues that may have a bearing on whether USCIS should find that the prospective adoptive parent(s) is (are) suitable for intercountry adoption.

New 8 CFR 204.309(b) lists certain factors that will require denial of a Form I-800. New 8 CFR 204.309(b)(1) requires denial of a Form I-800 if the adoptive parents adopted the child, or obtained custody of the child, before the provisional approval of the Form I-800. This provision reflects the requirement of article 5(c) and 17(d) of the Convention that the child's eligibility to immigrate is to be determined before the adoption occurs. USCIS acknowledges that the rule can work a hardship in cases in which the prospective adoptive parent(s), in good faith, adopted the child before beginning the Convention process. For this reason, new 8 CFR 204.309(b)(1) provides that, if the competent authority in the country of the child's habitual residence voids the adoption or custody order, then the fact that the prospective adoptive parent(s) had already adopted, or obtained custody of, the child before the Form I-800 was provisionally approved will no longer preclude provisional approval of the Form I-800. The prospective adoptive parent(s) would then adopt the child again, after complying with the Convention procedures, and after provisional approval of the Form I-800. The prospective adoptive parent(s) must have the prior adoption or custody order voided before the prospective adoptive parent may file the Form I-800.

Article 29 of the Convention restricts the ability of the prospective adoptive parents to have contact with the prospective adoptee's parents or other

custodians. New 8 CFR 204.309(b)(2) provides that a Form I-800 must be denied if any such contact occurred before the contact was legally permitted. Generally, contact is permitted only after USCIS has approved a Form I-800A and after the Convention country has determined that the child is eligible for intercountry adoption and that the necessary consents to adoption have been given. Earlier contact is permitted only as allowed under the conditions established by the competent authority of the Convention country, or in the case of an intra-family adoption. In the case of a child who was adopted without compliance with the Convention requirements, if the other Convention country voids the adoption and allows the child to be adopted again after complying with the Convention, any contact that had occurred will be considered to have been approved.

New 8 CFR 204.309(b)(3) and (b)(4) are drawn from current 8 CFR 204.3(i) and (k)(2), respectively. As noted, 8 CFR 204.3(i) requires the denial of a case if there is a finding of "child buying." New 8 CFR 204.309(b)(3) applies the same principle to Convention adoption cases.

Under 8 CFR 204.3(k)(2), a child who is already in the United States is generally not eligible for classification as an orphan. The only exception is for a child who has been paroled into the United States; even then, the child is eligible only if the child has not already been adopted in the United States. New 8 CFR 204.309(b)(4) would change this principle.

DHS has concluded that limiting the benefits of intercountry adoption to parolees, and barring this benefit to aliens admitted as nonimmigrants, can work a significant hardship. For example, some children are brought to the United States as nonimmigrants for emergency medical treatment. If the child later becomes eligible for intercountry adoption, current 8 CFR 204.3(k)(2) requires the child to leave the United States first in order to be eligible to qualify for an orphan petition. In at least some cases, however, the medical condition that warranted bringing the child here makes it difficult or ill-advised for the child to go abroad for adoption. The underlying purpose for current 8 CFR 204.3(k)(2) is to respect the jurisdiction of the country of the child's habitual residence over the child's placement and welfare. This interest, however, can be protected without having a rule as restrictive as current 8 CFR 204.3(k)(2).

As noted in the discussion of the proposed amendment to 8 CFR 204.2(d)(2)(vii), a child who has already

been brought to the United States will generally still be considered to be habitually resident in the Convention country. A child who is already present in the United States—as a parolee, nonimmigrant, or even in an unlawful status—will be able to be the beneficiary of a Convention adoption. It will, however, be necessary for the prospective adoptive parent(s) to comply with the Convention requirements and those of section 101(b)(1)(G) of the Act. This means that it will be necessary either to adopt the child in the Convention country, or to obtain custody of the child in the Convention country for purposes of adoption in the United States. To avoid unnecessary hardship to the child, however, the rule does not require the child to return abroad. Rather, it may be possible for USCIS to approve a Form I-800, if the Central Authority of the other Convention country will permit the prospective adoptive parents to complete the Convention process while the child remains in the United States.

Note that approval of a Form I-800 does not waive any substantive eligibility requirements that must be met for adjustment of status. As an immediate relative, the beneficiary of an approved Form I-800 would not be subject to ineligibility for adjustment under section 245(c)(2) of the Act, 8 U.S.C. 1255(c)(2), based on a failure to maintain lawful immigration status, nor under section 245(c)(4), based on having been admitted under the Visa Waiver Program. A child who is present without having been inspected and admitted, however, is ineligible for adjustment under section 245(a) of the Act, 8 U.S.C. 1255(a). Section 245(i) of the Act, 8 U.S.C. 1255(i), will not waive this requirement for Convention adoptees, since no Form I-800 will have been filed before April 30, 2001, as required by section 245(i). If the child would not be eligible for adjustment of status, the Form I-800 may be provisionally approved only if the child will, upon provisional approval, go abroad to obtain a visa.

New 8 CFR 204.309(b)(5) requires denial of a Form I-800 if it is filed before a Form I-800A has been approved, after an approval has expired, or after a Form I-800A has been denied. This provision is necessary to give effect to the principle that the prospective adoptive parent(s) must be found suitable for adoption before they may pursue the adoption of a specific child.

New 8 CFR 204.307(c) bars the filing of a new Form I-800A or Form I-800 within one year after a prior Form I-800A, I-800, I-600A, or I-600 was denied based on one of the specific

types of misconduct stated in the rule. New 8 CFR 204.309(a)(4) and (b)(6) require the denial of any Form I-800A or I-800 filed during this one-year period. If a Form I-800A, or Form I-800 under 8 CFR 204.307(c), is denied, no administrative appeal will be available.

New 8 CFR 204.309(c) establishes that, before denying a case under the new 8 CFR 304.309(a) or (b), USCIS will issue a notice of intent to deny the Form I-800A or Form I-800, so that the prospective adoptive parent(s) will have an opportunity to counter the claim that 8 CFR 204.309(a) requires denial of the Form I-800A. The response period for a notice of intent to deny in a Convention case will be 30 days.

#### New 8 CFR 204.310—Form I-800A Filing Requirements

The general filing requirements for a Form I-800A are set forth in new 8 CFR 204.310. In general, this new provision corresponds to current 8 CFR 204.3(c). If a married couple files the Form I-800A, both spouses must sign the Form I-800A personally. This means that one spouse cannot sign for the other, even under a power of attorney or similar agency arrangement. If the prospective adoptive parent is not married, he or she must present his or her birth certificate, or other evidence to establish that he or she is at least 24 years old. This provision mirrors the provision that has been followed in orphan cases: Although, by statute, the unmarried prospective adoptive parent may not file the visa petition until he or she is at least 25, the unmarried prospective adoptive parent may begin the process by filing the application for approval as an adoptive parent at age 24. *Cf.* 8 CFR 204.3(b) (definition of “prospective adoptive parent”). As contemplated by article 5(a) of the Convention, the prospective adoptive parent(s) seeking to adopt a Convention adoptee must file the Form I-800A before the prospective adoptive parent(s) has (have) adopted or obtained custody of the child.

The most significant change from 8 CFR 204.3(c) concerns the submission of the home study. Under current 8 CFR 204.3(c)(2), the prospective adoptive parent(s) in an orphan case may submit the home study up to one year after the filing of the Form I-600A. This provision serves little purpose. As the home study is the single most important item of evidence in determining the suitability of the prospective adoptive parent(s) for adoption, under new 8 CFR 204.310(a)(3)(vi) the home study must be submitted with the Form I-800A. If the home study is missing, USCIS will send a request for evidence, directing that the home study be submitted. If the

home study is not submitted within the period specified in the request for evidence, the Form I-800A will be denied, without prejudice to the filing of a new Form I-800A, with a new filing fee.

Under new 8 CFR 204.310(b), USCIS will arrange for the fingerprinting of the prospective adoptive parent(s) and any additional adult household members once the Form I-800A is filed. This provision mirrors current practice. The rule also makes clear that, unlike some types of cases, there is no upper age limit after which a person need not be fingerprinted. For example, an applicant for adjustment of status who is over 79 years old generally is not required to submit fingerprints. Applying this exception to intercountry adoption cases is not consistent with the protection of a child's best interests, since an older person could have a history of crime, sexual abuse, or child abuse that would be relevant to whether a child should be placed in the home.

#### New 8 CFR 204.311—Convention Adoption Home Study Requirements

Drawn from current 8 CFR 204.3(e), new 8 CFR 204.311 establishes the requirements that a home study must meet, in order to be admissible as evidence in a Form I-800A case. The rule includes some important changes. The most important Convention-related change concerns who may conduct a home study. Sections 201 and 404 of the IAA make it unlawful for any individual or entity to provide any of the six adoption services identified in section 3(3) of the IAA in connection with a Convention adoption, unless specifically authorized to do so. The Department of State, as the U.S. Central Authority, published in the **Federal Register** on February 15, 2006, at 71 FR 8064, a comprehensive regulation governing the accreditation or approval of individuals and agencies as authorized adoption service providers in Convention adoption cases. As noted earlier, new 8 CFR 204.301 incorporates these requirements by reference into the definition of “home study preparer” that applies to Convention adoption cases.

New 8 CFR 204.311(a) restates the first sentence of current 8 CFR 204.3(e).

New 8 CFR 204.311(b) incorporates the requirement that only someone authorized to do so under 22 CFR part 96 may complete a home study for a Convention adoption.

New 8 CFR 204.311(c) gives a general overview, drawn from 8 CFR 204.3(e), of the general requirements that all home studies must meet.

New 8 CFR 204.311(d) restates provisions, from 8 CFR 204.3(e)(2)(i) and (iii)(D), concerning the applicant's duty to disclose all information relevant to the proper completion of the home study. In particular, new 8 CFR 204.311(d) states the general requirement that the applicant, and any additional adult household member, must answer, truthfully and completely, all questions relating to the proper completion of the home study. USCIS regularly encounters cases in which a person failed to disclose an arrest or conviction. When USCIS raises the issue, the person may respond that he or she did not think that it had to be disclosed because it had been dismissed, expunged, or subjected to some other amelioration. Section 101(a)(48) of the Act, 8 U.S.C. 1101(a)(48), however, makes it clear that the disposition of a case may constitute a conviction, for purposes of the Act, even if it is no longer a conviction for State law purposes. More fundamentally, any arrest, regardless of the disposition, has the potential to be relevant in determining a person's suitability as an adoptive parent. New 8 CFR 204.311(d) makes clear, therefore, that the applicant, and any additional adult household members, must disclose each and every arrest or conviction, even if it has been erased, dismissed, expunged, or ameliorated in any other way. New 8 CFR 204.311(f) requires the home study preparer to certify that he or she advised the prospective adoptive parent(s) of this duty to disclose.

New 8 CFR 204.311(e) restates the requirement in 8 CFR 204.3(e) that a home study must meet applicable State standards. This provision also corresponds to 22 CFR 96.47(b).

New 8 CFR 204.311(f) requires the home study preparer to sign the home study under penalty of perjury. In doing so, the home study preparer declares that he or she either conducted or supervised the completion of the home study and that the factual statements in the home study are true to the best of the signer's knowledge, information and belief. Currently, 8 CFR 204.3 does not expressly require the home study to be signed under penalty of perjury. Adding this requirement reflects the fact that the home study is evidence in a legal proceeding.

Current 8 CFR 204.3(e) requires the home study preparer to interview the prospective adoptive parent(s) in person and to visit the home. New 8 CFR 204.311(g) includes this requirement, but adds the requirement that the home study must state specifically when and where these interviews and visits took

place. The home study preparer must also interview any additional adult members of the household. Unlike the interview(s) with the prospective adoptive parent(s), it is not strictly necessary to conduct face-to-face interviews of these other persons. The interview of an additional adult household member should be in person, if possible. If, for example, the additional adult household member is temporarily away at school, however, it may not be feasible to do the interview in person. Thus, new 8 CFR 204.311(g) allows the home study preparer to state that the interview with the additional adult household member was not done in person, and give a reason why the home study preparer decided it was appropriate to interview the person in this way. New 8 CFR 204.311(g)(3) and (4) restate the requirements of 8 CFR 204.3(e)(2)(i).

New 8 CFR 204.311(h) restates current 8 CFR 204.3(e)(2)(ii).

New 8 CFR 204.311(i) and (j) are drawn from current 8 CFR 204.3(e)(2)(iii), relating to the screening of prospective adoptive parents against child abuse registries. The rule includes a significant change. The home study preparer will be required under new 8 CFR 204.311(i)(1) to check the child abuse registries for any State or country in which the prospective adoptive parent(s) or additional adult household members has (have) lived since the age of 18. Current 8 CFR 204.3(e)(2)(iii)(A)(1) requires checking "available" registries, but does not specify the period that the checks must cover. Current 8 CFR 204.3(e)(2)(iii)(2) requires the home study preparer to ask whether a prospective adoptive parent or household member has any history of substance abuse, sexual abuse, child abuse, or domestic violence. The person must disclose any such history as an offender, even if there has never been an arrest or conviction. A single incidence of sexual abuse, child abuse, or family violence, under 8 CFR 204.311(c)(14), is enough to constitute a "history." A history of substance abuse, by contrast, might not involve a single act of substance abuse. For substance abuse, the concern under 8 CFR 204.311(c)(15) is whether the person's abuse has resulted in an impairment that may adversely affect suitability as adoptive parent(s).

New 8 CFR 204.311(k) requires the applicant, and any adult member of the household, to disclose any criminal history (other than minor traffic offenses), in addition to any history involving sexual abuse, child abuse, or family violence. This provision is drawn from 8 CFR 204.3(e)(2)(v).

New 8 CFR 204.311(l), drawn from 8 CFR 204.3(e)(2)(iii)(C), describes the type of evidence to be submitted to establish that a person with a history of sexual abuse, child abuse, family violence, or any other criminal activity, may show sufficient rehabilitation to warrant approval of a Form I-800A. The new provision makes clear that a home study preparer may not make a favorable recommendation if the applicant, or an additional adult member of the household, is on probation due to a criminal conviction. Approval will be possible only once the person has completed, and been discharged from, the probation.

New 8 CFR 204.311(m) requires the home study preparer to address issues of physical, mental or emotional health, or behavioral issues of the prospective adoptive parent(s) and any additional adult members of the household, as these issues may affect the suitability of the prospective adoptive parent(s) for intercountry adoption. This provision is drawn from current 8 CFR 204.3(e)(2)(i).

New 8 CFR 204.311(n), like current 8 CFR 204.3(e)(2)(iv), requires the disclosure, and provision of a copy, of any prior home study that did not favorably recommend the prospective adoptive parent(s), or an additional adult member of the household, for adoption or other custodial care of a child. If a copy of the prior home study is no longer available, the applicant must explain why it is not available. To ensure that USCIS has a complete history, the rule also requires the disclosure of any prior home study process that was initiated, but terminated without a formal home study having been completed.

New 8 CFR 204.311(o) and (p) are drawn from current 8 CFR 204.3(e)(3) and 204.3(e)(4).

New 8 CFR 204.311(q) is drawn from section 203(b)(1)(A)(ii) of Pub. L. 106-279, 114 Stat. 833. Any home study for a proposed Convention adoption must specifically address whether the prospective adoptive parent(s) will actually be eligible to adopt or obtain custody of a child from the Convention country. To ensure that the United States and adoption service providers will be aware of these requirements, section 102(b)(2) and (3) of Pub. L. 106-279 requires the Department of State to obtain from other Convention countries, and make available to adoption service providers, any special requirements relating to eligibility to adopt in those countries. Once the Department of State has obtained this information and made it available, new 8 CFR 204.311(q) will require that the home study address those requirements. For example, if a

particular Convention country sets a maximum (or minimum) age for prospective adoptive parent(s), the home study will have to specifically state that requirement and assess whether the prospective adoptive parent(s) meet(s) the requirements. Note that USCIS will not deny a Form I-800A based solely on the other Convention country's requirements. It is for that other Convention country to determine how to apply its own law to a particular case. Including this information in the home study is meant to ensure that the prospective adoptive parent(s) is (are) aware of the requirements, that the home study preparer can assess the relevance of these requirements, and that the prospective adoptive parent(s) may make an informed decision about whether to attempt to adopt in a particular country.

New 8 CFR 204.311(r) is drawn from current 8 CFR 204.3(e)(6). The home study preparer must specifically recommend for or against approval of the prospective adoptive parent(s) as suitable as the adoptive parent(s) of a Convention adoptee. As noted, new 8 CFR 204.311(e) requires the home study preparer to prepare the home study according to the requirements that apply to home studies in the State of residence of the prospective adoptive parent(s). The home study must also specify the scope of the recommendation, and note whether the home study preparer recommends any restrictions concerning the age, gender, or other characteristics of the intended adopted child.

New 8 CFR 204.311(s) and (t) address the review of the home study. First, under 8 CFR 204.311(s), the home study preparer must specify the basis of the authority to complete the home study. As noted, only someone authorized under 22 CFR part 96 to complete a Convention home study may do so. If the home study preparer is not a public domestic authority or an accredited agency or temporarily accredited agency as defined in 22 CFR part 96, then, under 8 CFR 204.311(t)(2), an accredited agency or temporarily accredited agency must review and approve the home study before it can be submitted to USCIS. Finally, 8 CFR 204.311(t)(1) also requires review of the home study by the competent authority of the State in which the prospective adoptive parent(s) reside, if that State's law requires this review. New 8 CFR 204.311(t)(1) is drawn from current 8 CFR 204.3(e)(8).

New 8 CFR 204.311(u) is drawn from current 8 CFR 204.3(e)(9), relating to the need to amend or update a home study. An amended or updated home study is subject to the same review

requirements, in new 8 CFR 204.311(s) and (t), that apply to the initial home study. It is not universally the case that an amended or updated home study is completed by the same home study preparer. For the sake of completeness, new 8 CFR 204.311(u) requires that any amended or updated home study must include a copy of the earlier home study (and all prior updates or amendments) and the preparer must specifically state that the preparer reviewed the prior home study (and any prior amendments or updates) and is aware of its contents. USCIS, of course, will already have a copy of the original home study and any prior update or amendment. Requiring the update or amendment to include the prior home study ensures that the home study preparer did, in fact, receive a copy of these prior documents.

If it becomes necessary to amend or update the home study while the Form I-800A is still pending, the prospective adoptive parent(s) need only submit it to USCIS. In some cases, however, the change that necessitates an amended or updated home study will occur after USCIS has approved the Form I-800A. The INS never developed a standardized process for submitting an amended or updated home study after approval of a Form I-600A. This rule fills that void. Rather than requiring a motion to reopen, new 8 CFR 204.311(u) allows the prospective adoptive parent(s) to submit the updated or amended home study with a properly completed Form I-800A Supplement 3, with the filing fee established by 8 CFR 103.7(b). The basis for calculating the Form I-800A Supplement 3 filing fee is discussed below, in relation to new 8 CFR 204.312(e)(3), governing the extension of the approval period for a Form I-800A. As noted in that discussion, the filing fee for the Form I-800A Supplement 3 is less than the fee for a motion to reopen. If USCIS finds that the updated or amended home study supports the validity of the decision approving the Form I-800A, USCIS will issue a new approval notice. The new notice will not extend the approval period; new 8 CFR 204.312(e)(3) covers that issue.

#### New 8 CFR 204.312—Adjudication of the Form I-800A

New 8 CFR 204.312(a) states the burden of proof and persuasion that must be met in order for USCIS to approve a Form I-800A. USCIS will approve the Form I-800A if the prospective adoptive parent(s) establish(es) that the prospective adoptive parent(s) is (are) eligible to file a Form I-800A (i.e., a married couple, at least one of whom is a United States

citizen, or an unmarried United States citizen who is at least 24) and that the prospective adoptive parent(s) is (are) are suitable as the adoptive parent(s) of a Convention adoptee.

New 8 CFR 204.312(b) and (c) correspond to current 8 CFR 204.3(h)(2) and 204.3(h)(4) through (h)(7). First, new 8 CFR 204.312(b), like current 8 CFR 204.3(h)(2), makes it clear that it is for the USCIS officer, not the home study preparer, to decide whether the Form I-800A should be approved. Although the home study will have considerable evidentiary weight, the USCIS officer is not bound to approve a Form I-800A simply because the home study is favorable. The officer may consult the accredited or temporarily accredited agency, the home study preparer, the prospective adoptive parents, State or local child welfare agencies, or other professionals. If USCIS denies the Form I-800A, new 8 CFR 204.312(c) will require USCIS to inform the prospective adoptive parents of the reasons for the denial, and of the right to file an administrative appeal.

New 8 CFR 204.312(d) provides for the issuance of an approval notice, if USCIS approves the Form I-800A. The rule deletes, as no longer necessary, the current requirement in 8 CFR 204.3(j)(1) regarding the issuance of "telegraphic notification" of the approval to a visa issuing post. The availability of the National Visa Center, fax transmissions, and e-mails obviate the need for "telegrams." New 8 CFR 204.312(d)(2) requires that, once the Form I-800A is approved, any submission of the home study to the Central Authority of the other Convention country must include the entire and complete text of the same home study, including any amendments or updates, that was submitted to USCIS. This requirement harmonizes DHS regulations with the accreditation standards found in 22 CFR 96.47(d).

New 8 CFR 204.312(e)(1) defines the approval period for a Form I-800A. Under current 8 CFR 204.3(h)(3)(i), the approval notice for a Form I-600A in an orphan case is valid for 18 months. Except for 8 CFR 204.3(h)(3)(ii), a special provision adopted in 2003 in response to the outbreak of Severe Acute Respiratory Syndrome (SARS), 8 CFR 204.3(h)(3) includes no provision for the extension of this approval period. If the Form I-600A approval expires before a child is located for adoption, the current rule requires the prospective adoptive parents either to file a new Form I-600A, or else to file with the Form I-600 the type of evidence necessary for approval of a Form I-600A.

The current rule presents two problems. From the point of view of the protection of an adopted child, the approval period is too long. Standard USCIS policy has been that the FBI's clearance of a person's fingerprints is valid for 15 months. After that period, USCIS will not assume that the person's criminal history remains unchanged. Thus, by making the approval of a Form I-600A valid for 18 months, there is some risk that a Form I-600 may be approved without the discovery of new, adverse information. From the perspective of prospective adoptive parents, by contrast, the inability to obtain an extension of the approval period creates uncertainty, since some countries will not match for adoption a prospective adoptive parent whose Form I-600A approval has expired, despite the ability to obtain a new approval.

DHS adopted a provisional remedy to this problem under the final fee rule, published on May 30, 2007, at 72 FR 29851. The fee rule amended 8 CFR 103.7(b) to permit the prospective adoptive parent(s) to make one request to extend the approval period of Form I-600A. *Id.* at 29874. No fee was established for this request, since the proposed rule did not include any provision on this issue.

New 8 CFR 204.312(e)(1) and (3) seek to provide a more comprehensive resolution to both problems. First, under new 8 CFR 204.312(e)(1), the initial approval period for a Form I-800A in a Convention case will be 15 months from the date USCIS received the initial FBI response for the fingerprints of the prospective adoptive parent(s) and any additional family members. If the initial 15-month period is about to expire, the fingerprints must be submitted again before approval, as specified in new 8 CFR 204.310. Moreover, under new 8 CFR 204.312(e)(3), the prospective adoptive parent(s) will be able to request an extension of the approval period for an additional 15 months. To obtain this extension, if the approval of the Form I-800A is about to expire but no Form I-800 has yet been filed, the prospective adoptive parent(s) will file Form I-800A Supplement 3, without having to pay the Supplement 3 filing fee (for the first request for an extension), with an updated or amended home study. If USCIS finds that approval of the Form I-800A remains warranted, USCIS will extend the approval period for an additional 15 months, from the date USCIS receives the new FBI response on the fingerprints.

As noted, if the prospective adoptive parents have not yet filed a Form I-800,

no filing fee will be required to file Form I-800A Supplement 3 in order to obtain a first extension of the Form I-800A approval. This interim rule, however, is broader than the solution adopted in the final fee rule, in that under this interim rule there is no limit to the number of times the approval of a Form I-800A may be extended. As long as the prospective adoptive parents are still seeking to adopt a child, and are still suitable as adoptive parents, they may seek extensions as often as needed to keep the Form I-800A approval current. If the prospective adoptive parents will need to file a new Form I-800A Supplement 3 to obtain a second, or subsequent, extension of the approval of the Form I-800A, however, they will need to pay the Form I-800A Supplement 3 filing fee for the second or subsequent request. This interim rule adopts the filing fee for Form I-824, Application for Action on Approved Petition or Application, as the filing fee for Form I-800A Supplement 3 because USCIS anticipates that the cost of adjudicating an extension request will be substantially similar to the cost of adjudicating Form I-824. USCIS currently uses Form I-824 in a variety of situations in which a petitioner or applicant asks USCIS to take a specific act on an approved petition or application. USCIS will re-examine its fee structure again in 2 years in accordance with OMB requirements and all application and petition fees may be adjusted then. The actual experience of USCIS in adjudicating extension requests will be used to determine the fee for extension requests at that time. As noted, the Form I-800A Supplement 3 filing fee is considerably less than the fee for a motion to reopen or to file a new Form I-800A.

As a change in marital status is a considerable change in the facts supporting a prior approval, under 8 CFR 204.312(e)(2), approval of a Form I-800A will be revoked automatically if an unmarried prospective adoptive parent marries, or if the marriage of a prospective adoptive parent couple ends. Revocation of the approval of the Form I-800A will be without prejudice to the filing of a new Form I-800A and Form I-800, reflecting the change in marital status. As stated previously, when the prospective adoptive parents are married, both spouses must adopt the child. For this reason, 8 CFR 204.312(e)(2) also provides that approval of a Form I-800A is automatically revoked if either spouse withdraws his or her signature on the Form I-800A.

New 8 CFR 204.313—Filing and Adjudication of Form I-800

Once USCIS has approved a Form I-800A and the prospective adoptive parent(s) has (have) identified a child who may qualify for immigration as a Convention adoptee, the next step is to file Form I-800. New 8 CFR 204.313 governs the filing and adjudication of Forms I-800. The basic framework is drawn from current 8 CFR 204.3(d).

The most significant difference, in comparison with orphan cases, is that the prospective adoptive parent(s) must file the Form I-800 *before* they adopt or obtain custody of the child. This provision reflects the requirements of article 5(c) of the Convention. The fundamental Convention principle is that the child's eligibility for immigration, based on the proposed adoption, must be determined before the adoption or custody can take place.

For this reason, new 8 CFR 204.313 provides a two-step process. First, the prospective adoptive parent(s) must submit a properly completed Form I-800 and evidence that the alien child qualifies as a Convention adoptee. The most important items of evidence will be the Central Authority's reports that document the child's eligibility for intercountry adoption. If the USCIS or Department of State officer finds that the child qualifies as a Convention adoptee, the USCIS or Department of State officer will issue a provisional approval of the Form I-800. The provisional approval permits the prospective adoptive parent(s) to complete the adoption or, for a child who will be adopted in the United States, to obtain custody of the child for purposes of emigration and adoption. Note that one requirement under article 5(b) of the Convention is that all necessary counseling must be completed before the adoption takes place. The required counseling is described in 22 CFR 96.48. At the Form I-800A stage, the home study is required to discuss the extent to which counseling has been completed and outline a plan for further counseling. New 8 CFR 204.311(c)(8). Further, before the Form I-800 can be provisionally approved, the adoption service provider must submit evidence that the remaining required counseling has been completed. New 8 CFR 204.313(c)(3).

Section 101(b)(1)(G) of the Act requires that the visa petition in a Convention case must be filed before the child's sixteenth birthday. There is no authority to permit a later filing. This rule does establish, however, two special provisions for cases involving

children who are placed for adoption in cases initiated while the child is 15:

- If the prospective adoptive parent(s) filed the Form I-800A after the child's fifteenth birthday but before the child's sixteenth birthday, the Form I-800A filing date will be treated as the Form I-800 filing date, but only if the Form I-800 is filed within 180 days after the initial approval of the Form I-800A;
- If the Central Authority places the child for adoption more than 6 months after the child's 15th birthday but before the child's 16th birthday, and the reports that must accompany the Form I-800 are not yet available, the prospective adoptive parent(s) may file the Form I-800 without those reports, but the Form I-800 will not be provisionally approved until the reports are submitted.

When the Form I-800 is filed without the required reports, so as not to miss the filing deadline on the day before the child's sixteenth birthday, the prospective adoptive parents would, instead, present a declaration from the adoption service provider that the Central Authority has, in fact, made the decision to place the child with the prospective adoptive parent(s) for adoption.

The rule includes a special provision concerning the child's admissibility. Ordinarily, whether an alien beneficiary of a visa petition is admissible is not addressed in the visa petition proceeding. *Matter of O-*, 8 I&N Dec. 295 (BIA 1959). Article 5(c) of the Convention, however, provides that a Convention adoption should not occur, unless the child "is or will be authorized to enter and reside permanently" in the receiving country. For this reason, new 8 CFR 204.313(d)(5) permits the prospective adoptive parent(s) to file with the Form I-800 an application for any waiver that may be necessary to overcome a known or suspected ground of inadmissibility. Provisional approval of the Form I-800 will include approval of the waiver application, although the waiver will be void if the child does not actually immigrate on the basis of the approved Form I-800. If it is determined that the waiver application will be denied, provisional approval of the Form I-800 will not be granted.

Similarly, many Convention adoptees will not be subject to the affidavit of support requirement under section 213A of the Act, either because their adoptive parents already have 40 quarters of coverage under the Social Security Act or else because the children will acquire United States citizenship under section 320 of the Act

upon admission. 8 CFR 213a.2(a)(2)(ii)(C) and (E). Thus, new 8 CFR 204.313(d)(6) permits the prospective adoptive parent(s) to file the Form I-864W, Intending Immigrant's I-864 Exemption, or, if needed, Form I-864, with the Form I-800.

New 8 CFR 204.313(f) provides authority to conduct an investigation before the provisional or final approval of a Form I-800. This investigation corresponds to the "I-604 investigation" that is conducted in orphan cases. See 8 CFR 204.3(k)(1). Unlike the "I-604 investigation," new 8 CFR 204.313(f) does not require an investigation in every case. The respective roles of the Central Authorities should make it more readily apparent that the documents submitted with a Form I-800 are legally sufficient to establish that the child is eligible to immigrate as a Convention adoptee. USCIS anticipates that, as a general principle, it will accept the Central Authority's certification that the consents necessary to make the child eligible for adoption are valid. New 8 CFR 204.313(f) does, however, permit an investigation, if the USCIS officer or Department of State officer believes that an investigation is necessary to the proper adjudication of the case. Consequently, even when the Central Authority has provided a certification that appears proper, USCIS may deny a Form I-800 if, as a result of an investigation, USCIS finds that the purported consents are not valid, or that the child, for any other reason, does not qualify as a Convention adoptee.

The prospective adoptive parent(s) may either complete the adoption abroad, or else obtain custody of the child in order to bring the child to the United States for adoption, after (1) USCIS (or the Department of State officer acting on behalf of USCIS) has provisionally approved the Form I-800; (2) the consular officer has annotated the visa application as specified in the Department of State rule published in the **Federal Register** on June 22, 2006, at 71 FR 35847; and (3) the Department of State has provided the notice contemplated by article 5(c) of the Convention. Upon completing the above processes, the parents would then present the adoption or custody decree to the Department of State officer with jurisdiction to adjudicate the child's visa application. Once the Secretary of State has certified that the adoption or custody decree satisfies the Convention and IAA requirements, and all other steps required both by this regulation and the Department of State regulations have been completed, the Department of State officer, acting on behalf of USCIS, will give final approval of the Form I-

800. As with provisional approvals, if the Department of State officer determines that the Form I-800 is not clearly approvable, the Department of State officer must refer the Form I-800 to USCIS for decision.

Under current 8 CFR 204.3, approval of a Form I-600 makes the alien beneficiary eligible to apply for an immigrant visa. Approval of a Form I-800 will have the same effect. In some cases, however, the intention is not for the child to live in the United States with the adoptive parent(s) immediately after the adoption. Rather, the intention is for the family to bring the child to the United States briefly, either after completing the adoption abroad or else to complete it in the United States, and then to return to the family's residence abroad. Use of an immigrant visa is not really designed for this situation. Moreover, acquisition of United States citizenship under section 320 of the Act occurs only if the child is "residing in" the United States with the United States citizen parent. To accommodate the situation of families living abroad, new 8 CFR 204.313(b)(2) provides that approval of a Form I-800 can support issuance of a nonimmigrant visa, as well as an immigrant visa, if the adoption is actually completed abroad. Admission of the child as a nonimmigrant will facilitate the child's naturalization under section 322 of the Act, rather than under section 320 of the Act. Admission with a nonimmigrant visa for purposes of naturalization under section 322 of the Act is not an option, if the child will be adopted in the United States.

#### New 8 CFR 204.314—Administrative Appeals

Under current 8 CFR 204.3, the prospective adoptive parent(s) may appeal to the Administrative Appeals Office from a decision denying a Form I-600A or Form I-600. New 8 CFR 204.314(a) retains this right to appeal for Convention adoption cases. There are four situations, however, in which the prospective adoptive parents will not be able to appeal the denial of a Form I-800 or Form I-800A. No appeal will be available if USCIS denies a: (i) Form I-800A because the Form I-800A was filed during any period during which 8 CFR 204.307(c) bars the filing of a Form I-800A; or (ii) Form I-800A for failure to timely file a home study as required by 8 CFR 204.310(a)(4)(viii); or (iii) Form I-800 because the Form I-800 was filed during any period during which 8 CFR 204.307(c) bars the filing of a Form I-800; or (iv) Form I-800 filed either before USCIS approved a Form I-800A or after the expiration of the approval of a Form I-800A.



### 3. Affidavits of Support Under Section 213A of the Act

Sections 212(a)(4) and 213A of the Act, 8 U.S.C. 1182(a)(4) and 1183a, require the submission of a legally-enforceable affidavit of support on behalf of most aliens who immigrate as immediate relatives and family-based immigrants. The affidavit of support rule, 8 CFR 213a.2, provides, however, that this requirement does not apply to an alien who has already earned, or can be credited with, 40 quarters of coverage under the Social Security Act. 8 CFR 213a.2(a)(2)(ii)(C). A child is credited with any quarters of coverage that the child's parents have already earned. *Id.* For this reason, many, and perhaps most, Convention adoptees will be exempt from the affidavit of support requirement under this provision.

The affidavit of support is also waived for alien children of United States citizens who will acquire United States citizenship by naturalization under section 320 of the Act, 8 U.S.C. 1431, immediately upon admission for permanent residence. Many, and perhaps most, Convention adoptees will be naturalized under section 320 of the Act immediately upon having been admitted for permanent residence. This rule makes a conforming amendment to 8 CFR 213a.2(a)(2)(ii)(E) to clarify that the affidavit of support requirement does not apply to Convention adoptees who will acquire United States citizenship upon admission under section 320 of the Act.

### 4. Applying for Naturalization Under Section 322 of the Act

As noted, approval of a Form I-800 may support the child's admission as a nonimmigrant, if the child will come to the United States for naturalization under section 322 of the Act and then return abroad to live with the adoptive parent(s). For orphan cases, 8 CFR 322.3 provides for the submission of the Form I-600 approval notice and supporting evidence, if the orphan seeks naturalization under section 322. This rule adopts a corresponding provision for Convention cases. If the child will seek naturalization under section 322, the Form I-800 approval notice and supporting evidence (other than the home study) will be submitted to establish the child's eligibility for naturalization under that provision.

## V. Regulatory Requirements

### A. Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, permits DHS to publish this rule without prior notice and comment, because this rule

implicates a foreign affairs function of the United States. 5 U.S.C. 553(a)(1). DHS has also determined that this rule is exempt from the APA's notice and comment requirements because those requirements are impracticable, unnecessary, and contrary to the public interest. 5 U.S.C. 553(b)(3)(B).

### I. Foreign Affairs Function

This rule implicates a foreign affairs function and advances the foreign policy interests of the United States and is, therefore, exempt from the Administrative Procedure Act's (APA) notice and comment requirements. 5 U.S.C. 553(a)(1). The APA's foreign affairs exemption allows Federal agencies to forgo notice and comment when the request for comments may provoke undesirable international consequences. *Am. Association of Exporters & Importers v. U.S.*, 751 F.2d 1239 (Fed. Cir. 1985). *Cf. Zhang v. Slattery*, 55 F.3d 732, 736 (2d Cir. 1995) (holding that "notice and comment provisions of Administrative Procedure Act are inapplicable to rules involving military or foreign affairs function of United States, presumably to avoid public airing of matters that might inflame or embarrass relations with other countries"). In *Am. Association of Exporters*, the court determined that the adoption of textile trade regulations by the Committee for Implementation of Textile Agreements was exempt from APA notice-and-comment requirements, since prior disclosure of the Government's intention to impose import restrictions would provoke undesirable international consequences. *Id.*, at 1241. The court first found that the underlying statute authorized regulations to carry out agreements with nations not covered by any agreement, so as to protect the textile trade program which the agreements established, and the subject multi-country arrangements announced as its purpose to negate unsatisfactory situations in world textile trade. The court also found that soliciting comments on the Committee's rules would disseminate market information to the detriment of market participants and parties to the agreement. *Id.*

Consistent with the rule established in *Am. Association of Exporters*, the present rule obviously implicates foreign policy. As stated above, the Convention has been ratified by 74 countries to, *inter alia*, establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and to secure the recognition of adoptions made in accordance with the Convention by contracting states. The United States

Government has publicly committed to ratification of the Convention in 2007. See Testimony of Catherine Barry, Deputy Assistant Secretary for Overseas Citizens Services, U.S. Department Of State, before Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations House of Representatives (November 14, 2006). Since the United States is one of the primary destinations for children subject to intercountry adoption, ratification by the U.S. is necessary to advance the purposes of the Convention. The IAA assigned primary responsibility for implementation of the agreement to DOS; however, these regulations, promulgated after those of the Department of State and as required by statute, are necessary for ratification. Requesting public comments on issues already addressed by the DOS rules would make it very unlikely that the U.S. will ratify the Convention in 2007. Such a delay would be detrimental to the agreements made by the U.S. and damage the nation's foreign policy interests. If notice and comment precedes, rather than follows, the promulgation of this rule, the delays associated with soliciting comments will result in the inability of the United States to fulfill its commitment to ratify the Convention this year.

Until the United States becomes a party, the ability of the United States to advocate for wider acceptance of the Convention will be hampered. This result could have an impact on children in the United States, as well as abroad. This rule addresses the immigration of children into the United States. The Convention itself, however, also applies its protections to children who are habitually resident in the United States and who are adopted by adoptive parents living abroad. A delay in ratification of the Convention will result in a delay in the ability to extend the benefits of the Convention to such children.

This is further supported by well-established precedent. See *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994) ("foreign affairs function" exception applied to rule promulgated to implement a memorandum of understanding between the United States and Mexico regarding recognition of each country's commercial drivers' licenses); *Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567 (C.I.T. 1984) ("foreign affairs function" exception applied to regulations to implement bilateral trade agreements); *WBEN, Inc. v. U.S.*, 396 F.2d 601 (2d Cir. 1968) ("foreign affairs function" exception applied to FCC

broadcast rules required by agreement with Canada).

## II. Impractical, Unnecessary, and Contrary to Public Interest

In addition, it would be unnecessary and impracticable for USCIS to seek comment on this interim rule. See 5 U.S.C. 553(b)(3)(A) (providing that notice and comment requirements do not apply “when the agency for good cause finds \* \* \* that notice and public procedure are impracticable, unnecessary, or contrary to public interest”). The Senate consented to ratification of the Convention in 2000, and Congress enacted the implementing legislation that same year. The consent to ratification, and hence the effective date of title III of Public Law 106-279, was conditioned on the creation of the necessary administrative procedures. For DOS, adopting the “necessary administrative procedures” required the creation of a comprehensive, and entirely new, procedural mechanism for accrediting and regulating adoption service providers who handle Convention cases. DOS completed this rulemaking process with the publication of 22 CFR part 96 in the **Federal Register** on February 15, 2006, at 71 FR 8064.

This DHS interim rule, by contrast, has a more modest scope. Because DOS has established the accreditation process for these Convention cases, DHS is able to establish its necessary administrative procedures for these Convention cases. DHS has been able to adapt its existing regulations for orphan cases, which were promulgated after notice and comment on August 1, 1994, at 59 FR 38876, to reflect the accreditation requirements of 22 CFR part 96. An additional round of public comments on these accreditation issues, which DOS has already substantially addressed in its rule, would make it virtually impossible to ratify the Convention in 2007.

This rule also incorporates the requirement of articles 5 and 17 of the Convention, which provides that the adoptive parent’s(s’) suitability for adoption and the child’s eligibility to immigrate must be determined before the actual adoption occurs. Notice and comment on those issues would be impracticable, since it would not be possible to “implement” the Convention while ignoring its key procedural requirements. Other aspects of this rule, such as the home study requirements, can most properly be characterized as clarifying, rather than significantly changing, the existing requirements that have been used in orphan cases for many years.

For these reasons, DHS is promulgating this rule before requesting public comment. Although pre-promulgation notice and comment is not legally required, the Department has elected not to publish this rule as a final rule, with no opportunity for public comment at all. By using, instead, an interim rule, the Department does invite notice and comment on all aspects of this rule. Any comments received will be considered in the formulation of the final rule. Because of the need for prompt ratification of the Convention, however, any changes made in the final rule will probably take effect after the Convention enters into force. The Department will adjudicate cases under this interim rule until the final rule is published.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) mandates that an agency conduct an RFA analysis when an agency is “required by section 553 \* \* \*, or any other law, to publish general notice of rule making for any rule.” 5 U.S.C. 603(a). As noted, the Department has the authority to publish this rule without prior notice and comment, and has chosen to do so. Therefore, no RFA analysis is required for this rule. In any event, this rule applies to individuals, families, children, and adoptions and involves no effort to directly regulate the actions of small entities as defined by the RFA. Thus, the RFA does not apply.

### C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### E. Executive Order 12866

The Office of Management and Budget (OMB) has reviewed this Interim Rule under Executive Order 12866. USCIS has conducted an analysis of the impacts on intercountry adoptions that are expected to result from this rule. This analysis relates only to the changes made by this interim rule itself, and not to changes resulting, for example, from the rules promulgated by the Department of State. Nonetheless, the costs and benefits associated with this rule may overlap with the costs and benefits of the DOS rules, as well as the costs and benefits of the ratification of the Convention and the enactment of the IAA.

This regulation is required by legislation that is intended to support intercountry adoptions. The United States, by ratifying the Convention and through passage of the IAA, recognizes that adoption of a child by parents in another country may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in the country of the child’s habitual residence. Generally, governments regulate adoptions to make sure that the best interests of the adopted children are protected, rather than leave decisions regarding the welfare of a child to private organizations where placement of a child in a home may be based less on the child’s best interest and the suitability of the prospective adoptive parent(s) and more on economic or other considerations. In any event, these intangible benefits of standardizing and improving the intercountry adoption process are difficult to quantify. Nonetheless, USCIS has performed an analysis of the impacts of this rule and summarized them below.

#### New Forms and Fee for Convention Adoptions

USCIS immigration benefit fees are established based on the amount that is necessary for the agency to recover the costs of the government resources expended to deliver the benefit. As stated earlier in this rule, because the adjudication process for Convention cases will be very similar to orphan cases, this rule sets the filing fee at the same rate that applies for orphan cases. Thus, the filing fee for the forms to be submitted for adoptions of children under the Convention, Forms I-800A and I-800, will be \$670. There is one difference. In current orphan cases, a fee is required for Form I-600A or with Form I-600, if it is filed alone and no Form I-600A was filed. A new fee is required if Form I-600 was filed after

the approval of Form I-600A expired, or if the parent filed more than one Form I-600 for non-siblings. Since

Convention adoption cases require an approved I-800A in every case before the Form I-800 may be filed, the fee payment sequence will not be the same as with the I-600/600A. As an I-800A is always required, an I-800A fee will always be required. There will not be a fee required for the first I-800. However, if the parents file more than one Form I-800, a separate fee will be required for the second, and any subsequent, Form I-800. The one exception will be if the second and subsequent I-800s are for adoption of pre-adoption siblings, in which case there is no required fee.

This interim rule adopts the same filing fee for Convention cases as USCIS has adopted for orphan cases. USCIS anticipates that the cost of adjudicating a Convention case will be substantially similar to the cost of adjudicating orphan cases. USCIS will re-examine its fee structure again in 2 years in accordance with OMB requirements and all application and petition fees may be adjusted then. The actual experience of USCIS in adjudicating Convention adoptions will be used to determine the fee for Convention adoptions at that time. Thus, although the fee charged by the agency for Convention adoptions will be established identical to that for non-Convention orphan adoption petitions, if actual experience is that there are variations in the complexity of adjudication of the petitions, the respective fees may differ in the future.

#### Monetized Impacts

This rule is expected to be revenue neutral to USCIS and the public. Although the number of applications and petitions for intercountry adoptions shifts each year between countries, general trends from recent years are expected to continue in a consistent fashion, unless there is an unforeseen disruption or surge in a particular country. After this rule, a prospective adoptive parent must file a Form I-800A and I-800 if they wish to adopt from a Convention country, unless an I-600A or I-600 had been filed prior to the effective date of this rule. Thus, following publication and implementation of this rule, adoptions from Convention countries are expected to shift from submission of the Form I-600 and 600A to Forms I-800A and I-800. Since the fees for both forms are equal, cost to the petitioner and fees collected by USCIS do not increase from shifts to Convention countries.

There were 13,241 U.S. intercountry adoptions in fiscal year 2005 from countries that have joined the

Convention, and based on the average number of intercountry orphan adoptions over the past 5 years, approximately 61 percent of them have been from Convention countries. While the Convention provides benefits to countries that adopt its provisions, USCIS has no reliable data from which to estimate increases or decreases in the number of orphan adoptions, relative shifts in the number of adoptions from one country to another, or any other movement in adoption statistics that may occur as a result of this rule. Likewise, this analysis makes no estimate or assumptions as to how many additional countries will implement the Convention or how many countries that currently do not permit U.S. citizens to adopt children from their country will do so once this rule takes effect. If, for example, a country that historically has been the source of a large number of orphan adoptions that has not yet ratified the Convention, such as Russia, implements the requirements of the Convention, approximately 5000 I-600A/I-600 filings will shift to I-800A/I-800 filings. Nonetheless, the near-term impacts from such changes are not expected to be significant and current trends in the number of source countries for adoptions are expected to remain somewhat constant. The projected fee receipts from filing fees for petitions for Convention adoptions is approximately \$8,710,000 per year (13,000 × \$670). However, this figure does not represent a net increase or decrease in fees for adoption petitions because, as stated above, USCIS has not undertaken an analysis of potential increase or decrease in the number of orphan adoptions, shifts in adoptions from one country to another, or any other movement in adoption statistics. The projected fees from projected Form I-800A filings would have been collected from I-600A filings regardless of this rule. Thus, the actual net economic effect of this rule should be zero.

#### Non-Monetized Impacts

On its Web site, the Department of State lists the major advantages of the Convention and its implementation. See [http://travel.state.gov/family/adoption/convention/convention\\_2300.html](http://travel.state.gov/family/adoption/convention/convention_2300.html). With regard to the changes made by this rule, USCIS has identified the following qualitative benefits:

*Expanded definition of adoptable child.* The IAA eliminates the orphan restriction for those adoptions conducted under, and in accord with, the Convention. The broader definition of an eligible child under the Convention will no longer require that an internationally adopted child be a

true orphan (*i.e.*, both parents deceased), be legally abandoned, or that both parents have disappeared, deserted, or become separated or lost from the child. Under the Convention, a child with two known birthparents can be eligible for adoption as long as the parents are both unable to meet the child's needs under the standards of the country of origin. Additionally, the definition of a sole parent is expanded for Convention adoptions. In orphan cases, the term "sole parent" is defined strictly to include only the mother of a child who was born out of wedlock and has not been legitimated. For a Convention adoption, a child is also deemed the child of the sole parent if the other parent has abandoned or deserted the child, or has disappeared from the child's life. A child will be deemed to be the child of a sole parent if the child has only one legal parent, based on the competent authority's determination that the other legal parent has abandoned or deserted the child, or has disappeared from the child's life. There will be no requirement that a sole or surviving parent be unable to provide proper care. Consequently, the expanded definition under the Convention provides a broader means for a child residing in a Convention country to qualify as a child eligible for adoption.

There are several advantages to the adoption process under the Convention. First, a United States citizen can bring a child into the United States immediately without undergoing the two year period of residence and legal custody required for an adopted child who is not an orphan. Many international adoptions that would have required the two year legal custody and joint residence requirement for non-orphan adoptions can now be adopted under Convention orphan rules. Second, many parents who adopt in courts abroad re-adopt in their home state in the United States out of a concern that the decrees from family courts or other forums in many foreign countries may not be recognized in the United States. Parents who complete Convention adoptions will receive a certification from DOS, and this certification will establish that the foreign adoption is entitled to recognition in the United States. Third, both Convention adoptees and orphans are immediate relatives exempt from numerical quotas. Fourth, birth mothers relinquishing children for adoption into the U.S. may no longer feel they have to lie about the existence of a father, as was sometimes the case, allowing adopting families access to more accurate information. As a result,

more children in Convention countries are expected to qualify as eligible children for adoption.

*Standardization.* By adopting the best interest of the child as its legal standard, a standard recognized both in the United States and internationally, the Convention places the focus on the child. The Convention mandates close coordination between the governments of contracting countries through a Central Authority in each Convention country that is responsible for sharing information about the laws of its own, and other Convention countries, and for monitoring individual cases. This cooperation is to ensure that safeguards are respected and to prevent the abduction, sale of, or traffic in children. The Convention also requires all parties to act expeditiously in the processing of intercountry adoptions, whether as sending or receiving country. This coordination and information sharing should result in less chance for irregularities and red tape in the adoption process.

*Duration of approval and extensions.* By providing that the approval period for a Form I-800A is 15 months instead of the current 18 months, this rule matches the approval of the family for the adoption with the duration of the FBI's clearance of a person's fingerprints. The FBI fingerprint clearance process is a critical component necessary to the determination that a person has been found eligible and suitable to adopt. The matching of these two periods of validity recognizes the importance of the fingerprint clearance process to the approval of the family for adoption. From the perspective of prospective adoptive parents, under this rule the prospective adoptive parent(s) who has (have) not yet filed a Form I-800 will be able to request an extension of the approval period for an additional 15 months by filing a Form I-800A Supplement 3. The first extension will be free. The required fee for a second or subsequent Supplement 3 is considerably less than the fee for a motion to reopen, and for a new Form I-800A.

#### Government Costs

This rule requires no outlays of Congressionally appropriated funds. The requirements of this rule and the associated benefits are funded by fees collected from persons requesting these benefits. The fees are deposited into the Immigration Examinations Fee Account and are used to fund the full cost of processing immigration and naturalization benefit applications and

petitions, biometric services, and associated support services.

*Reduction in multiple fee collections.* When developing its fee schedule, USCIS heard from many intercountry adoption applicants that it is common for parents to have to repeat filings of applications as a result of expiration of the approval before the child has been matched with the family. USCIS has determined that collecting a full application fee for adjudication of an extension of the parent's approval was not justified in light of the lesser adjudicative burden for USCIS in approving extensions as compared to initial applications. Therefore, this rule provides that to request an extension of their period of approval for an additional 15 months, prior to the expiration of the approval, the parents must simply file a request for an extension and any additional documents from the original application that need updating, such as the home study. While the effects of this change are expected to be minor, USCIS has no reliable record of how many applications are updated in a typical year due to expiration of approval and, therefore, cannot accurately estimate the revenue impact of this change.

#### Public Cost

*Paperwork Reduction Act.* Section 503(c) of the IAA waives the requirement of the Paperwork Reduction Act with respect to information collected for use as a Convention record. Thus, USCIS has not conducted an analysis to estimate any changes to the agency's currently approved information collection burden that will result from this rule. Nonetheless, as stated above, this rule is not expected to result in a noticeable increase or decrease in the number of intercountry adoptions of orphans.

*Requires Cooperation of Federal and State Authorities.* Some adoption advocates are concerned that the IAA regulations will bring the federal government into adoption practices that have traditionally been under state purview. That is because the Convention and DOS accreditation requirements increase federal involvement and impose federal requirements on state and local entities in an area that has been governed mainly by states. Thus, states will have to adopt Convention requirements for such an adoption to proceed. Compliance with the Convention and the IAA will be a new task for states and will require close cooperation between DOS, state courts with family law jurisdiction, and USCIS to ensure that the United States meets its obligations

under the Convention. However, states are not expected to have any major challenges or incur costs for complying with the USCIS petition requirements in this rule.

*Orphans may no longer be available from certain countries.* The Hague Conference lists Guatemala as a contracting party to the Convention. Currently, however, Guatemala's adoption procedures are not in compliance with the Convention. After this rule is published, USCIS will not approve immigrant visa petitions based on adoptions from Guatemala unless Guatemala's adoption process is changed to comply with the Convention. That would be a reduction of about 3500-4000 adoptions each year, unless those prospective adoptive parents decide to adopt children from another country that either is not a contracting party to the Convention or else has the established the procedures in place for determining, according to the principles of the Convention, whether children are eligible for adoption. However, while pointing out the possible negative effects on prospective adoptions from Guatemala, USCIS does not project whether or not Guatemala can take the necessary actions to be Convention compliant by the time the Convention enters into force for the United States and this rule takes effect.

*Home study.* The receiving country for the Convention adoptee must determine in advance that the prospective adoptive parent(s) is (are) eligible and suited to adopt; that they have received counseling and training, as necessary; and that the child will be eligible to enter and reside permanently in the receiving country. These advance determinations and studies are designed to ensure that the child is protected and that there are no obstacles to completing the adoption. For USCIS to determine that the child will receive proper care, this rule provides the requirements for the home study that must be submitted to permit USCIS to make an informed decision in exercising this authority. By requiring a home study to adjudicate the Convention adoption of a child, this rule technically imposes the costs of the home study. However, DOS regulations, not this USCIS rule, address an adoption service provider's obligations regarding fees. Regardless, Convention home study requirements are not projected to be much more onerous, if at all, than current home study requirements for adjudication of intercountry orphan adoptions. This rule simply standardizes these requirements to comply with the Convention. Further, DOS requires

adoption service providers to clearly disclose all fees so parents may accurately compare costs between adoption service providers.

*Child background study.* This rule incorporates the requirement of article 16(a) of the Convention, under which the sending Convention country must prepare a child background study that includes the medical history of the child as well as other background information addressing the factors that make the child eligible for adoption as a Convention adoptee. Once they have received this report and have decided to accept the placement, the prospective adoptive parents will file Form I-800, with the report and other evidence required by this rule. This study could add to the burden and costs of an intercountry adoption; thus, this requirement is added by this rule to USCIS petition requirements and is included here as an added burden. However, by standardizing the sending country requirements, and providing that the receiving country will accept the conclusions of the sending country rather than adjudicating the child's status itself, the child study may actually reduce the time, costs, and burden of orphan adoptions for Convention countries. The actual effects of this new requirement cannot be determined until after implementation occurs.

#### Summary

These regulations are required by legislation and are the final step for the United States to begin carrying out its obligations under the Convention. The effects of this rule are:

- This rule is to address immigration related determinations of how a United States citizen may obtain lawful custody, or adopt, a child from a number of countries.
- The U.S. is the largest receiving country for orphans from abroad, adopting more children from abroad than all other countries combined. The number of foreign children adopted annually by American citizens has doubled over the last decade from 11,340 to 22,739.
- USCIS expects to receive approximately 13,000 Convention adoption petitions per year. The resulting fee receipts are estimated at \$8,710,000 per year. This does not, however, represent new fee income to USCIS, but a transfer of fees from non-Convention adoption petitions. The net economic effect of the rule should be zero.
- Under the Convention, an eligible child can have two known birth parents and still be eligible for adoption as long

as the parents are both unable to meet the child's needs. The definition of sole parent is expanded and there is no requirement that a sole or surviving parent be unable to meet the child's needs.

- The Convention adopts the best interest of the child as its legal standard, a standard recognized internationally which places the focus on the welfare of the child.

- The Convention mandates close coordination between each Convention country, and requires all parties to act expeditiously in the processing of adoptions. This coordination should result in less chance for irregularities and red tape in the adoption process.

- This rule is expected to be revenue neutral to USCIS. This rule requires no outlays of Congressionally appropriated funds.

- This rule is not expected to result in a noticeable increase or decrease in the number of intercountry adoptions.

- This rule is estimated to require the same amount of time to complete its new petitions as it does for current forms. This rule is estimated to have no impact on the information collection burden imposed on the public.

- After this rule is published, and after the Convention enters into force with respect to the United States, USCIS will not approve adoptions from Guatemala unless Guatemala's adoption process is changed to comply with the Convention. This could have an impact on 3,500 to 4,000 adoptions per year.

- Adoptive parents must submit a "home study" and an application in order for USCIS to determine eligibility and suitability as adoptive parents prior to submission of the petition on behalf of a Convention adoptee.

- This rule requires that the sending Convention country prepare a child background study which could add to the burden and costs of an intercountry adoption.

USCIS is required by statute to promulgate this rule. As indicated in this analysis, the benefits of the requirements of this rule justify the costs to be imposed by it.

#### F. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government. Section 503(a) of the IAA makes clear that neither it nor the Convention preempt State laws relating to intercountry adoption that are consistent with them. This rule respects corresponding State laws. For

example, if prospective adoptive parents live in a particular State, the home study preparer must be authorized under that State's law to complete a home study for them. The home study itself must, in addition to the requirements of this rule, meet the requirements of that State's laws. A child who has not already been adopted abroad may not immigrate in order to be adopted in the United States unless the prospective adoptive parents comply with the adoption requirements of the State in which they will adopt the child.

There will be some impact on the States, as the States will have to adopt Convention requirements for these adoptions to proceed. However, such impact should not cause the States to have to incur any costs or experience any challenges complying with the USCIS petition requirements in this rule. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### G. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### H. Paperwork Reduction Act

As noted, USCIS intends to create two new forms, the Form I-800A and Form I-800, for use in Convention adoption cases. The use of these new forms is considered an information collection that, ordinarily, would be subject to review and clearance under the Paperwork Reduction Act procedures. Section 503(c) of the IAA, however, waives the requirement of the Paperwork Reduction Act with respect to information collected for use as a Convention record. Forms I-800A and I-800 will be included in the Convention record for a particular child's adoption.

#### List of Subjects

##### 8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

##### 8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 213a

Administrative practice and procedure, Aliens, Affidavits of support, Immigrants, Immigration and Nationality Act.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

8 CFR Part 322

Citizenship and naturalization, Infants and children, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 et seq.); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. Section 103.7(b)(1) is amended by adding the entries for Forms "I-800" and "I-800A", in alpha/numeric sequence, to read as follows:

§ 103.7 Fees.

Table with asterisks representing the fee schedule for forms I-800 and I-800A.

Form I-800. For filing a petition to classify a Convention adoptee as an immediate relative.

No fee for the first Form I-800 filed for a child on the basis of an approved Form I-800A, filed during the approval period.

If more than one Form I-800 is filed during the approval period for different children, the fee is \$670 for the second and each subsequent Form I-800 submitted.

If the children are already siblings before the proposed adoption, however, only one filing fee of \$670 is required, regardless of the sequence of submission of the Form I-800.

Form I-800A. For filing an application for determination of suitability to adopt a child from a Convention country—\$670.

For filing a Form I-800A, Supplement 3, Request for Action on Approved Form I-800A—\$340, except that this filing fee is not charged if no Form I-800 has been filed based on the approval of the Form I-800A, and Form I-800A Supplement 3 is filed in order to obtain a first extension of the approval of the Form I-800A.

Asterisks indicating continuation of the table.

PART 204—IMMIGRANT PETITIONS

3. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255; 8 CFR part 2.

Subpart A—[Added]

4. In part 204, a subpart A heading is added to read as follows:

Subpart A—Immigrant Visa Petitions

5. Sections 204.1 through 204.13, inclusive, are designated under subpart A.

6. Section 204.1 is amended by:

- a. Revising paragraph (a)(4);
b. Re-designating paragraph (a)(5) as paragraph (a)(6); and
c. Adding a new paragraph (a)(5).

The revisions and additions to read as follows:

§ 204.1 General information about immediate relative and family-sponsored petitions.

(a) \* \* \*

(4) A U.S. citizen seeking to have USCIS accord immediate relative status to a child based on the citizen's adoption of the child as an orphan, as defined in section 101(b)(1)(F) of the Act, must follow the procedures in § 204.3.

(5) A U.S. citizen seeking to have USCIS accord immediate relative status to a child under section 101(b)(1)(G) of the Act on the basis of a Convention adoption must:

- (i) File a Form I-800A, Application to Determine Suitability as Adoptive Parents for a Convention adoptee; and
(ii) After USCIS approves the Form I-800A, file a Form I-800, Petition to Classify Convention adoptee as Immediate Relative, as provided in 8 CFR part 204, subpart C.

7. Section 204.2 is amended by adding new paragraphs (d)(2)(vii)(D), (E) and (F), to read as follows:

§ 204.2 Petitions for relatives, widows and children.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(vii) \* \* \*

(D) On or after the Convention effective date, as defined in 8 CFR part 204.301, a United States citizen who is habitually resident in the United States, as determined under 8 CFR 204.303, may not file a Form I-130 under this section on behalf of child who was habitually resident in a Convention country, as determined under 8 CFR 204.303, unless the adoption was

completed before the Convention effective date. In the case of any adoption occurring on or after the Convention effective date, a Form I-130 may be filed and approved only if the United States citizen petitioner was not habitually resident in the United States at the time of the adoption.

(E) For purposes of paragraph (d)(2)(vii)(D) of this section, USCIS will deem a United States citizen, 8 CFR 204.303 notwithstanding, to have been habitually resident outside the United States, if the citizen satisfies the 2-year joint residence and custody requirements by residing with the child outside the United States.

(F) For purposes of paragraph (d)(2)(vii)(D) of this section, USCIS will not approve a Form I-130 under section 101(b)(1)(E) of the Act on behalf of an alien child who is present in the United States based on an adoption that is entered on or after the Convention effective date, but whose habitual residence immediately before the child's arrival in the United States was in a Convention country. However, the U.S. citizen seeking the child's adoption may file a Form I-800A and Form I-800 under 8 CFR part 204, subpart C.

\* \* \* \* \*

8. Section 204.3 is amended by revising the section heading and paragraph (a) to read as follows:

§ 204.3 Orphan cases under section 101(b)(1)(F) of the Act (non-Convention cases).

(a) This section addresses the immigration classification of alien orphans as provided for in section 101(b)(1)(F) of the Act.

(1) Except as provided in paragraph (a)(2) of this section, a child who meets the definition of orphan contained in section 101(b)(1)(F) of the Act is eligible for classification as the immediate relative of a U.S. citizen if:

(i) The U.S. citizen seeking the child's immigration can document that the citizen (and his or her spouse, if any) are capable of providing, and will provide, proper care for an alien orphan; and

(ii) The child is an orphan under section 101(b)(1)(F) of the Act.

A U.S. citizen may submit the documentation necessary for each of these determinations separately or at one time, depending on when the orphan is identified.

(2) Form I-600A or Form I-600 may not be filed under this section on or after the Convention effective date, as defined in 8 CFR 204.301, on behalf of a child who is habitually resident in a Convention country, as defined in 8

CFR 204.301. On or after the Convention effective date, USCIS may approve a Form I-600 on behalf of a child who is habitually resident in a Convention country only if the Form I-600A or Form I-600 was filed before the Convention effective date.

\* \* \* \* \*

### Subpart B—[Added and Reserved]

■ 9. Subpart B is added and reserved.

■ 10. Subpart C is added to read as follows:

### Subpart C—Intercountry Adoption of a Convention Adoptee

Sec.

- 204.300 Scope of this subpart.
- 204.301 Definitions.
- 204.302 Role of service providers.
- 204.303 Determination of habitual residence.
- 204.304 Improper inducement prohibited.
- 204.305 State preadoption requirements.
- 204.306 Classification as an immediate relative based on Convention adoption.
- 204.307 Who may file a Form I-800A or Form I-800.
- 204.308 Where to file Form I-800A or Form I-800.
- 204.309 Factors requiring denial of a Form I-800A or Form I-800.
- 204.310 Filing requirements for Form I-800A.
- 204.311 Convention adoption home study requirements.
- 204.312 Adjudication of the Form I-800A.
- 204.313 Filing and adjudication of the Form I-800.
- 204.314 Appeal.

### Subpart C—Intercountry Adoption of a Convention Adoptee

#### § 204.300 Scope of this subpart.

(a) *Convention adoptees.* This subpart governs the adjudication of a Form I-800A or Form I-800 for a Convention adoptee under section 101(b)(1)(G) of the Act. The provisions of this subpart enter into force on the Convention effective date, as defined in 8 CFR 204.301.

(b) *Orphan cases.* On or after the Convention effective date, no Form I-600A or I-600 may be filed under section 101(b)(1)(F) of the Act and 8 CFR 204.3 in relation to the adoption of a child who is habitually resident in a Convention country. If a Form I-600A or Form I-600 was filed before the Convention effective date, the case will continue to be governed by 8 CFR 204.3, as in effect before the Convention effective date.

(c) *Adopted children.* This subpart does not apply to the immigrant visa classification of adopted children, as defined in section 101(b)(1)(E) of the Act. For the procedures that govern classification of adopted children as

defined in section 101(b)(1)(E) of the Act, see 8 CFR 204.2.

#### § 204.301 Definitions.

The definitions in 22 CFR 96.2 apply to this subpart C. In addition, as used in this subpart C, the term:

*Abandonment* means:

(1) That a child's parent has willfully forsaken all parental rights, obligations, and claims to the child, as well as all custody of the child without intending to transfer, or without transferring, these rights to any specific individual(s) or entity.

(2) The child's parent must have actually surrendered such rights, obligations, claims, control, and possession.

(3) That a parent's knowledge that a specific person or persons may adopt a child does not void an abandonment; however, a purported act of abandonment cannot be conditioned on the child's adoption by that specific person or persons.

(4) That if the parent(s) entrusted the child to a third party for custodial care in anticipation of, or preparation for, adoption, the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) must have been authorized under the Convention country's child welfare laws to act in such a capacity.

(5) That, if the parent(s) entrusted the child to an orphanage, the parent(s) did not intend the placement to be merely temporary, with the intention of retaining the parent-child relationship, but that the child is abandoned if the parent(s) entrusted the child permanently and unconditionally to an orphanage.

(6) That, although a written document from the parent(s) is not necessary to prove abandonment, if any written document signed by the parent(s) is presented to prove abandonment, the document must specify whether the parent(s) who signed the document was (were) able to read and understand the language in which the document is written. If the parent is not able to read or understand the language in which the document is written, then the document is not valid unless the document is accompanied by a declaration, signed by an identified individual, establishing that that identified individual is competent to translate the language in the document into a language that the parent understands and that the individual, on the date and at the place specified in the declaration, did in fact read and explain the document to the parent in a language that the parent understands. The declaration must also

indicate the language used to provide this explanation. If the person who signed the declaration is an officer or employee of the Central Authority (but not of an agency or entity authorized to perform a Central Authority function by delegation) or any other governmental agency, the person must certify the truth of the facts stated in the declaration. Any other individual who signs a declaration must sign the declaration under penalty of perjury under United States law.

*Adoption* means the judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor's legal parent and terminates the legal parent-child relationship between the adoptive child and any former parent(s).

*Adult member of the household*

means:

(1) Any individual other than the applicant, who has the same principal residence as the applicant and who had reached his or her 18th birthday on or before the date a Form I-800A is filed; or

(2) Any person who has not yet reached his or her 18th birthday before the date a Form I-800A is filed, or who does not actually live at the same residence, but whose presence in the residence is relevant to the issue of suitability to adopt, if the officer adjudicating the Form I-800A concludes, based on the facts of the case, that it is necessary to obtain an evaluation of how that person's presence in the home affects the determination whether the applicant is suitable as the adoptive parent(s) of a Convention adoptee.

*Applicant* means the U.S. citizen (and his or her spouse, if any) who has filed a Form I-800A under this subpart C. The applicant may be an unmarried U.S. citizen who is at least 24 years old when the Form I-800A is filed, or a married U.S. citizen of any age and his or her spouse of any age. Although the singular term "applicant" is used in this subpart, the term includes both a married U.S. citizen and his or her spouse.

*Birth parent* means a "natural parent" as used in section 101(b)(1)(G) of the Act.

*Central Authority* means the entity designated as such under Article 6(1) of the Convention by any Convention country or, in the case of the United States, the United States Department of State. Except as specified in this Part, "Central Authority" also means, solely for purposes of this Part, an individual who or entity that is performing a Central Authority function, having been authorized to do so by the designated

Central Authority, in accordance with the Convention and the law of the Central Authority's country.

*Competent authority* means a court or governmental agency of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption.

*Convention* means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, opened for signature at The Hague on May 29, 1993.

*Convention adoptee* means a child habitually resident in a Convention country who is eligible to immigrate to the United States on the basis of a Convention adoption.

*Convention adoption*, except as specified in 8 CFR 204.300(b), means the adoption, on or after the Convention effective date, of an alien child habitually resident in a Convention country by a U.S. citizen habitually resident in the United States, when in connection with the adoption the child has moved, or will move, from the Convention country to the United States.

*Convention country* means a country that is a party to the Convention and with which the Convention is in force for the United States.

*Convention effective date* means the date on which the Convention enters into force for the United States as announced by the Secretary of State under 22 CFR 96.17.

*Custody for purposes of emigration and adoption exists when:*

(1) The competent authority of the country of a child's habitual residence has, by a judicial or administrative act (which may be either the act granting custody of the child or a separate judicial or administrative act), expressly authorized the petitioner, or an individual or entity acting on the petitioner's behalf, to take the child out of the country of the child's habitual residence and to bring the child to the United States for adoption in the United States.

(2) If the custody order shows that custody was given to an individual or entity acting on the petitioner's behalf, the custody order must indicate that the child is to be adopted in the United States by the petitioner.

(3) A foreign judicial or administrative act that is called an adoption but that does not terminate the legal parent-child relationship between the former parent(s) and the adopted child and does not create the permanent legal parent-child relationship between the petitioner and the adopted child will be deemed a grant of custody of the child for purposes of this part, but only

if the judicial or administrative act expressly authorizes the custodian to take the child out of the country of the child's habitual residence and to bring the child to the United States for adoption in the United States by the petitioner.

*Deserted or desertion* means that a child's parent has willfully forsaken the child and has refused to carry out parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the Convention country.

*Disappeared or Disappearance* means that a child's parent has unaccountably or inexplicably passed out of the child's life so that the parent's whereabouts are unknown, there is no reasonable expectation of the parent's reappearance, and there has been a reasonable effort to locate the parent as determined by a competent authority in accordance with the laws of the Convention country. A stepparent who under the definition of "Parent" in this section is deemed to be a child's legal parent, may be found to have disappeared if it is established that the stepparent either never knew of the child's existence, or never knew of their legal relationship to the child.

*Home study preparer* means a person (whether an individual or an agency) authorized under 22 CFR part 96 to conduct home studies for Convention adoption cases, either as a public domestic authority, an accredited agency, a temporarily accredited agency, approved person, supervised provider, or exempted provider and who (if not a public domestic authority) holds any license or other authorization that may be required to conduct adoption home studies under the law of the jurisdiction in which the home study is conducted.

*Incapable of providing proper care* means that, in light of all the relevant circumstances including but not limited to economic or financial concerns, extreme poverty, medical, mental, or emotional difficulties, or long term-incarceration, the child's two living birth parents are not able to provide for the child's basic needs, consistent with the local standards of the Convention country.

*Irrevocable consent* means a document which indicates the place and date the document was signed by a child's legal custodian, and which meets the other requirements specified in this definition, in which the legal custodian freely consents to the termination of the legal custodian's legal relationship with the child. If the irrevocable consent is signed by the child's birth mother or any legal

custodian other than the birth father, the irrevocable consent must have been signed after the child's birth; the birth father may sign an irrevocable consent before the child's birth if permitted by the law of the child's habitual residence. This provision does not preclude a birth father from giving consent to the termination of his legal relationship to the child before the child's birth, if the birth father is permitted to do so under the law of the country of the child's habitual residence.

(1) To qualify as an irrevocable consent under this definition, the document must specify whether the legal custodian is able to read and understand the language in which the consent is written. If the legal custodian is not able to read or understand the language in which the document is written, then the document does not qualify as an irrevocable consent unless the document is accompanied by a declaration, signed, by an identified individual, establishing that that identified individual is competent to translate the language in the irrevocable consent into a language that the parent understands, and that the individual, on the date and at the place specified in the declaration, did in fact read and explain the consent to the legal custodian in a language that the legal custodian understands. The declaration must also indicate the language used to provide this explanation. If the person who signed the declaration is an officer or employee of the Central Authority (but not of an agency or entity authorized to perform a Central Authority function by delegation) or any other governmental agency, the person must certify the truth of the facts stated in the declaration. Any other individual who signs a declaration must sign the declaration under penalty of perjury under United States law.

(2) If more than one individual or entity is the child's legal custodian, the consent of each legal custodian may be recorded in one document, or in an additional document, but all documents, taken together, must show that each legal custodian has given the necessary irrevocable consent.

*Legal custodian* means the individual who, or entity that, has legal custody of a child, as defined in 22 CFR 96.2.

*Officer* means a USCIS officer with jurisdiction to adjudicate Form I-800A or Form I-800 or a Department of State officer with jurisdiction, by delegation from USCIS, to grant either provisional or final approval of a Form I-800.

*Parent* means any person who is related to a child as described in section 101(b)(1)(A), (B), (C), (D), (E), (F), or (G) and section 101(b)(2) of the Act, except



that a stepparent described in section 101(b)(1)(B) of the Act is not considered a child's parent, solely for purposes of classification of the child as a Convention adoptee, if the petitioner establishes that, under the law of the Convention country, there is no legal parent-child relationship between a stepparent and stepchild. This definition includes a stepparent if the stepparent adopted the child, or if the stepparent, under the law of the Convention country, became the child's legal parent by marrying the other legal parent. A stepparent who is a legal parent may consent to the child's adoption, or may be found to have abandoned or deserted the child, or to have disappeared from the child's life, in the same manner as would apply to any other legal parent.

*Petitioner* means the U.S. citizen (and his or her spouse, if any) who has filed a Form I-800 under this subpart C. The petitioner may be an unmarried U.S. citizen who is at least 25 years old when the Form I-800 is filed, or a married U.S. citizen of any age and his or her spouse of any age. Although the singular term "petitioner" is used in this subpart, the term includes both a married U.S. citizen and his or her spouse.

*Sole parent* means:

(1) The child's mother, when the competent authority has determined that the child's father has abandoned or deserted the child, or has disappeared from the child's life; or

(2) The child's father, when the competent authority has determined that the child's mother has abandoned or deserted the child, or has disappeared from the child's life; except that

(3) A child's parent is not a sole parent if the child has acquired another parent within the meaning of section 101(b)(2) of the Act and this section.

*Suitability as adoptive parent(s)* means that USCIS is satisfied, based on the evidence of record, that it is reasonable to conclude that the applicant is capable of providing, and will provide, proper parental care to an adopted child.

*Surviving parent* means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act and this section.

#### **§ 204.302 Role of service providers.**

(a) *Who may provide services in Convention adoption cases.* Subject to the limitations in paragraph (b) or (c) of this section, a U.S. citizen seeking to file a Form I-800A or I-800 may use the

services of any individual or entity authorized to provide services in connection with adoption, except that the U.S. citizen must use the services of an accredited agency, temporarily accredited agency, approved person, supervised provider public domestic authority or exempted provider when required to do so under 22 CFR part 96.

(b) *Unauthorized practice of law prohibited.* An adoption agency or facilitator, including an individual or entity authorized under 22 CFR part 96 to provide the six specific adoption services identified in 22 CFR 96.2, may not engage in any act that constitutes the legal representation, as defined in 8 CFR 1.1(i), (j) and (m), of the applicant (for a Form I-800A case) or petitioner (for a Form I-800 case) unless authorized to do so as provided in 8 CFR part 292. An individual authorized under 8 CFR part 292 to practice before USCIS may provide legal services in connection with a Form I-800A or I-800 case, but may not provide any of the six specific adoption services identified in 22 CFR 96.2, unless the individual is authorized to do so under 22 CFR part 96 (for services provided in the United States) or under the laws of the country of the child's habitual residence (for services performed outside the United States). The provisions of 8 CFR 292.5 concerning sending notices about a case do not apply to an adoption agency or facilitator that is not authorized under 8 CFR part 292 to engage in representation before USCIS.

(c) *Application of the Privacy Act.* Except as permitted by the Privacy Act, 5 U.S.C. 552a and the relevant Privacy Act notice concerning the routine use of information, USCIS may not disclose or give access to any information or record relating to any applicant or petitioner who has filed a Form I-800A or Form I-800 to any individual or entity other than that person, including but not limited to an accredited agency, temporarily accredited agency, approved person, public domestic authority, exempted provider, or supervised provider, unless the applicant who filed the Form I-800A or the petitioner who filed Form I-800 has filed a written consent to disclosure, as provided by the Privacy Act, 5 U.S.C. 552a.

#### **§ 204.303 Determination of habitual residence.**

(a) *U.S. Citizens.* For purposes of this subpart, a U.S. citizen who is seeking to have an alien classified as the U.S. citizen's child under section 101(b)(1)(G) of the Act is deemed to be habitually resident in the United States if the individual:

(1) Has his or her domicile in the United States, even if he or she is living temporarily abroad; or

(2) Is not domiciled in the United States but establishes by a preponderance of the evidence that:

(i) The citizen will have established a domicile in the United States on or before the date of the child's admission to the United States for permanent residence as a Convention adoptee; or

(ii) The citizen indicates on the Form I-800 that the citizen intends to bring the child to the United States after adopting the child abroad, and before the child's 18th birthday, at which time the child will be eligible for, and will apply for, naturalization under section 322 of the Act and 8 CFR part 322. This option is not available if the child will be adopted in the United States.

(b) *Convention adoptees.* A child whose classification is sought as a Convention adoptee is, generally, deemed for purposes of this subpart C to be habitually resident in the country of the child's citizenship. If the child's actual residence is outside the country of the child's citizenship, the child will be deemed habitually resident in that other country, rather than in the country of citizenship, if the Central Authority (or another competent authority of the country in which the child has his or her actual residence) has determined that the child's status in that country is sufficiently stable for that country properly to exercise jurisdiction over the child's adoption or custody. This determination must be made by the Central Authority itself, or by another competent authority of the country of the child's habitual residence, but may not be made by a nongovernmental individual or entity authorized by delegation to perform Central Authority functions. The child will not be considered to be habitually resident in any country to which the child travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

#### **§ 204.304 Improper inducement prohibited.**

(a) *Prohibited payments.* Neither the applicant/petitioner, nor any individual or entity acting on behalf of the applicant/petitioner may, directly or indirectly, pay, give, offer to pay, or offer to give to any individual or entity or request, receive, or accept from any individual or entity, any money (in any amount) or anything of value (whether the value is great or small), directly or indirectly, to induce or influence any decision concerning:

(1) The placement of a child for adoption;

(2) The consent of a parent, a legal custodian, individual, or agency to the adoption of a child;

(3) The relinquishment of a child to a competent authority, or to an agency or person as defined in 22 CFR 96.2, for the purpose of adoption; or

(4) The performance by the child's parent or parents of any act that makes the child a Convention adoptee.

(b) *Permissible payments.* Paragraph (a) of this section does not prohibit an applicant/petitioner, or an individual or entity acting on behalf of an applicant/petitioner, from paying the reasonable costs incurred for the services designated in this paragraph. A payment is not reasonable if it is prohibited under the law of the country in which the payment is made or if the amount of the payment is not commensurate with the costs for professional and other services in the country in which any particular service is provided. The permissible services are:

(1) The services of an adoption service provider in connection with an adoption;

(2) Expenses incurred in locating a child for adoption;

(3) Medical, hospital, nursing, pharmaceutical, travel, or other similar expenses incurred by a mother or her child in connection with the birth or any illness of the child;

(4) Counseling services for a parent or a child for a reasonable time before and after the child's placement for adoption;

(5) Expenses, in an amount commensurate with the living standards in the country of the child's habitual residence, for the care of the birth mother while pregnant and immediately following the birth of the child;

(6) Expenses incurred in obtaining the home study;

(7) Expenses incurred in obtaining the reports on the child as described in 8 CFR 204.313(d)(3) and (4);

(8) Legal services, court costs, and travel or other administrative expenses connected with an adoption, including any legal services performed for a parent who consents to the adoption of a child or relinquishes the child to an agency; and

(9) Any other service the payment for which the officer finds, on the basis of the facts of the case, was reasonably necessary.

(c) *Department of State requirements.* See 22 CFR 96.34, 96.36 and 96.40 for additional regulatory information concerning fees in relation to Convention adoptions.

#### **§ 204.305 State preadoption requirements.**

State preadoption requirements must be complied with when a child is

coming into the State as a Convention adoptee to be adopted in the United States. A qualified Convention adoptee is deemed to be coming to be adopted in the United States if either of the following factors exists:

(a) The applicant/petitioner will not complete the child's adoption abroad; or

(b) In the case of a married applicant/petitioner, the child was adopted abroad only by one of the spouses, rather than by the spouses jointly, so that it will be necessary for the other spouse to adopt the child after the child's admission.

#### **§ 204.306 Classification as an immediate relative based on a Convention adoption.**

(a) Unless 8 CFR 204.309 requires the denial of a Form I-800A or Form I-800, a child is eligible for classification as an immediate relative, as defined in section 201(b)(2)(A)(i) of the Act, on the basis of a Convention adoption, if the U.S. citizen who seeks to adopt the child establishes that:

(1) The United States citizen is (or, if married, the United States citizen and the United States citizen's spouse are) eligible and suitable to adopt; and

(2) The child is a Convention adoptee.

(b) A U.S. citizen seeking to have USCIS classify an alien child as the U.S. citizen's child under section 101(b)(1)(G) of the Act must complete a two-step process:

(1) First, the U.S. citizen must file a Form I-800A under 8 CFR 204.310;

(2) Then, once USCIS has approved the Form I-800A and a child has been identified as an alien who may qualify as a Convention adoptee, the U.S. citizen must file a Form I-800 under 8 CFR 204.313.

#### **§ 204.307 Who may file a Form I-800A or Form I-800.**

(a) *Eligibility to file Form I-800A.*

Except as provided in paragraph (c) of this section, the following persons may file a Form I-800A:

(1) An unmarried United States citizen who is at least 24 years old and who is habitually resident in the United States, as determined under 8 CFR 204.303(a); or

(2) A married United States citizen, who is habitually resident in the United States, as determined under 8 CFR 204.303(a), and whose spouse will also adopt any child adopted by the citizen based on the approval of a Form I-800A; and

(3) The citizen's spouse must also be either a U.S. citizen, a non-citizen U.S. national, or an alien who, if living in the United States, holds a lawful status under U.S. immigration law. If an alien spouse is present in a lawful status other than the status of an alien lawfully

admitted for permanent residence, such status will be a factor evaluated in determining whether the family's situation is sufficiently stable to support a finding that the applicant is suitable as the adoptive parents of a Convention adoptee.

(b) *Eligibility to file a Form I-800.*

Except as provided in paragraph (c) of this section, the following persons may file a Form I-800:

(1) An unmarried United States citizen who is at least 25 years old and who is habitually resident in the United States, as determined under 8 CFR 204.303(a); or

(2) A married United States citizen, who is habitually resident in the United States as determined under 8 CFR 204.303(a), and whose spouse will also adopt the child the citizen seeks to adopt. The spouse must be either a United States citizen or a non-citizen U.S. national or an alien who, if living in the United States, holds a lawful status under U.S. immigration law; and

(3) The person has an approved and unexpired Form I-800A.

(c) *Exceptions.* (1) No applicant may file a Form I-800A, and no petitioner may file a Form I-800, if:

(i) The applicant filed a prior Form I-800A that USCIS denied under 8 CFR 204.309(a); or

(ii) The applicant filed a prior Form I-600A under 8 CFR 204.3 that USCIS denied under 8 CFR 204.3(h)(4); or

(iii) The petitioner filed a prior Form I-800 that USCIS denied under 8 CFR 204.309(b)(3); or

(iv) The petitioner filed a prior Form I-600 under 8 CFR 204.3 that USCIS denied under 8 CFR 204.3(i).

(2) This bar against filing a subsequent Form I-800A or Form I-800 expires one year after the date on which the decision denying the prior Form I-800A, I-600A, I-800 or I-600 became administratively final. If the applicant (for a Form I-800A or I-600A case) or the petitioner (for a Form I-800 or I-600 case) does not appeal the prior decision, the one-year period ends one year after the date of the original decision denying the prior Form I-800A, I-600A, I-800 or I-600. Any Form I-800A, or Form I-800 filed during this one-year period will be denied. If the applicant (for a Form I-800A or Form I-600A case) or petitioner (for a Form I-800 or I-600 case) appeals the prior decision, the bar to filing a new Form I-800A or I-800 applies while the appeal is pending and ends one year after the date of an Administrative Appeals Office decision affirming the denial.

(3) Any facts underlying a prior denial of a Form I-800A, I-800, I-600A, or I-600 are relevant to the adjudication of

any subsequently filed Form I-800A or Form I-800 that is filed after the expiration of this one year bar.

**§ 204.308 Where to file Form I-800A or Form I-800.**

(a) *Form I-800A.* An applicant must file a Form I-800A with the USCIS office identified in the instructions that accompany Form I-800A.

(b) *Form I-800.* After a Form I-800A has been approved, a petitioner may file a Form I-800 on behalf of a Convention adoptee with the stateside or overseas USCIS office identified in the instructions that accompany Form I-800. The petitioner may also file the Form I-800 with a visa-issuing post that would have jurisdiction to adjudicate a visa application filed by or on behalf of the Convention adoptee, when filing with the visa-issuing post is permitted by the instructions that accompany Form I-800.

(c) *Final approval of Form I-800.* Once a Form I-800 has been provisionally approved under 8 CFR 204.313(g) and the petitioner has either adopted or obtained custody of the child for purposes of emigration and adoption, the Department of State officer with jurisdiction to adjudicate the child's application for an immigrant or nonimmigrant visa has jurisdiction to grant final approval of the Form I-800. The Department of State officer may approve the Form I-800, but may not deny it; the Department of State officer must refer any Form I-800 that is "not clearly approvable" for a decision by a USCIS office having jurisdiction over Form I-800 cases. If the Department of State officer refers the Form I-800 to USCIS because it is "not clearly approvable," then USCIS has jurisdiction to approve or deny the Form I-800. In the case of an alien child who is in the United States and who is eligible both under 8 CFR 204.309(b)(4) for approval of a Form I-800 and under 8 CFR part 245 for adjustment of status, the USCIS office with jurisdiction to adjudicate the child's adjustment of status application also has jurisdiction to grant final approval of the Form I-800.

(d) *Use of electronic filing.* When, and if, USCIS adopts electronic, internet-based or other digital means for filing Convention cases, the terms "filing a Form I-800A" and "filing a Form I-800" will include an additional option. Rather than filing the Form I-800A or Form I-800 and accompanying evidence in a paper format, the submission of the same required information and accompanying evidence may be filed according to the digital filing protocol that USCIS adopts.

**§ 204.309 Factors requiring denial of a Form I-800A or Form I-800.**

(a) *Form I-800A.* A USCIS officer must deny a Form I-800A if:

(1) The applicant or any additional adult member of the household failed to disclose to the home study preparer or to USCIS, or concealed or misrepresented, any fact(s) about the applicant or any additional member of the household concerning the arrest, conviction, or history of substance abuse, sexual abuse, child abuse, and/or family violence, or any other criminal history as an offender; the fact that an arrest or conviction or other criminal history has been expunged, sealed, pardoned, or the subject of any other amelioration does not relieve the applicant or additional adult member of the household of the obligation to disclose the arrest, conviction or other criminal history;

(2) The applicant, or any additional adult member of the household, failed to cooperate in having available child abuse registries checked in accordance with 8 CFR 204.311;

(3) The applicant, or any additional adult member of the household, failed to disclose, as required by 8 CFR 204.311, each and every prior adoption home study, whether completed or not, including those that did not favorably recommend for adoption or custodial care, the person(s) to whom the prior home study related; or

(4) The applicant is barred by 8 CFR 204.307(c) from filing the Form I-800A.

(b) *Form I-800.* A USCIS officer must deny a Form I-800 if:

(1) Except as specified in 8 CFR 204.312(e)(2)(ii) with respect to a new Form I-800 filed with a new Form I-800A to reflect a change in marital status, the petitioner completed the adoption of the child, or acquired legal custody of the child for purposes of emigration and adoption, before the provisional approval of the Form I-800 under 8 CFR 204.313(g). This restriction will not apply if a competent authority in the country of the child's habitual residence voids, vacates, annuls, or terminates the adoption or grant of custody and then, after the provisional approval of the Form I-800, and after receipt of notice under article 5(c) of the Convention that the child is, or will be, authorized to enter and reside permanently in the United States, permits a new grant of adoption or custody. The prior adoption must be voided, vacated, annulled or otherwise terminated before the petitioner files a Form I-800.

(2) Except as specified in 8 CFR 204.312(e)(2)(ii) with respect to a new Form I-800 filed with a new Form I-

800A to reflect a change in marital status, the petitioner, or any additional adult member of the household had met with, or had any other form of contact with, the child's parents, legal custodian, or other individual or entity who was responsible for the child's care when the contact occurred, unless the contact was permitted under this paragraph. An authorized adoption service provider's sharing of general information about a possible adoption placement is not "contact" for purposes of this section. Contact is permitted under this paragraph if:

(i) The first such contact occurred only after USCIS had approved the Form I-800A filed by the petitioner, and after the competent authority of the Convention country had determined that the child is eligible for intercountry adoption and that the required consents to the adoption have been given; or

(ii) The competent authority of the Convention country had permitted earlier contact, either in the particular instance or through laws or rules of general application, and the contact occurred only in compliance with the particular authorization or generally applicable laws or rules. If the petitioner first adopted the child without complying with the Convention, the competent authority's decision to permit the adoption to be vacated, and to allow the petitioner to adopt the child again after complying with the Convention, will also constitute approval of any prior contact; or

(iii) The petitioner was already, before the adoption, the father, mother, son, daughter, brother, sister, uncle, aunt, first cousin (that is, the petitioner, or either spouse, in the case of a married petitioner had at least one grandparent in common with the child's parent), second cousin (that is, the petitioner, or either spouse, in the case of a married petitioner, had at least one great-grandparent in common with the child's parent) nephew, niece, husband, former husband, wife, former wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister of the child's parent(s).

(3) The USCIS officer finds that the petitioner, or any individual or entity acting on behalf of the petitioner has engaged in any conduct related to the adoption or immigration of the child that is prohibited by 8 CFR 204.304, or that the petitioner has concealed or misrepresented any material facts concerning payments made in relation to the adoption;

(4) The child is present in the United States, unless the petitioner, after compliance with the requirements of this subpart, either adopt(s) the child in the Convention country, or else, after having obtained custody of the child under the law of the Convention country for purposes of emigration and adoption, adopt(s) the child in the United States. This subpart does not require the child's actual return to the Convention country; whether to permit the child's adoption without the child's return is a matter to be determined by the Central Authority of the country of the child's habitual residence, but approval of a Form I-800 does not relieve an alien child of his or her ineligibility for adjustment of status under section 245 of the Act, if the child is present in the United States without inspection or is otherwise ineligible for adjustment of status. If the child is in the United States but is not eligible for adjustment of status, the Form I-800 may be provisionally approved only if the child will leave the United States after the provisional approval and apply for a visa abroad before the final approval of the Form I-800.

(5) Except as specified in 8 CFR 204.312(e)(2)(ii) with respect to a new Form I-800 filed with a new Form I-800A to reflect a change in marital status, the petitioner files the Form I-800:

- (i) Before the approval of a Form I-800A, or
  - (ii) After the denial of a Form I-800A;
- or
- (iii) After the expiration of the approval of a Form I-800A;

(6) The petitioner is barred by 8 CFR 204.307(c) from filing the Form I-800.

(c) *Notice of intent to deny.* Before denying a Form I-800A under paragraph (a) or a Form I-800 under paragraph (b) of this section, the USCIS officer will notify the applicant (for a Form I-800A case) or petitioner (for a Form I-800 case) in writing of the intent to deny the Form I-800A or Form I-800 and provide 30 days in which to submit evidence and argument to rebut the claim that this section requires denial of the Form I-800A or Form I-800.

(d) *Rebuttal of intent to deny.* If USCIS notifies the applicant that USCIS intends to deny a Form I-800A under paragraph (a) of this section, because the applicant or any additional adult member(s) of the household failed to disclose to the home study preparer or to USCIS, or concealed or misrepresented, any fact(s) concerning the arrest, conviction, or history of substance abuse, sexual abuse or child abuse, and/or family violence, or other criminal history, or failed to cooperate

in search of child abuse registries, or failed to disclose a prior home study, the applicant may rebut the intent to deny only by establishing, by clear and convincing evidence that:

(1) The applicant or additional adult member of the household did, in fact, disclose the information; or

(2) If it was an additional adult member of the household who failed to cooperate in the search of child abuse registries, or who failed to disclose to the home study preparer or to USCIS, or concealed or misrepresented, any fact(s) concerning the arrest, conviction, or history of substance abuse, sexual abuse or child abuse, and/or family violence, or other criminal history, or failed to disclose a prior home study, that that person is no longer a member of the household and that that person's conduct is no longer relevant to the suitability of the applicant as the adoptive parent of a Convention adoptee.

**§ 204.310 Filing requirements for Form I-800A.**

(a) *Completing and filing the Form.* A United States citizen seeking to be determined eligible and suitable as the adoptive parent of a Convention adoptee must:

(1) Complete Form I-800A, including a Form I-800A Supplement 1 for each additional adult member of the household, in accordance with the instructions that accompany the Form I-800A.

(2) Sign the Form I-800A personally. One spouse cannot sign for the other, even under a power of attorney or similar agency arrangement.

(3) File the Form I-800A with the USCIS office that has jurisdiction under 8 CFR 204.308(a) to adjudicate the Form I-800A, together with:

(i) The fee specified in 8 CFR 103.7(b)(1) for the filing of Form I-800A;

(ii) The additional biometrics information collection fee required under 8 CFR 103.7(b)(1) for the applicant and each additional adult member of the household;

(iii) Evidence that the applicant is a United States citizen, as set forth in 8 CFR 204.1(g), or, in the case of a married applicant, evidence either that both spouses are citizens or, if only one spouse is a United States citizen, evidence of that person's citizenship and evidence that the other spouse, if he or she lives in the United States, is either a non-citizen United States national or an alien who holds a lawful status under U.S. immigration law.

(iv) A copy of the current marriage certificate, unless the applicant is not married;

(v) If the applicant has been married previously, a death certificate or divorce or dissolution decree to establish the legal termination of all previous marriages, regardless of current marital status;

(vi) If the applicant is not married, his or her birth certificate, U.S. passport biographical information page, naturalization or citizenship certificate, or other evidence, to establish that he or she is at least 24 years old;

(vii) A written description of the preadoption requirements, if any, of the State of the child's proposed residence in cases where it is known that any child the applicant may adopt will be adopted in the United States, and of the steps that have already been taken or that are planned to comply with these requirements. The written description must include a citation to the State statutes and regulations establishing the requirements. Any preadoption requirements which cannot be met at the time the Form I-800A is filed because of the operation of State law must be noted and explained when the Form I-800A is filed.

(viii) A home study that meets the requirements of 8 CFR 204.311 and that bears the home study preparer's original signature. If the home study is not included with the Form I-800A, the director of the office that has jurisdiction to adjudicate the Form I-800A will make a written request for evidence, directing the applicant to submit the home study. If the applicant fails to submit the home study within the period specified in the request for evidence, the director of the office that has jurisdiction to adjudicate the Form I-800A will deny the Form I-800A. Denial of a Form I-800A under this paragraph for failure to submit a home study is not subject to appeal, but the applicant may file a new Form I-800A, accompanied by a new filing fee.

(b) *Biometrics.* Upon the proper filing of a Form I-800A, USCIS will arrange for the collection of biometrics from the applicant and each additional adult member of the household, as prescribed in 8 CFR 103.2(e), but with no upper age limit. It will be necessary to collect the biometrics of each of these persons again, if the initial collection expires before approval of the Form I-800A. USCIS may waive this requirement for any particular individual if USCIS determines that that person is physically unable to comply. However, USCIS will require the submission of affidavits, police clearances, or other evidence relating to whether that person

has a criminal history in lieu of collecting the person's biometrics.

(c) *Change in marital status.* If, while a Form I-800A is pending, an unmarried applicant marries, or the marriage of a married applicant ends, an amended Form I-800A and amended home study must be filed to reflect the change in marital status. No additional filing fee is required to file an amended Form I-800A while the original Form I-800A is still pending. See 8 CFR 204.312(e)(2) concerning the need to file a new Form I-800A if the marital status changes after approval of a Form I-800A.

**§ 204.311 Convention adoption home study requirements.**

(a) *Purpose.* For immigration purposes, a home study is a process for screening and preparing an applicant who is interested in adopting a child from a Convention country.

(b) *Preparer.* Only an individual or entity defined under 8 CFR 204.301 as a home study preparer for Convention cases may complete a home study for a Convention adoption. In addition, the individual or entity must be authorized to complete adoption home studies under the law of the jurisdiction in which the home study is conducted.

(c) *Study requirements.* The home study must:

(1) Be tailored to the particular situation of the applicant and to the specific Convention country in which the applicant intends to seek a child for adoption. For example, an applicant who has previously adopted children will require different preparation than an applicant who has no adopted children. A home study may address the applicant's suitability to adopt in more than one Convention country, but if the home study does so, the home study must separately assess the applicant's suitability as to each specific Convention country.

(2) If there are any additional adult members of the household, identify each of them by name, alien registration number (if the individual has one), and date of birth.

(3) Include an interview by the preparer of any additional adult member of the household and an assessment of him or her in light of the requirements of this section.

(4) Be no more than 6 months old at the time the home study is submitted to USCIS.

(5) Include the home study preparer's assessment of any potential problem areas, a copy of any outside evaluation(s), and the home study preparer's recommended restrictions, if any, on the characteristics of the child

to be placed in the home. See 8 CFR 204.309(a) for the consequences of failure to disclose information or cooperate in completion of a home study.

(6) Include the home study preparer's signature, in accordance with paragraph (f) of this section.

(7) State the number of interviews and visits, the participants, date and location of each interview and visit, and the date and location of any other contacts with the applicant and any additional adult member of the household.

(8) Summarize the pre-placement preparation and training already provided to the applicant concerning the issues specified in 22 CFR 96.48(a) and (b), the plans for future preparation and training with respect to those issues, or with respect to a particular child, as specified in 22 CFR 96.48(c), and the plans for post-placement monitoring specified in 22 CFR 96.50, in the event that the child will be adopted in the United States rather than abroad.

(9) Specify whether the home study preparer made any referrals as described in paragraph (g)(4) of this section, and include a copy of the report resulting from each referral, the home study preparer's assessment of the impact of the report on the suitability of the applicant to adopt, and the home study preparer's recommended restrictions, if any, on the characteristics of the child to be placed in the home.

(10) Include results of the checks conducted in accordance with paragraph (i) of this section including that no record was found to exist, that the State or foreign country will not release information to the home study preparer or anyone in the household, or that the State or foreign country does not have a child abuse registry.

(11) Include each person's response to the questions regarding abuse and violence in accordance with paragraph (j) of this section.

(12) Include a certified copy of the documentation showing the final disposition of each incident which resulted in arrest, indictment, conviction, and/or any other judicial or administrative action for anyone subject to the home study and a written statement submitted with the home study giving details, including any mitigating circumstances about each arrest, signed, under penalty of perjury, by the person to whom the arrest relates.

(13) Contain an evaluation of the suitability of the home for adoptive placement of a child in light of any applicant's or additional adult member of the household's history of abuse and/or violence as an offender, whether this

history is disclosed by an applicant or any additional adult member of the household or is discovered by home study preparer, regardless of the source of the home study preparer's discovery. A single incident of sexual abuse, child abuse, or family violence is sufficient to constitute a "history" of abuse and/or violence.

(14) Contain an evaluation of the suitability of the home for adoptive placement of a child in light of disclosure by an applicant, or any additional adult member of the household, of a history of substance abuse. A person has a history of substance abuse if his or her current or past use of alcohol, controlled substances, or other substances impaired or impairs his or her ability to fulfill obligations at work, school, or home, or creates other social or interpersonal problems that may adversely affect the applicant's suitability as an adoptive parent.

(15) Include a general description of the information disclosed in accordance with paragraph (m) of this section concerning the physical, mental, and emotional health of the applicant and of any additional adult member of the household.

(16) Identify the agency involved in each prior or terminated home study in accordance with paragraph (o) of this section, when the prior home study process began, the date the prior home study was completed, and whether the prior home study recommended for or against finding the applicant or additional adult member of the household suitable for adoption, foster care, or other custodial care of a child. If a prior home study was terminated without completion, the current home study must indicate when the prior home study began, the date of termination, and the reason for the termination.

(d) *Duty to disclose.* (1) The applicant, and any additional adult members of the household, each has a duty of candor and must:

(i) Give true and complete information to the home study preparer.

(ii) Disclose any arrest, conviction, or other adverse criminal history, whether in the United States or abroad, even if the record of the arrest, conviction or other adverse criminal history has been expunged, sealed, pardoned, or the subject of any other amelioration. A person with a criminal history may be able to establish sufficient rehabilitation.

(iii) Disclose other relevant information, such as physical, mental or emotional health issues, or behavioral issues, as specified in paragraph (m) of

this section. Such problems may not necessarily preclude approval of a Form I-800A, if, for example, they have been or are being successfully treated.

(2) This duty of candor is an ongoing duty, and continues while the Form I-800A is pending, after the Form I-800A is approved, and while any subsequent Form I-800 is pending, and until there is a final decision admitting the Convention adoptee to the United States with a visa. The applicant and any additional adult member of the household must notify the home study preparer and USCIS of any new event or information that might warrant submission of an amended or updated home study.

(e) *State standards.* In addition to the requirements of this section, the home study preparer must prepare the home study according to the requirements that apply to a domestic adoption in the State of the applicant's actual or proposed residence in the United States.

(f) *Home study preparer's signature.* The home study preparer (or, if the home study is prepared by an entity, the officer or employee who has authority to sign the home study for the entity) must personally sign the home study, and any updated or amended home study. The home study preparer's signature must include a declaration, under penalty of perjury under United States law, that:

(1) The signer personally, and with the professional diligence reasonably necessary to protect the best interests of any child whom the applicant might adopt, either actually conducted or supervised the home study, including personal interview(s), the home visits, and all other aspects of the investigation needed to prepare the home study; if the signer did not personally conduct the home study, the person who actually did so must be identified;

(2) The factual statements in the home study are true and correct, to the best of the signer's knowledge, information and belief; and

(3) The home study preparer has advised the applicant of the duty of candor under paragraph (d) of this section, specifically including the ongoing duty under paragraph (d)(2) of this section concerning disclosure of new events or information warranting submission of an updated or amended home study.

(g) *Personal interview(s) and home visit(s).* The home study preparer must:

(1) Conduct at least one interview in person, and at least one home visit, with the applicant.

(2) Interview, at least once, each additional adult member of the household, as defined in 8 CFR 204.301. The interview with an additional adult

member of the household should also be in person, unless the home study preparer determines that interviewing that individual in person is not reasonably feasible and explains in the home study the reason for this conclusion.

(3) Provide information on and assess the suitability of the applicant as the adoptive parent of a Convention adoptee based on the applicant's background, family and medical history (including physical, mental and emotional health), social environment, reasons for adoption, ability to undertake an intercountry adoption, and the characteristics of the child(ren) for whom they would be qualified to care.

(4) Refer the applicant to an appropriate licensed professional, such as a physician, psychiatrist, clinical psychologist, clinical social worker, or professional substance abuse counselor, for an evaluation and written report, if the home study preparer determines that there are areas beyond his or her expertise that need to be addressed. The home study preparer must also make such a referral if such a referral would be required for a domestic adoption under the law of the State of the applicant's actual or proposed place of residence in the United States.

(5) Apply the requirements of this paragraph to each additional adult member of the household.

(h) *Financial considerations.* (1) Assessment of the finances of the applicant must include:

(i) A description of the applicant's income, financial resources, debts, and expenses.

(ii) A statement concerning the evidence that was considered to verify the source and amount of income and financial resources.

(2) Any income designated for the support of one or more children in the applicant's care and custody, such as funds for foster care, or any income designated for the support of another member of the household, must not be counted towards the financial resources available for the support of a prospective adoptive child.

(3) USCIS will not routinely require a detailed financial statement or supporting financial documents. However, should the need arise, USCIS reserves the right to ask for such detailed documentation.

(i) *Checking available child abuse registries.* The home study preparer must ensure that a check of the applicant, and of each additional adult member of the household, has been made with available child abuse registries in any State or foreign country that the applicant, or any additional adult member of the household, has

resided in since that person's 18th birthday. USCIS may also conduct its own check of any child abuse registries to which USCIS has access. Depending on the extent of access to a relevant registry allowed by the State or foreign law, the home study preparer must take one of the following courses of action:

(1) If the home study preparer is allowed access to information from the child abuse registries, he or she must make the appropriate checks for the applicant and each additional adult member of the household;

(2) If the State or foreign country requires the home study preparer to secure permission from the applicant and each additional adult member of the household before gaining access to information in such registries, the home study preparer must secure such permission from those individuals and make the appropriate checks;

(3) If the State or foreign country will only release information directly to an individual to whom the information relates, then the applicant and the additional adult member of the household must secure such information and provide it to the home study preparer.

(4) If the State or foreign country will release information neither to the home study preparer nor to the person to whom the information relates, or has not done so within 6 months of a written request for the information, this unavailability of information must be noted in the home study.

(j) *Inquiring about history of abuse or violence as an offender.* The home study preparer must ask each applicant and each additional adult member of the household whether he or she has a history as an offender, whether in the United States or abroad, of substance abuse, sexual abuse, or child abuse, or family violence, even if such history did not result in an arrest or conviction. This evaluation must include:

(1) The dates of each arrest or conviction or history of substance abuse, sexual abuse or child abuse, and/or family violence; or,

(2) If not resulting in an arrest, the date or time period (if occurring over an extended period of time) of each occurrence and

(3) Details including any mitigating circumstances about each incident.

Each statement must be signed, under penalty of perjury, by the person to whom the incident relates.

(k) *Criminal history.* The applicant, and any additional adult members of the household, must also disclose to the home study preparer and USCIS any history, whether in the United States or abroad, of any arrest and/or conviction

(other than for minor traffic offenses) in addition to the information that the person must disclose under paragraph (j) of this section. If an applicant or an additional adult member of the household has a criminal record, the officer may still find that the applicant will be suitable as the adoptive parent of a Convention adoptee, if there is sufficient evidence of rehabilitation as described in paragraph (l) of this section.

(l) *Evidence of rehabilitation.* If an applicant, or any additional adult member of the household, has a history of substance abuse, sexual abuse or child abuse, and/or family violence as an offender, or any other criminal history, the home study preparer may, nevertheless, make a favorable finding if the applicant has demonstrated that the person with this adverse history has achieved appropriate rehabilitation. A favorable recommendation cannot be made based on a claim of rehabilitation while an applicant or any additional adult member of the household is on probation, parole, supervised release, or other similar arrangement for any conviction. The home study must include a discussion of the claimed rehabilitation, which demonstrates that the applicant is suitable as the adoptive parent(s) of a Convention adoptee. Evidence of rehabilitation may include:

(1) An evaluation of the seriousness of the arrest(s), conviction(s), or history of abuse, the number of such incidents, the length of time since the last incident, the offender's acceptance of responsibility for his or her conduct, and any type of counseling or rehabilitation programs which have been successfully completed, or

(2) A written opinion from an appropriate licensed professional, such as a psychiatrist, clinical psychologist, or clinical social worker.

(m) *Assessment with respect to physical, mental and emotional health or behavioral issues.* The home study must address the current physical, mental and emotional health of the applicant, or any additional adult member of the household, as well as any history of illness or of any mental, emotional, psychological, or behavioral instability if the home study preparer determines, in the exercise of reasonable professional judgment, that the suitability of the applicant as an adoptive parent may be affected adversely by such history. Paragraph (g)(4) of this section, regarding referral to professionals, applies to any home study involving prior psychiatric care, or issues arising from sexual abuse, child abuse, or family violence issues if, in the home study preparer's reasonable

professional judgment, such referral(s) may be necessary or helpful to the proper completion of the home study.

(n) *Prior home study.* The home study preparer must ask each applicant, and any additional adult member of the household, whether he or she previously has had a prior home study completed, or began a home study process in relation to an adoption or to any form of foster or other custodial care of a child that was not completed, whether or not the prior home study related to an intercountry adoption, and must include each individual's response to this question in the home study report. A copy of any previous home study that did not favorably recommend the applicant or additional adult member of the household must be attached to any home study submitted with a Form I-800A. If a copy of any prior home study that did not favorably recommend the applicant or additional adult member of the household is no longer available, the current home study must explain why the prior home study is no longer available. The home study preparer must evaluate the relevance of any prior unfavorable or uncompleted home study to the suitability of the applicant as the adoptive parent of a Convention adoptee.

(o) *Living accommodations.* The home study must include a detailed description of the living accommodations where the applicant currently resides. If the applicant is planning to move, the home study must include a description of the living accommodations where the child will reside with the applicant, if known. If the applicant is residing abroad at the time of the home study, the home study must include a description of the living accommodations where the child will reside in the United States with the applicant, if known. Each description must include an assessment of the suitability of accommodations for a child and a determination whether such space meets applicable State requirements, if any.

(p) *Handicapped or special needs child.* A home study conducted in conjunction with the proposed adoption of a special needs or handicapped child must contain a discussion of the preparation, willingness, and ability of the applicant to provide proper care for a child with the handicap or special needs. This information will be used to evaluate the suitability of the applicant as the adoptive parent of a special needs or handicapped child. If this information is not included in the home study, an updated or amended home study will be necessary if the applicant

seeks to adopt a handicapped or special needs child.

(q) *Addressing a Convention country's specific requirements.* If the Central Authority of the Convention country has notified the Secretary of State of any specific requirements that must be met in order to adopt in the Convention country, the home study must include a full and complete statement of all facts relevant to the applicant's eligibility for adoption in the Convention country, in light of those specific requirements.

(r) *Specific approval for adoption.* If the home study preparer's findings are favorable, the home study must contain his or her specific approval of the applicant for adoption of a child from the specific Convention country or countries, and a discussion of the reasons for such approval. The home study must include the number of children the applicant may adopt at the same time. The home study must state whether there are any specific restrictions to the adoption based on the age or gender, or other characteristics of the child. If the home study preparer has approved the applicant for a handicapped or special needs adoption, this fact must be clearly stated.

(s) *Home study preparer's authority to conduct home studies.* The home study must include a statement in which the home study preparer certifies that he or she is authorized under 22 CFR part 96 to complete home studies for Convention adoption cases. The certification must specify the State or country under whose authority the home study preparer is licensed or authorized, cite the specific law or regulation authorizing the preparer to conduct home studies, and indicate the license number, if any, and the expiration date, if any, of this authorization or license. The certification must also specify the basis under 22 CFR part 96 (public domestic authority, accredited agency, temporarily accredited agency, approved person, exempted provider, or supervised provider) for his or her authorization to conduct Convention adoption home studies.

(t) *Review of home study.* (1) If the law of the State in which the applicant resides requires the competent authority in the State to review the home study, such a review must occur and be documented before the home study is submitted to USCIS.

(2) When the home study is not performed in the first instance by an accredited agency or temporarily accredited agency, as defined in 22 CFR part 96, then an accredited agency or temporarily accredited agency, as defined in 22 CFR part 96, must review

and approve the home study as specified in 22 CFR 96.47(c) before the home study is submitted to USCIS. This requirement for review and approval by an accredited agency or temporarily accredited agency does not apply to a home study that was actually prepared by a public domestic authority, as defined in 22 CFR 96.2.

(u) *Home study updates and amendments.* (1) A new home study amendment or update will be required if there is:

(i) A significant change in the applicant's household, such as a change in residence, marital status, criminal history, financial resources; or

(ii) The addition of one or more children in the applicant's home, whether through adoption or foster care, birth, or any other means. Even if the original home study provided for the adoption of more than one adopted child, the applicant must submit an amended home study recommending adoption of an additional child, because the addition of the already adopted child(ren) to the applicant's household is a significant change in the household that should be assessed before the adoption of any additional child(ren);

(iii) The addition of other dependents or additional adult member(s) of the household to the family prior to the prospective child's immigration into the United States;

(iv) A change resulting because the applicant is seeking to adopt a handicapped or special needs child, if the home study did not already address the applicant's suitability as the adoptive parent of a child with the particular handicap or special need;

(v) A change to a different Convention country. This change requires the updated home study to address suitability under the requirements of the new Convention country;

(vi) A lapse of more than 6 months between the date the home study is completed and the date it is submitted to USCIS; or

(vii) A change to the child's proposed State of residence. The preadoption requirements of the new State must be complied with in the case of a child coming to the United States to be adopted.

(2) Any updated or amended home study must:

(i) Meet the requirements of this section;

(ii) Be accompanied by a copy of the home study that is being updated or amended, including all prior updates and amendments;

(iii) Include a statement from the preparer that he or she has reviewed the home study that is being updated or

amended and is personally and fully aware of its contents; and

(iv) Address whether the home study preparer recommends approval of the proposed adoption and the reasons for the recommendation.

(3) If submission of an updated or amended home study becomes necessary before USCIS adjudicates the Form I-800A, the applicant may simply submit the updated or amended home study to the office that has jurisdiction over the Form I-800A.

(4) If it becomes necessary to file an updated or amended home study after USCIS has approved the Form I-800A, the applicant must file a Form I-800A Supplement 3 with the filing fee specified in 8 CFR 103.7(b)(1) and the amended or updated home study. If USCIS determines that the amended or updated home study shows that the applicant remains suitable as the adoptive parent(s) of a Convention adoptee, USCIS will issue a new approval notice that will expire on the same date as the original approval. If the applicant also wants to have USCIS extend the approval period for the Form I-800A, the applicant must submit the updated or amended home study with an extension request under 8 CFR 204.312(e)(3), rather than under this paragraph (u) of this section.

(5) Each update must indicate that the home study preparer has updated the screening of the applicant and any additional adult member of the household under paragraphs (i) through (l) of this section, and must indicate the results of this updated screening.

#### **§ 204.312 Adjudication of the Form I-800A.**

(a) *USCIS action.* The USCIS officer must approve a Form I-800A if the officer finds, based on the evidence of record, that the applicant is eligible under 8 CFR 204.307(a) to file a Form I-800A and the USCIS officer is satisfied that the applicant is suitable as the adoptive parent of a child from the specified Convention country. If the applicant sought approval for more than one Convention country, the decision will specify each country for which the Form I-800A is approved, and will also specify whether the Form I-800A is denied with respect to any particular Convention country.

(b) *Evaluation of the home study.* In determining suitability to adopt, the USCIS officer will give considerable weight to the home study, but is not bound by it. Even if the home study is favorable, the USCIS officer must deny the Form I-800A if, on the basis of the evidence of record, the officer finds, for a specific and articulable reason, that the applicant has failed to establish that

he or she is suitable as the adoptive parent of a child from the Convention country. The USCIS officer may consult the accredited agency or temporarily accredited agency that approved the home study, the home study preparer, the applicant, the relevant State or local child welfare agency, or any appropriate licensed professional, as needed to clarify issues concerning whether the applicant is suitable as the adoptive parent of a Convention adoptee. If this consultation yields evidence that is adverse to the applicant, the USCIS officer may rely on the evidence only after complying with the provisions of 8 CFR 103.2(b)(16) relating to the applicant's right to review and rebut adverse information.

(c) *Denial of application.* (1) The USCIS officer will deny the Form I-800A if the officer finds that the applicant has failed to establish that the applicant is:

(i) Eligible under 8 CFR 204.307(a) to file Form I-800A; or

(ii) Suitable as the adoptive parent of a child from the Convention country.

(2) Before denying a Form I-800A, the USCIS officer will comply with 8 CFR 103.2(b)(16), if required to do so under that provision, and may issue a request for evidence or a notice of intent to deny under 8 CFR 103.2(b)(8).

(3) A denial will be in writing, giving the reason for the denial and notifying the applicant of the right to appeal, if any, as provided in 8 CFR 204.314.

(4) It is for the Central Authority of the other Convention country to determine how its own adoption requirements, as disclosed in the home study under 8 CFR 204.311(q), should be applied in a given case. For this reason, the fact that the applicant may be ineligible to adopt in the other Convention country under those requirements, will not warrant the denial of a Form I-800A, if USCIS finds that the applicant has otherwise established eligibility and suitability as the adoptive parent of a Convention adoptee.

(d) *Approval notice.* (1) If USCIS approves the Form I-800A, USCIS will notify the applicant in writing as well as the Department of State. The notice of approval will specify:

(i) The expiration date for the notice of approval, as determined under paragraph (e) of this section, and

(ii) The name(s) and marital status of the applicant; and

(iii) If the applicant is not married and not yet 25 years old, the applicant's date of birth.

(2) Once USCIS approves the Form I-800A, or extends the validity period for a prior approval under paragraph (e) of



this section, any submission of the home study to the Central Authority of the country of the child's habitual residence must consist of the entire and complete text of the same home study and of any updates or amendments submitted to USCIS.

(e) *Duration or revocation of approval.* (1) A notice of approval expires 15 months after the date on which USCIS received the FBI response on the applicant's, and any additional adult member of the household's, biometrics, unless approval is revoked. If USCIS received the responses on different days, the 15-month period begins on the earliest response date. The notice of approval will specify the expiration date. USCIS may extend the validity period for the approval of a Form I-800A only as provided in paragraph (e)(3) of this section.

(2) (i) The approval of a Form I-800A is automatically revoked if before the final decision on a Convention adoptee's application for admission with an immigrant visa or for adjustment of status:

(A) The marriage of the applicant terminates; or

(B) An unmarried applicant marries; or

(C) In the case of a married applicant, either spouse files with a USCIS or Department of State officer a written document withdrawing his or her signature on the Form I-800A.

(ii) This revocation is without prejudice to the filing of a new Form I-800A, with fee, accompanied by a new or amended home study, reflecting the change in marital status. If a Form I-800 had already been filed based on the approval of the prior Form I-800A, a new Form I-800 must also be filed with the new Form I-800A under this paragraph. The new Form I-800 will be adjudicated only if the new Form I-800A is approved. The new Form I-800 will not be subject to denial under 8 CFR 204.309(b)(1) or (2), unless the original Form I-800 would have been subject to denial under either of those provisions.

(3)(i) If the 15-month validity period for a Form I-800A approval is about to expire, and the applicant has not filed a Form I-800, the applicant may file Form I-800A Supplement 3, with the filing fee under 8 CFR 103.7(b)(1), if required. The applicant may not file a Form I-800A Supplement 3 seeking extension of an approval notice more than 90 days before the expiration of the validity period for the Form I-800A approval, but must do so on or before the date on which the validity period expires. The applicant is not required to pay the Form I-800A Supplement 3

filing fee for the first request to extend the approval of a Form I-800A. If the applicant files a second or subsequent Form I-800A Supplement 3 to obtain a second or subsequent extension, however, the applicant must pay the Form I-800A Supplement 3 filing fee, as specified in 8 CFR 103.7(b), for the second, or any subsequent, Form I-800A Supplement 3 that is filed to obtain a second or subsequent extension. Any Form I-800A Supplement 3 that is filed to obtain an extension of the approval of a Form I-800A must be accompanied by:

(A) A statement, signed by the applicant under penalty of perjury, detailing any changes to the answers given to the questions on the original Form I-800A;

(B) An updated or amended home study as required under 8 CFR 204.311(u); and

(C) A photocopy of the Form I-800A approval notice.

(ii) Upon receipt of the Form I-800A Supplement 3, USCIS will arrange for the collection of the biometrics of the applicant and of each additional adult member of the applicant's household.

(iii) If USCIS continues to be satisfied that the applicant remains suitable as the adoptive parent of a Convention adoptee, USCIS will extend the approval of the Form I-800A to a date not more than 15 months after the date on which USCIS received the new biometric responses. If new responses are received on different dates, the new 15-month period begins on the earliest response date. The new notice of approval will specify the new expiration date.

(iv) There is no limit to the number of extensions that may be requested and granted under this section, so long as each request is supported by an updated or amended home study that continues to recommend approval of the applicant for intercountry adoption and USCIS continues to find that the applicant remain suitable as the adoptive parent(s) of a Convention adoptee.

(4) In addition to the automatic revocation provided for in paragraph (e)(2) of this section, the approval of a Form I-800A may be revoked pursuant to 8 CFR 205.1 or 205.2.

#### **§ 204.313 Filing and adjudication of a Form I-800.**

(a) *When to file.* Once a Form I-800A has been approved and the Central Authority has proposed placing a child for adoption by the petitioner, the petitioner may file the Form I-800. The petitioner must complete the Form I-800 in accordance with the instructions that accompany the Form I-800, and

must sign the Form I-800 personally. In the case of a married petitioner, one spouse cannot sign for the other, even under a power of attorney or similar agency arrangement. The petitioner may then file the Form I-800 with the stateside or overseas USCIS office or the visa issuing post that has jurisdiction under 8 CFR 204.308(b) to adjudicate the Form I-800, together with the evidence specified in this section and the filing fee specified in 8 CFR 103.7(b)(1), if more than one Form I-800 is filed for children who are not siblings.

(b) *What to include on the Form.* (1) The petitioner must specify on the Form I-800 either that:

(i) The child will seek an immigrant visa, if the Form I-800 is approved, because the child will reside in the United States with the petitioner (in the case of a married petitioner, if only one spouse is a United States citizen, with that spouse) after the child's admission to the United States on the basis of the proposed adoption; or

(ii) The child will seek a nonimmigrant visa, in order to travel to the United States to obtain naturalization under section 322 of the Act, because the petitioner intends to complete the adoption abroad and the petitioner and the child will continue to reside abroad immediately following the adoption, rather than residing in the United States with the petitioner. This option is not available if the child will be adopted in the United States.

(2) In applying this paragraph (b), if a petitioner is a United States citizen who is domiciled in the United States, but who is posted abroad temporarily under official orders as a member of the Uniformed Services as defined in 5 U.S.C. 2101, or as a civilian officer or employee of the United States Government, the child will be deemed to be coming to the United States to reside in the United States with that petitioner.

(c) *Filing deadline.* (1) The petitioner must file the Form I-800 before the expiration of the notice of the approval of the Form I-800A and before the child's 16th birthday. Paragraphs (c)(2) and (3) of this section provide special rules for determining that this requirement has been met.

(2) If the appropriate Central Authority places the child with the petitioner for intercountry adoption more than 6 months after the child's 15th birthday but before the child's 16th birthday, the petitioner must still file the Form I-800 before the child's 16th birthday. If the evidence required by paragraph (d)(3) or (4) of this section is not yet available, instead of that

evidence, the petitioner may submit a statement from the primary provider, signed under penalty of perjury under United States law, confirming that the Central Authority has, in fact, made the adoption placement on the date specified in the statement. Submission of a Form I-800 with this statement will satisfy the statutory requirement that the petition must be submitted before the child's 16th birthday, but no provisional or final approval of the Form I-800 will be granted until the evidence required by paragraph (d)(3) or (4) of this section has been submitted. When submitted, the evidence required by paragraph (d)(3) and (4) must affirmatively show that the Central Authority did, in fact, make the adoption placement decision before the child's 16th birthday.

(3) If the Form I-800A was filed after the child's 15th birthday but before the child's 16th birthday, the filing date of the Form I-800A will be deemed to be the filing date of the Form I-800, provided the Form I-800 is filed not more than 180 days after the initial approval of the Form I-800A.

(d) *Required evidence.* Except as specified in paragraph (c)(2) of this section, the petitioner must submit the following evidence with the properly completed Form I-800:

(1) The Form I-800A approval notice and, if applicable, proof that the approval period has been extended under 8 CFR 204.312(e);

(2) A statement from the primary provider, as defined in 22 CFR 96.2, signed under penalty of perjury under United States law, indicating that all of the pre-placement preparation and training provided for in 22 CFR 96.48 has been completed;

(3) The report required under article 16 of the Convention, specifying the child's name and date of birth, the reasons for making the adoption placement, and establishing that the competent authority has, as required under article 4 of the Convention:

(i) Established that the child is eligible for adoption;

(ii) Determined, after having given due consideration to the possibility of placing the child for adoption within the Convention country, that intercountry adoption is in the child's best interests;

(iii) Ensured that the legal custodian, after having been counseled as required, concerning the effect of the child's adoption on the legal custodian's relationship to the child and on the child's legal relationship to his or her family of origin, has freely consented in writing to the child's adoption, in the required legal form;

(iv) Ensured that if any individual or entity other than the legal custodian must consent to the child's adoption, this individual or entity, after having been counseled as required concerning the effect of the child's adoption, has freely consented in writing, in the required legal form, to the child's adoption;

(v) Ensured that the child, after having been counseled as appropriate concerning the effects of the adoption; has freely consented in writing, in the required legal form, to the adoption, if the child is of an age that, under the law of the country of the child's habitual residence, makes the child's consent necessary, and that consideration was given to the child's wishes and opinions; and

(vi) Ensured that no payment or inducement of any kind has been given to obtain the consents necessary for the adoption to be completed.

(4) The report under paragraph (d)(3) of this section must be accompanied by:

(i) A copy of the child's birth certificate, or secondary evidence of the child's age; and

(ii) A copy of the irrevocable consent(s) signed by the legal custodian(s) and any other individual or entity who must consent to the child's adoption unless, as permitted under article 16 of the Convention, the law of the country of the child's habitual residence provides that their identities may not be disclosed, so long as the Central Authority of the country of the child's habitual residence certifies in its report that the required documents exist and that they establish the child's age and availability for adoption;

(iii) A statement, signed under penalty of perjury by the primary provider (or an authorized representative if the primary provider is an agency or other juridical person), certifying that the report is a true, correct, and complete copy of the report obtained from the Central Authority of the Convention country;

(iv) A summary of the information provided to the petitioner under 22 CFR 96.49(d) and (f) concerning the child's medical and social history. This summary, or a separate document, must include:

(A) A statement concerning whether, from any examination as described in 22 CFR 96.49(e) or for any other reason, there is reason to believe that the child has any medical condition that makes the child inadmissible under section 212(a)(1) of the Act; if the medical information that is available at the provisional approval stage is not sufficient to assess whether the child may be inadmissible under section

212(a)(1), the submission of this information may be deferred until the petitioner seeks final approval of the Form I-800;

(B) If both of the child's birth parents were the child's legal custodians and signed the irrevocable consent, the factual basis for determining that they are incapable of providing proper care for the child, as defined in 8 CFR 204.301;

(C) Information about the circumstances of the other birth parent's death, if applicable, supported by a copy of the death certificate, unless paragraph (d)(4)(ii) of this section makes it unnecessary to provide a copy of the death certificate;

(D) If a sole birth parent was the legal custodian, the circumstances leading to the determination that the other parent abandoned or deserted the child, or disappeared from the child's life; and

(E) If the legal custodian was the child's prior adoptive parent(s) or any individual or entity other than the child's birth parent(s), the circumstances leading to the custodian's acquisition of custody of the child and the legal basis of that custody.

(v) If the child will be adopted in the United States, the primary provider's written report, signed under penalty of perjury by the primary provider (or an authorized representative if the primary provider is an agency or other juridical person) detailing the primary adoption service provider's plan for post-placement duties, as specified in 22 CFR 96.50; and

(5) If the child may be inadmissible under any provision of section 212(a) for which a waiver is available, a properly completed waiver application for each such ground; and

(6) Either a Form I-864W, Intending Immigrant's I-864 Exemption, or a Form I-864, Affidavit of Support, as specified in 8 CFR 213a.2.

(e) *Obtaining the home study and supporting evidence.* The materials from the Form I-800A proceeding will be included in the record of the Form I-800 proceeding.

(f) *Investigation.* An investigation concerning the alien child's status as a Convention adoptee will be completed before the Form I-800 is adjudicated in any case in which the officer with jurisdiction to grant provisional or final approval of the Form I-800 determines, on the basis of specific facts, that completing the investigation will aid in the provisional or final adjudication of the Form I-800. Depending on the circumstances surrounding the case, the investigation may include, but is not limited to, document checks, telephone checks, interview(s) with the birth or

prior adoptive parent(s), a field investigation, and any other appropriate investigatory actions. In any case in which there are significant differences between the facts presented in the approved Form I-800A or Form I-800 and the facts uncovered by the investigation, the office conducting the investigation may consult directly with the appropriate USCIS office. In any instance where the investigation reveals negative information sufficient to sustain a denial of the Form I-800 (including a denial of a Form I-800 that had been provisionally approved) or the revocation of the final approval of the Form I-800, the results of the investigation, including any supporting documentation, and the Form I-800 and its supporting documentation will be forwarded to the appropriate USCIS office for action. Although USCIS is not precluded from denying final approval of a Form I-800 based on the results of an investigation under this paragraph, the grant of provisional approval under paragraph (g), and the fact that the Department of State has given the notice contemplated by article 5(c) of the Convention, shall constitute prima facie evidence that the grant of adoption or custody for purposes of adoption will, ordinarily, warrant final approval of the Form I-800. The Form I-800 may still be denied, however, if the Secretary of State declines to issue the certificate provided for under section 204(d)(2) of the Act or if the investigation under this paragraph establishes the existence of facts that clearly warrant denial of the petition.

(g) *Provisional approval.* (1) The officer will consider the evidence described in paragraph (d) of this section and any additional evidence acquired as a result of any investigation completed under paragraph (f) of this section, to determine whether the preponderance of the evidence shows that the child qualifies as a Convention adoptee. Unless 8 CFR 204.309(b) prohibits approval of the Form I-800, the officer will serve the petitioner with a written order provisionally approving the Form I-800 if the officer determines that the child does qualify for classification as a "child" under section 101(b)(1)(G), and that the proposed adoption or grant of custody will meet the Convention requirements.

(i) The provisional approval will expressly state that the child will, upon adoption or acquisition of custody, be eligible for classification as a Convention adoptee, adjudicate any waiver application and (if any necessary waiver of inadmissibility is granted) direct the petitioner to obtain and present the evidence required under

paragraph (h) of this section in order to obtain final approval of the Form I-800.

(ii) The grant of a waiver of inadmissibility in conjunction with the provisional approval of a Form I-800 is conditioned upon the issuance of an immigrant or nonimmigrant visa for the child's admission to the United States based on the final approval of the same Form I-800. If the Form I-800 is finally denied or the immigrant or nonimmigrant visa application is denied, the waiver is void.

(2) If the petitioner filed the Form I-800 with USCIS and the child will apply for an immigrant or nonimmigrant visa, then, upon provisional approval of the Form I-800, the officer will forward the notice of provisional approval, Form I-800, and all supporting evidence to the Department of State. If the child will apply for adjustment of status, USCIS will retain the record of proceeding.

(h) *Final approval.* (1) To obtain final approval of a provisionally approved Form I-800, the petitioner must submit to the Department of State officer who has jurisdiction of the child's application for an immigrant or nonimmigrant visa, or to the USCIS officer who has jurisdiction of the child's adjustment of status application, a copy of the following document(s):

(i) If the child is adopted in the Convention country, the adoption decree or administrative order from the competent authority in the Convention country showing that the petitioner has adopted the child; in the case of a married petitioner, the decree or order must show that both spouses adopted the child; or

(ii) If the child will be adopted in the United States:

(A) The decree or administrative order from the competent authority in the Convention country giving custody of the child for purposes of emigration and adoption to the petitioner or to an individual or entity acting on behalf of the petitioner. In the case of a married petitioner, an adoption decree that shows that the child was adopted only by one spouse, but not by both, will be deemed to show that the petitioner has acquired sufficient custody to bring the child to the United States for adoption by the other spouse;

(B) If not already provided before the provisional approval (because, for example, the petitioner thought the child would be adopted abroad, but that plan has changed so that the child will now be adopted in the United States), a statement from the primary provider, signed under penalty of perjury under United States law, summarizing the plan under 22 CFR 96.50 for monitoring

of the placement until the adoption is finalized in the United States;

(C) If not already provided before the provisional approval (because, for example, the petitioner thought the child would be adopted abroad, but that plan has changed so that the child will now be adopted in the United States), a written description of the preadoption requirements that apply to adoptions in the State of the child's proposed residence and a description of when and how, after the child's immigration, the petitioner intends to complete the child's adoption. The written description must include a citation to the relevant State statutes or regulations and specify how the petitioner intends to comply with any requirements that can be satisfied only after the child arrives in the United States.

(2) If the Secretary of State, after reviewing the evidence that the petitioner provides under paragraph (h)(1)(i) or (ii) of this section, issues the certificate required under section 204(d)(2) of the Act, the Department of State officer who has jurisdiction over the child's visa application has authority, on behalf of USCIS, to grant final approval of a Form I-800. In the case of an alien who will apply for adjustment of status, the USCIS officer with jurisdiction of the adjustment application has authority to grant this final approval upon receiving the Secretary of State's certificate under section 204(d)(2) of the Act.

(i) *Denial of Form I-800.* (1) A USCIS officer with authority to grant provisional or final approval will deny the Form I-800 if the officer finds that the child does not qualify as a Convention adoptee, or that 8 CFR 204.309(b) of this section requires denial of the Form I-800. Before denying a Form I-800, the officer will comply with the requirements of 8 CFR 103.2(b)(16)), if required to do so under that provision, and may issue a request for evidence or a notice of intent to deny under 8 CFR 103.2(b)(8).

(2) The decision will be in writing, specifying the reason(s) for the denial and notifying the petitioner of the right to appeal, if any, as specified in 8 CFR 204.314.

(3) If a Department of State officer finds, either at the provisional approval stage or the final approval stage, that the Form I-800 is "not clearly approvable," or that 8 CFR 204.309(b) warrants denial of the Form I-800, the Department of State officer will forward the Form I-800 and accompanying evidence to the USCIS office with jurisdiction over the place of the child's habitual residence for review and decision.

**§ 204.314 Appeal.**

(a) *Decisions that may be appealed.*  
 (1) Except as provided in paragraph (b) of this section:  
 (i) An applicant may appeal the denial of a Form I-800A (including the denial of a request to extend the prior approval of a Form I-800A) and  
 (ii) A petitioner may appeal the denial of a Form I-800.  
 (2) The provisions of 8 CFR 103.3, concerning how to file an appeal, and how USCIS adjudicates an appeal, apply to the appeal of a decision under this subpart C.  
 (b) *Decisions that may not be appealed.* There is no appeal from the denial of:  
 (1) Form I-800A because the Form I-800A was filed during any period during which 8 CFR 204.307(c) bars the filing of a Form I-800A; or  
 (2) Form I-800A for failure to timely file a home study as required by 8 CFR 204.310(a)(3)(viii); or

(3) Form I-800 that is denied because the Form I-800 was filed during any period during which 8 CFR 204.307(c) bars the filing of a Form I-800;  
 (4) Form I-800 filed either before USCIS approved a Form I-800A or after the expiration of the approval of a Form I-800A.

**PART 213a—AFFIDAVITS OF SUPPORT ON BEHALF OF IMMIGRANTS**

■ 11. The authority citation for part 213a continues to read as follows:  
**Authority:** 8 U.S.C. 1183a; 8 CFR part 2.  
 ■ 12. Section 213a.2(a)(2)(ii)(E) is amended by adding two new sentences at the end, to read as follows:  
**§ 213a.2 Use of affidavit of support.**  
 (a) \* \* \*  
 (2) \* \* \*  
 (ii) \* \* \*  
 (E) \* \* \* In the case of a child who immigrates as a Convention adoptee, as

defined in 8 CFR 204.301, this exception applies if the child was adopted by the petitioner in the Convention country. An affidavit of support under this part is still required in the case of a child who immigrates as a Convention adoptee if the petitioner will adopt the child in the United States only after the child's acquisition of permanent residence.  
 \* \* \* \* \*

**PART 299—PRESCRIBED FORMS**

■ 13. The authority citation in part 299 continues to read as follows:  
**Authority:** 8 U.S.C. 1101 and note, 1103; 8 CFR part 2.  
 ■ 14. Section 299.1 is amended in the table by adding the entries “I-800 and I-800A”, in proper alpha/numeric sequence, to read as follows:  
**§ 299.1 Prescribed forms.**  
 \* \* \* \* \*

Form No.	Edition date	Title
I-800	09-21-07	Petition to Classify a Convention Adoptee as an Immediate Relative.
I-800A	09-21-07	Application for Determination of Suitability to Adopt a Child from a Convention Country.

**PART 322—CHILD BORN OUTSIDE THE UNITED STATES; REQUIREMENTS FOR APPLICATION FOR CERTIFICATE OF CITIZENSHIP**

■ 15. The authority citation for part 322 continues to read as follows:  
**Authority:** 8 U.S.C. 1103, 1443; 8 CFR part 2.  
 ■ 16. Section 322.3 is amended by:  
 ■ a. Removing the word “and” at the end of paragraph (b)(1)(xi);

■ b. Redesignating paragraph (b)(1)(xii) as paragraph (b)(1)(xiii); and by  
 ■ c. Adding a new paragraph (b)(1)(xii). The addition read as follows.  
**§ 322.3. How, where, and what forms and other documents should the United States citizen parent(s) file?**  
 \* \* \* \* \*  
 (b) \* \* \*  
 (1) \* \* \*  
 (xii) For a Convention adoptee applying under section 322 of the Act,

a copy of the notice of approval of the Form I-800 and the supporting documents submitted with the Form I-800 (except the home study); and  
 \* \* \* \* \*  
 Dated: September 21, 2007.  
**Michael Chertoff,**  
*Secretary.*  
 [FR Doc. E7-18992 Filed 10-3-07; 8:45 am]  
**BILLING CODE 4411-10-P**