

9 FAM 42.21 Notes

(TL:VISA-562; 08-01-2003)
(Office of Origin: CA/VO/L/R)

9 FAM 42.21 N1 “Immediate Relative” Defined

(TL:VISA-329; 10-26-2001)

The Immigration and Nationality Act defines “immediate relative” to include the following:

- (1) Spouse of a U.S. citizen [see 9 FAM 40.1 N1];
- (2) Certain spouses (and the accompanying or following-to-join children) of deceased U.S. citizens [see 9 FAM 42.21 N1.2];
- (3) Child of a U.S. citizen [see 9 FAM 40.1 N2];
- (4) Adopted child of a U.S. citizen [see 9 FAM 42.21 N12];
- (5) Orphan to be adopted by a U.S. citizen residing in the United States [see 9 FAM 42.21 N13];
- (6) Parent of an adult U.S. citizen [see 9 FAM 40.1 N5]; and
- (7) Child under 16 adopted or to be adopted under the terms of the Hague Convention [see 9 FAM 42.21 N14 below].

9 FAM 42.21 N1.1 “Spouse,” “Child,” and “Parent” Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 40.1 Notes.

9 FAM 42.21 N1.2 “Spouse and Child of Deceased U.S. Citizen” Defined

(TL:VISA-372; 03-18-2002)

a. INA 201(b)(2)(A)(i) as amended by sec. 101(a) of Public Law 101-649 changed the definition of “immediate relatives” to include the spouse of a deceased U.S. citizen, provided the spouse:

- (1) Was married to the U.S. citizen for at least two years prior to the U.S. citizen’s death;
- (2) Was not legally separated at the time of the spouse’s death;

(3) Has not remarried; and

(4) Files a petition under INA 204(a)(1)(A)(ii) within two years after the death of the spouse.

b. Section 219(b)(1) of Public Law 103-416 further amended the definition to include the child(ren) of the spouse of the deceased U.S. citizen. Such children, however, may not petition in their own behalf but are derivatives of the principal beneficiary. Consequently, they can obtain status only as derivatives by accompanying or following to join the principal beneficiary. Derivative status does not extend to unmarried sons or daughters of widows or widowers.

c. Section 423(a)(1) of Public Law 107-56 (the "USA Patriot Act") further extended the self-petitioning right to the spouses (widows/widowers) of U.S. citizen victims of one of the terrorist acts of September 11, 2001, with no requirement that the marriage has existed a specific minimum period. The other requirements placed on spouses of deceased U.S. citizens do apply, however. [See 9 FAM 42.21 N1.2a (2), (3), and (4) above.] The children of such spouses may be included in the petition of the parent.

d. Section 423(a)(2) of the USA Patriot Act provides that the child of a deceased U.S. citizen victim may retain immediate relative "child" status, regardless of changes of age or marital status, if the child files a petition for such status within two years of the parent's death.

9 FAM 42.21 N1.2-1 Applying for Status Under Section 423 (the USA Patriot Act)

(TL:VISA-562; 08-01-2003)

Under section 423 of the USA Patriot Act, the surviving spouse or child must file a Form I-130, *Petition For Alien Relative*, with either the *Bureau of Citizenship and Immigration Services (BCIS)* office that has jurisdiction over the place of residence, or with the consular post abroad in which district the beneficiaries reside. Applicants must provide evidence that the U.S. citizen spouse or parent was killed in the attacks of September 11 [see 9 FAM 40.1 N12], as well as relationship.

9 FAM 42.21 N1.2-2 Consular processing

(TL:VISA-562; 08-01-2003)

Applicants will be processed as IR1/IR2, even if the IR2 is 21 years or older. The usual national crime information center (NCIC), security checks, medical exam, as well as birth, death, divorce and/or marriage certificates are required. No Form I-864, *Affidavit of Support Under Section 213A of the Act*, may be required. Applicants are exempt from the public charge inadmissibility of INA 212(a)(4). Consular officers should issue an IR1 to a spouse who qualifies under section 423 of the *USA Patriot Act* and issue an IR2 to the alien child, son or daughter who qualifies under this section regardless of age or marital status. Consular officers should annotate the visa

"Beneficiary of USA Patriot Act sec. 423"

9 FAM 42.21 N1.3 “Adopted Child” Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 42.21 N12.1.

9 FAM 42.21 N1.4 “Orphan” Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 42.21 N13.1.

9 FAM 42.21 N2 Entitlement to Status

9 FAM 42.21 N2.1 Immediate Relative (IR) Petition Beneficiaries

(TL:VISA-170; 10-01-1997)

An alien is entitled to status as an IR if the consular officer has received a properly approved petition from the Immigration and Naturalization Service and the consular officer is satisfied that the claimed relationship exists.

9 FAM 42.21 N2.2 Derivative IR Status for Spouses or Children

9FAM 42.21 N2.2-1 Generally No Derivative Status

(TL:VISA-179; 08-21-1998)

The INA does not generally [see exception under 9 FAM 42.21 N2.2-3] accord derivative status for family members of immediate relatives as it

does for preference applicants. INA 203(d) does not apply to the classes described in INA 201(b). A U.S. citizen must file separate immediate relative petitions for the spouse, each child, and each parent.

9 FAM 42.21 N2.2-2 Spouse/Child of (Immediate Relative (IR-5) Not Entitled to Derivative Status

(TL:VISA-562; 08-01-2003)

“Parents” of U.S. citizens are accorded IR-5 status only upon *Bureau of Citizenship and Immigration Services (BCIS)* approval of a Form I-130, *Petition for Alien Relative*, establishing that the appropriate child-parent relationship exists. In certain circumstances, a U.S. citizen may be entitled to petition for only one parent, such as when the beneficiary’s spouse does not meet the definition of “parent” as set forth at INA 101(b)(2). For example, an alien who becomes a stepparent of an 18 year old is not considered to be the “parent” of that child for immigration purposes (see INA 101(b)(1)(B)). Consequently, should that stepchild become a U.S. citizen, *Bureau of Citizenship and Immigration Services (BCIS)* would be unable to approve a Form I-130 petition (for IR-5 status) for that stepparent. Further, spouses and children of IR-5s cannot benefit from derivative status through the principal alien. Spouses who cannot qualify in their own right for IR-5 status, and any children of an IR-5, would require the filing of a separate Form I-130 petition (family-based second) upon the principal’s admission to the United States as a permanent resident.

9 FAM 42.21 N2.2-3 Exception

(TL:VISA-170; 10-01-1997)

Sec. 219(b)(1) of Public Law 103-416 makes an exception to the general rule by providing derivative status for the accompanying or following-to-join children of spouses of deceased U.S. citizens.

9 FAM 42.21 N3 Petition Procedures for U.S. Citizens Abroad

(TL:VISA-23; 04-04-1989)

See 9 FAM 42.41 N4.

9 FAM 42.21 N4 Refusal to File Immediate Relative (IR) Petition

(TL:VISA-170; 10-01-1997)

In general, the spouse, child, or parent of a U.S. citizen who is entitled to classification as an immediate relative should be processed as an

immediate relative. However, if the consular officer is fully satisfied that the U.S. citizen relative has refused to file a petition on behalf of the spouse, child, or parent, for reasons other than financial consideration or inconvenience, the officer may consider the applicant for any other type of immigrant visa for which he or she is qualified.

9 FAM 42.21 N4.1 Alien Classifiable as (Immediate Relative (IR) or Preference Immigrant

(TL:VISA-170; 10-01-1997)

If an alien is classifiable both as an iIR and a preference immigrant, and the alien's spouse refuses to file an immediate relative petition to avoid conditional status, the consular officer may process the alien case as that of a preference immigrant. [See 9 FAM 42.21 N7.]

9 FAM 42.21 N4.2 Spouse/Child of Abusive U.S. Citizen or Lawful Permanent Resident (LPR)

(TL:VISA-179; 08-21-1998)

Abusers generally refuse to file relative petitions because they find it easier to control relatives who do not have lawful immigration status. Section 40701 of Public Law 103-322 contains provisions that allow the qualified spouse or child of an abusive U.S. citizen or LPR to self-petition for immigrant classification. [See 9 FAM 42.42 N3.2]

9 FAM 42.21 N5 Alien Classifiable as Immediate Relative and Special Immigrant

(TL:VISA-49; 10-30-1991)

An alien classifiable as an immediate relative who is also classifiable as a special immigrant under INA 101(a)(27)(A) or (B) may establish entitlement to classification under either category, depending upon which of the two may be more easily established. Since special immigrants under INA 101(a)(27)(A) and (B) are not subject to numerical limitations, this procedure is in accord with the original intent of Congress in enacting INA 201(b), namely, to prevent the use of immigrant visa numbers by aliens who are able to immigrate in a visa category not subject to numerical limitations.

9 FAM 42.21 N6 Petitioner's Naturalization Subsequent to Approval of Family Second Preference Petition

(TL:VISA-562; 08-01-2003)

- a. In the event of the petitioner's naturalization after approval of a

family second petition but before visa issuance, *Department of Homeland Security (DHS)* regulations [8 CFR 204.2(h)(3)], the petition is automatically converted as of the date of the petitioner's naturalization to accord immediate relative status under INA 201(b) for the spouse (automatically converted from F21 to IR1) or child (automatically converted from F22 to IR2), or first preference status under INA 203(a)(1) for an unmarried son or daughter (automatically converted from F24 to F11).

b. Proof of naturalization must be submitted to the consular officer considering the visa application and the consular officer must include it in the issued visa. The petition need not be returned to *Bureau of Citizenship and Immigration Services (BCIS)* for re-approval. If notification of the naturalization has been received from *BCIS* in the form of a letter, the consular officer shall attach it to the petition.

c. Automatic conversion of a petition is not authorized for an alien who is a derivative beneficiary (F23 or FX3) of a petition filed by an legal permanent resident (LPR) who subsequently becomes a U.S. citizen. The principal beneficiary must file (and obtain *BCIS* approval of) a Form I-130, *Petition for Alien Relative* (family second preference) upon the principal's admission to the United States before the derivative alien may be granted a visa.

9 FAM 42.21 N7 Conditional Status for Certain Immediate Relatives

(TL:VISA-49; 10-30-1991)

a. The Immigration Marriage Fraud Amendments Act of 1986 (Public Law 99-639) amended the Immigration and Nationality Act by adding section 216 which provides conditional permanent resident status for certain immediate relative categories at the time of admission.

b. The consular officer shall classify the spouse of a U.S. citizen or the child of a U.S. citizen as a conditional immigrant at the time of visa issuance if the basis for immigration is a marriage that was entered into less than two years prior to the date of visa issuance.

9 FAM 42.21 N8 Marriage Between Relatives

(TL:VISA-562; 08-01-2003)

Under INA 204, the *Bureau of Citizenship and Immigration Services (BCIS)* has the responsibility for determining whether an alien is entitled to immediate relative or preference status by reason of the alien's relationship to a U.S. citizen or permanent resident alien. If the *Bureau of Citizenship and Immigration Services (BCIS)* approves a petition with the knowledge that the parties concerned are related to each other such as uncle and

niece or as first cousins, the consular officer shall accept such determination and not attempt to reach an independent conclusion. [See 9 FAM 42.43 PN1.] [For information on petitionable marriage relationships, see 9 FAM 40.1.]

9 FAM 42.21 N9 Stepparent/Stepchild Relationship

(TL:VISA-170; 10-01-1997)

A stepparent or stepchild may confer or derive immigrant status even when parties to a marriage creating the stepparent/stepchild relationship have legally separated provided the family relationship has continued to exist between the stepparent and stepchild. Note, however, that the stepparent-stepchild relationship must have been established prior to the stepchild's 18th birthday (INA 101(b)(1)(B)).

9 FAM 42.21 N10 Effect of Private Legislation According “Child” Status

(TL:VISA-49; 10-30-1991)

A petition according preference status shall be regarded as approved to accord immediate relative status under INA 201(b)(2) if the beneficiary has been declared a “child” of the petitioner by private legislation. The consular officer shall regard such a petition as approved for that purpose as of the date of the enactment of the private legislation or of the effective date stated in the language of the private law.

9 FAM 42.21 N11 Processing Visas in Adoption Cases

(TL:VISA-562; 08-01-2003)

a. The Bureau of Consular Affairs considers adoption cases to be of the highest priority. Consular sections should provide helpful, courteous and expeditious assistance to U.S. citizens and maintain sound visa-issuance policies.

b. Consular sections should be responsive to inquiries, schedule interviews quickly, and make prompt decisions. An adoption involves both the adopting parents and the child. Even if the final resolution is that the child is ineligible for immigration, the consular officer best serves all parties by making this determination as quickly as possible. Any required field investigations or record checks in an adoption case must be given priority over other immigrant and nonimmigrant visa cases, and must be completed expeditiously so that the case may be resolved in a timely manner. If a consular officer determines that a petition is not “clearly approvable” or that

an *BCIS*-approved petition may have been approved in error, the consular officer shall forward it to the appropriate *BCIS* office without delay together with a cover memo detailing the reasons for the return.

c. Correspondence on orphan and adoption issues should be shared with other concerned offices outside the Visa Office (CA/VO) in particular CA/OCS/CI and, when appropriate, CA/FPP. Posts should use CVIS, CASC, KOCI and KFRD tags respectively, on adoption-related correspondence, to ensure timely distribution of cables to these offices. Posts should keep the Department and *BCIS* informed of general adoption issues, especially changes in local documentation or legal/ and/or procedural requirements.

9 FAM 42.21 N12 Adopted Child Under 101(b)(1)(E) - (IR-2)

9 FAM 42.21 N12.1 "Child" Defined

(TL:VISA-372; 03-18-2002)

a. Under INA 101(b)(1)(E), an alien is defined as a child and is classified IR-2, if the child:

(1) Was adopted while under the age of 16 (or is the natural sibling of such child who was adopted by the same parents while under the age of 18); and

(2) Has been in the legal custody of, and has resided with, the adopting parent(s) for two years.

b. A child who satisfies all the requirements of INA 101(b)(1)(E) with respect to an U.S. citizen adoptive parent/petitioner may be the beneficiary of an Form I-130, *Petition for Alien Relative*, and classifiable as an IR-2. A child who satisfies the requirements of this subsection with respect to an alien may seek any immigration benefit appropriate to a legitimate child of that alien.

9 FAM 42.21 N12.2 Adoption Requirement

(TL:VISA-372; 03-18-2002)

The adoption must have been both final and legal in the jurisdiction in which it occurred. A "simple" or "limited" adoption (an adoption which does not create a permanent parent-child relationship or give the adopted child the same rights as a child legitimately born to the adoptive parent, i.e., inheritance) does not constitute an adoption for immigration purposes.

9 FAM 42.21 N12.3 Legal Custody Requirement

(TL:VISA-372; 03-18-2002)

"Legal custody" means the assumption of responsibility for a minor by an adult under the laws of the state and under the order or approval of a court of law or other appropriate government entity. This provision requires that a legal process involving the courts or other recognized government entity take place. If the adopting parent was granted legal custody by the court or recognized governmental entity prior to the adoption, that period may be counted toward fulfillment of the two-year legal custody requirement. However, if custody was not granted prior to the adoption, the adoption decree shall be deemed to mark the commencement of legal custody. An informal custodial or guardianship document, such as a sworn affidavit signed before a notary public, is insufficient for this purpose.

9 FAM 42.21 N12.4 Residence Requirement

(TL:VISA-372; 03-18-2002)

Evidence must also be submitted to show that the adopted child and/or beneficiary resided with the adoptive parent and/or petitioner for at least two years. Generally, such documentation must establish that the petitioner and the beneficiary resided together in a parent-child relationship. The evidence must clearly indicate the physical living arrangements of the adopted child, the adoptive parent(s), and the natural parent(s) for the period of time during which the adoptive parent claims to have met the residence requirement. When the adopted child continued to reside in the same household as the natural parent(s) during the period in which the adoptive parent/petitioner seeks to establish his or her compliance with this requirement, the petitioner has the burden of establishing that he or she

exercised primary parental control during that period of residence. Evidence of parental control may include, but is not limited to, evidence that the adoptive parent provided financial support and day-to-day supervision of the child, and owned or maintained the property where the child resided.

9 FAM 42.21 N12.5 Applying Two-Year Custody and Residence Requirement

(TL:VISA-372; 03-18-2002)

The two years the child was in the legal custody of the adoptive parent do not have to be the same two years the child resided with the adoptive parent. The requisite two-year custody and two-year residence may take

place either prior to or after the adoption, but both must be completed before the child will be eligible for benefits under INA 101(b)(1)(E). Both legal custody and residence are counted in aggregate time. A break in legal custody or residence, therefore, will not affect the time already fulfilled.

9 FAM 42.21 N12.6 Processing Immigrant Visas for Adopted Children

(TL:VISA-372; 03-18-2002)

An adopted child who has satisfied all of the requirements of INA 101(b)(1)(E) while still unmarried and under the age of 21 qualifies as a child of the adoptive parent. An immigrant visa for such a child is processed in much the same way as an immigrant visa would be for a legitimate biological child of the same parent. In support of the Form I-130, *Petition for Alien Relative*, the adoptive parent and/or petitioner must provide:

- (1) A certified copy of the adoption decree;
- (2) The legal custody decree; if custody occurred before the adoption; and
- (3) A statement showing dates and places where child resided with the parents.
- (4) If the child was adopted while aged 16 or 17 years – evidence that the child was adopted together with, or subsequent to the adoption of, a natural sibling under age 16 by the same adoptive parent(s).

9 FAM 42.21 N12.7 Adopted Children Do Not Have To Be Orphans

(TL:VISA-372; 03-18-2002)

A child who satisfies the requirements of INA 101(b)(1)(E) does not have to qualify as an orphan under INA 101(b)(1)(F), nor does he or she have to have been an orphan prior to the adoption.

9 FAM 42.21 N12.8 Adoptive Stepchildren

(TL:VISA-372; 03-18-2002)

A child can be considered the stepchild of his or her adoptive parent's spouse only if he or she qualified as the child of the adoptive parent under INA 101(b)(1) at some point when both a legal marriage existed between the adoptive parent and spouse and the child was still under age 18. For example, if an alien woman adopts a small child, fulfills the two-year custody and joint residence requirements per INA 101(b)(1)(E), and then marries an U.S. citizen while her adoptive child is still under age 18, the child qualifies as the stepchild of the U.S. citizen. If she marries the U.S. citizen before fulfilling the two-year custody and joint residence requirements, then the child does not become a stepchild of the American citizen for immigration purposes until those requirements are fulfilled, provided she is still legally married to the U.S. citizen and the child is still under age 18.

9 FAM 42.21 N12.9 Relating 101(b)(1)(E) to Adult or Married Sons or Daughters

(TL:VISA-372; 03-18-2002)

An alien may subsequently be considered the son or daughter of an adoptive parent provided he or she had satisfied the requirements of INA 101(b)(1)(E) with respect to that adoptive parent while still unmarried and under the age of 21. An alien who never satisfied the requirements of that subsection with respect to an adoptive parent, however, may not petition for or be the beneficiary of a petition filed by a previous parent, regardless of whether or not any benefit has been sought based on the adoptive relationship.

9 FAM 42.21 N13 Orphans Adopted Under 101(b)(1)(F)- (IR-3 and IR-4)

9 FAM 42.21 N13.1 “Orphan” Defined

(TL:VISA-562; 08-01-2003)

a. Under INA 101(b)(1)(F), an orphan is a child and classified IR-3 or IR-4 depending on whether the child was adopted abroad or is to be adopted in the United States if:

(1) The child is under the age of 16 at the time a petition is filed on his or her behalf:

(2) The child has no parents because of the death or disappearance of, abandonment or desertion by, or separation from or loss of both parents; or

(3) The sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption.

b. An orphan must be the beneficiary of an approved Form I-600, *Petition to Classify Orphan as Immediate Relative*, in order to be classified as the immediate relative of a U.S. citizen under this subsection. The visa category depends on whether the orphan has been validly adopted abroad (IR-3) or is to be adopted or re-adopted in the United States (IR-4). Because an actual Form I-600 petition is required in order to fulfill the requirements of INA 101(b)(1)(F), adoptive parents may also seek a Form I-600 petition as a prerequisite to benefits under the INA other than an immigrant visa. (For example, an approved Form I-600 is necessary for an orphan to obtain expeditious naturalization on a B-2 under INA 322. (See 9 FAM 42.21 N13.11.)

c. Under INA 101(b)(1)(F), a child is defined as an unmarried person under the age of 21 who satisfies all of the following three requirements:

(1) The child is under the age of 16 at the time an Form I-600 is filed on his or her behalf (or under the age of 18 if adopted or to be adopted together with a natural sibling under the age of 16);

(2) The child has been or will be adopted by a married U.S. citizen and spouse jointly, or by an unmarried U.S. citizen at least 25 years of age; and

(3) The child is an orphan because either:

(a) The child has no parents due to the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents; or

(b) The child's sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption.

d. *Department of Homeland Security* (DHS) regulations establish very specific meanings for terms such as "abandonment", "irrevocably released", and "sole or surviving parent". The meanings of these terms can be found in 8 CFR 204.3(b) and are discussed in more detail in 9 FAM 42.21 N13.5.

e. Only a U.S. citizen may file a Form I-600, *Petition to Classify Orphan as Immediate Relative*, petition. There are additional requirements depending on the marital status of the petitioner.

(1) If the petitioner is legally married, regardless of any legal separation or agreement, his or her spouse must be a party to the adoption and that fact must be reflected in the final adoption decree. The spouse does not have to be a U.S. citizen. There are no age requirements for a married petitioner and spouse.

(2) If the petitioner is unmarried, he or she must be at least 24 years of age at the time he or she submits a Form I-600A, *Application for Advance Processing of Orphan Petition*, and at least 25 years of age at the time he or she actually files the Form I-600 petition.

f. A Form I-600 petition must be filed before the beneficiary's 16th birthday (or 18th birthday, in the case of natural siblings.) In order to file an Form I-600, the *Bureau of Citizenship and Immigration Services (BCIS)* requires the petitioner to have either a final adoption decree or a legal custodial relationship that allows the child's emigration to the United States and his and/or her eventual adoption. Therefore, as long as a Form I-600 petition was filed and legal custody established before the child's 16th (or 18th) birthday, the child can satisfy the requirements of INA 101(b)(1)(F). The Form I-600 does not have to be approved before the child's 16th (or 18th, in the case of siblings, see 9 FAM N13.6-5) birthday nor does the child have to be adopted prior to that birthday.

9 FAM 42.21 N13.2 Processing a Child as an IR-4

(TL:VISA-562; 08-01-2003)

There are two *Department of Homeland Security (DHS)* forms that are used in orphan cases: the Form I-600A, *Application for Advance Processing of Orphan Petition*, which is used when the petition hasn't identified a specific child for adoption but wants to get pre-approved; and the Form I-600, *Petition to Classify Orphan as an Immediate Relative*, which establishes that a particular child meets the INA definition of "orphan". The Form I-600A, has to be approved by *Bureau of Citizenship and Immigration Services (BCIS)*. The Form I-600 can be approved by a consular officer in countries where there isn't a regional *DHS* office (see 8 CFR 100.4(c)(4) for a list of *DHS* offices abroad), however, an *BCIS*-approved Form I-600A has to accompany the petition in order to obtain consular approval.

9 FAM 42.21 N13.3 Form I-600A, Application for Advance Processing of an Orphan Petition

(TL:VISA-562; 08-01-2003)

a. The Form I-600A, is not a petition. It equates to the first segment of the orphan petition process – the determination of the suitability of the adoptive parents. It was designed to speed up the process by “pre-clearing” prospective adoptive parents who have not yet identified an orphan to adopt. It does not change the overall orphan petition process, but rather divides that process into two separate steps. An adoptive or prospective parent with an approved Form I-600A, must still file and obtain an approved Form I-600, *Petition to Classify Orphan as an Immediate Relative*, in order to seek an IR-3 or IR-4 visa on behalf of a child.

b. The use of Form I-600A and the "two step orphan processing" is optional; a U.S. citizen may file a Form I-600, petition with *BCIS* without having previously obtained approval of a Form I-600A. A petitioner who files a Form I-600 without a valid Form I-600A, however, often faces a longer approval process and loses the option of filing his Form I-600 at a consular post abroad. Although such a petitioner only files the Form I-600 petition, *BCIS* considers him or her to be filing both the Form I-600 and Form I-600A concurrently and requires him or her to submit all necessary documentation for both forms.

c. A U.S. citizen prospective adoptive parent may only file a Form I-600A, *Application for Advance Processing of Orphan Petition*, with the *Bureau of Citizenship and Immigration Services (BCIS)* office having jurisdiction over his or her place of residence. A consular officer may not adjudicate a Form I-600A. A consular officer may, with the concurrence of the regional (*BCIS*) office having jurisdiction over the consular district, accept a completed Form I-600A and fees from a U.S. citizen resident of the consular district for transmittal to the regional *BCIS* office. In such a case, the U.S. citizen should be advised to communicate directly with the regional *BCIS* office regarding requirements and status. Prospective adoptive parents must provide the following to *BCIS* along with a completed Form I-600A and the pertinent fees:

(1) Proof of citizenship and marriage;

(2) A fingerprint check for prospective adoptive parents and all adult members of the household; and

(3) A favorable home study and proof of compliance with state pre-adoption requirements, if applicable. [See 8 CFR 204.3(e) and (f) respectively.]

d. If consular officers determine that the fingerprint clearance(s) for prospective parents is more than 15 months old, a new fingerprint clearance is required. CA/VO/F/P can assist with expediting fingerprint clearances in such circumstances. Post should send the FS-258, Fingerprint Chart, by courier to the appropriate officer in CA/VO/F/P and an e-mail response to the clearance request will be forwarded back to post from the FBI visa CA/VO/F/P. If the FBI record shows no adverse information, consular officers can attach the CA/VO/F/P response to the VISAS THIRTY-SEVEN or approved Form I-600A, Application for Advance Processing of Orphan Petition, and process the case to conclusion. Should the Federal Bureau of Investigation (FBI) response contain an IDENT record, then post must stop processing the case and immediately forward the I-600A to the originating DHS office.

e. As part of the Form I-600A process, BCIS determines whether the parents are able to provide proper care for a child or children. BCIS will indicate on the approved Form I-600A the number of children the parents are eligible to adopt and whether they have been approved to adopt children with special medical, physical, or emotional needs. These determinations are based in part, but not entirely, on the home study. In addition, BCIS will often note compliance with, or limitations due to, the pre-adoption requirements of the parents' home state.

f. If the prospective adoptive parents plan to file a Form I-600, *Petition to Classify Orphan as Immediate Relative*, abroad, the Bureau of Citizenship and Immigration Services (BCIS) will send the Notice of Approval of Form I-600A (VISAS THIRTY-SEVEN) to the immigrant visas (IV) issuing post having jurisdiction over the country in which prospective parents plan to adopt a child. Consular officers are to accept the following methods of notification:

(1) The original of the approved Form I-600A, *Application for Advance Processing of Orphan Petition*;

(2) Cabled notice of approved Form I-600A (VISAS THIRTY-SEVEN);

(3) Faxed notice of approved Form I-600A, if transmitted directly from the approving *Department of Homeland Security (DHS)* field office or the Department; and

(4) E-mailed notification of approved Form I-600A, if transmitted directly from BCIS or the Department.

g. **Validity of Form I-600A approval:** The Form I-600A is valid for 18 months from the date of its approval. If an orphan petition is not properly filed within 18 months of the approval date of the Form I-600A, the Form I-600A shall be deemed abandoned. If the prospective adoptive parents wish to continue the process after their Form I-600A expires, a new Form I-600A, including all relevant documentation, must be filed with *BCIS*. A consular officer may not extend the validity of a Form I-600A.

h. **Form I-600A Approved for Multiple Children:** Because it merely "pre-clears" the adoptive parents and/or petitioners and does not address a specific beneficiary, a Form I-600A may be approved for more than one child. However, the petitioner will have to file an individual Form I-600, *Petition to Classify Orphan as Immediate Relative*, for each child.

i. **Effect of Changes in the Petitioner's Circumstances:** An approved Form I-600A indicates that the petitioner (and spouse, if applicable) is a suitable adoptive parent. Major changes in the petitioner's circumstances subsequent to the Form I-600A's approval may invalidate the Form I-600A. Such changes include a significant change in the petitioner's household (e.g. birth of a child, divorce of the petitioner, etc.), a change in jurisdiction (e.g., if the petitioner moves his or her habitual residence across a state or country border), or a change in financial circumstances (e.g., the petitioner loses his or her job.) A consular officer who learns of such changes shall refer the Form I-600A to the approving *BCIS* office and suspend processing on the case until and/or unless *BCIS* revalidates and/or reaffirms the Form I-600A.

9 FAM 42.21 N13.3 Form I-600, *Petition to Classify Orphan as an Immediate Relative*

9 FAM 42.21 N13.3-1 Approved Form I-600, *Petition to Classify Orphan as an Immediate Relative* Required for Visa Issuance

(*TL:VISA-372; 03-18-2002*)

Every orphan immigrating to the United States under INA 101(b)(1)(F) must be the beneficiary of an approved Form I-600, *Petition to Classify Orphan as an Immediate Relative*, filed by the U.S. citizen(s) who has adopted or intends to adopt the orphan, before a visa can be issued.

9 FAM 42.21 N13.3-2 Where to File Form I-600, Petition to Classify Orphan as an Immediate Relative

(TL:VISA-562; 08-01-2003)

a. U.S. citizen adoptive or prospective adoptive may file an Form I-600, petition with the *Bureau of Citizenship and Immigration Services (BCIS)* office having jurisdiction over their place of residence. Upon approval, *BCIS* will send notification of the Form I-600 approval to the U.S. embassy or consulate having jurisdiction over the child's case.

b. U.S. citizen adoptive parent(s) may also file the Form I-600 petition at the immigrant visa-issuing post having jurisdiction over the area where the child lives (or at another immigrant visas (IV) issuing post that has accepted jurisdiction) provided all of the following requirements have been met:

(1) The *BCIS* has approved a Form I-600A, *Application for Advance Processing of Orphan Petition* on behalf of the prospective adoptive parent(s) within the previous 18 months;

(2) There is no *BCIS* office located within the host country;

(3) The U.S. citizen petitioner is physically present before the consular officer; and

(4) The U.S. citizen petitioner does not already have a Form I-600 petition pending for the same beneficiary.

c. If the case is not clearly approvable, the consular officer must forward the filed petition and all supporting documentation to the regional *BCIS* office having jurisdiction over post's consular district for adjudication.

9 FAM 42.21 N13.3-3 Consular Authority to Approve Form I-600, Petition to Classify Orphan as an Immediate Relative

(TL:VISA-562; 08-01-2003)

a. The Form I-600, *Petition to Classify Orphan as an Immediate Relative*, is a *Department of Homeland Security (DHS)* document that is governed by *DHS* regulations. Final authority over Form I-600 adjudications rests with *Bureau of Citizenship and Immigration Services (BCIS)* *DHS* has delegated to consular officers, however, the limited authority to approve Form I-600 petitions when:

(1) The petitioner already has a valid Form I-600A, *Application for Advanced Processing of Orphan Petition*, (approved by *BCIS*);

(2) The U.S. citizen petitioner is physically present at a post located in a country where there is no *DHS* office; and

(3) The petition is clearly approvable.

b. In addition, a petition should not be accepted if the petitioner already has a petition pending with a *BCIS* office in the United States for the same beneficiary. The prospective adopting parent should be instructed to withdraw the existing petition before a new one can be filed.

9 FAM 42.21 N13.3-4 Form I-600A, *Application for Advanced Processing of Orphan Petition* “Not Clearly Approvable”

(*TL:VISA-372; 03-18-2002*)

a. Consular officers do not have the authority to adjudicate a Form I-600, *Petition to Classify Orphan as an Immediate Relative*, that is not clearly approvable. If a petition appears to be "not clearly approvable," however, the consular officer should first afford the petitioner an opportunity to respond to questions or issues that can be quickly or easily resolved.

b. Form I-600 petitions which are not clearly approvable shall be expeditiously forwarded, together with a completed Form I-604, *Request for Report on Overseas Orphan Investigation*, and all other relevant documents, to the regional *BCIS* office for adjudication. In addition, the consular officer should notify the prospective adoptive parent(s) in writing of this action, including a brief explanation of the decision and the name and address of the *BCIS* office to which the petition has been forwarded. Consular officers do not have the authority to deny an Form I-600 petition under any circumstances.

9 FAM 42.21 N13.3-5 Form I-600, *Petition to Classify Orphan as an Immediate Relative*, Procedures at Consular Office Abroad

(*TL:VISA-562; 08-01-2003*)

a. Signing the Form I-600, *Petition to Classify Orphan as an Immediate Relative*: A U.S. citizen petitioner must sign the completed Form I-600 in the presence of the consular officer. If the petitioner is married, his or her spouse must also sign the petition once it has been completed, although he or she does not have to sign before the consular officer. A third party may not sign the petition on behalf of the petitioner and/or spouse, even with a power of attorney. In the event that only one spouse travels abroad to file the Form I-600 petition at post, the consular officer should verify that the non-traveling spouse did not sign the petition before all of the information relating to the child had been entered onto the form. If a Form I-600A, *Application for Advance Processing of Orphan Petition*, has been approved

on behalf of a married couple, either spouse may sign and file the Form I-600 – it does not have to be the same spouse who obtained the Form I-600A approval. The only exception is when the married couple consists of one U.S. citizen and one alien, since only the U.S. citizen may file the Form I-600 and the Form I-600A.

b. Documents necessary to file an Form I-600 at post include the following:

(1) An approved Form I-600A, or the following evidence of approval of the same:

(a) A VISAS THIRTY-SEVEN cable,

(b) A faxed approval notice directly to post from either *Bureau of Citizenship and Immigration Services (BCIS)* or the Department, or

(c) An electronic notice of approval if transmitted directly from either *BCIS* or the Department.

NOTE: Consular officers may not process a case to conclusion on the basis of the adoptive parents' Form I-797, *Notice of Action*, notice of approval only.

(2) The child's birth certificate, or if such a certificate is not available, a written explanation together with secondary evidence of identity and age.

(3) Evidence that the child is an orphan as defined by INA 101(b)(1)(F). [See also 8 CFR 204.3(d) and 9 FAM 42.21 N13.6.]

(4) Either of the following sets of requirements, depending on the circumstances of the case:

(a) A legible, certified copy of the final adoption decree showing that the child has been adopted by the unmarried petitioner or by the married petitioner and spouse jointly, and evidence that the petitioner (and spouse, if married) actually saw the child prior to or during the adoption proceedings; or

(b) Evidence that the prospective adoptive parent(s) have, or a person or entity working on his or her or their behalf has, secured custody of the orphan in accordance with the laws of the foreign-sending country; if the orphan is to be adopted in the United States (because there was no adoption abroad, the adoptive parents did not personally see the orphan prior to or during the adoption proceeding abroad, or the adoption abroad was not full and final).

(5) Evidence that the petitioner (and spouse, if applicable) intends, and is legally able, to adopt the child in the United States, including evidence that the petitioner(s) has complied with pre-adoption requirements, if any, of his or her and/or their State of residence. (Generally, the approval of the Form I-600A, *Application for Advance Processing of Orphan Petition*, signifies that *Bureau of Citizenship and Immigration Services (BCIS)* has verified the pre-adoption requirements of the petitioner's home state. [See 9 FAM N13.3-10] The *BCIS* approval notice or cable will specify any pre-adoption requirements that must still be met. Any such requirements that cannot be complied prior to the orphan's arrival in the United States because of State law must be noted and explained); and

(6) If the orphan was not the subject of a full and final adoption under the laws of the foreign-sending country, an irrevocable release of the orphan for emigration and adoption from the person, organization, or competent authority which had the immediately previous legal custody or control over the orphan, or

(7) If there was an adoption abroad which does not meet statutory requirements pursuant to INA 101(b)(1)(F) because the adoptive parent(s) did not personally see the orphan prior to or during the adoption proceeding abroad, evidence that the state of the orphan's proposed residence allows re-adoption or provides for judicial recognition of the adoption abroad.

c. Documents Not Required: The consular officer need not verify the adoptive parents' marriage, citizenship status, and ability to support the adopted child or children. *BCIS* addresses these issues in the Form I-600A approval.

d. Form I-604, *Request For and Report on Overseas Orphan Investigation* required: All Form I-600, *Petition to Classify Orphan as Immediate Relative*, petitions must be supported by a completed Form I-604. When a Form I-600, is filed at a consular office abroad, the Form I-604 must be completed prior to the approval of the Form I-600 (see 9 FAM 42.21 N13.4-4). When the Form I-600 was filed at and approved by an *Bureau of Citizenship and Immigration Services (BCIS)* office in the United States, the Form I-604 must be completed prior to the adjudication of the immigrant visa.

e. **Fees for One Child Not Required:** A prospective adoptive parent who filed a Form I-600A, *Application for Advance Processing of Orphan Petition* with BCIS paid the Form I-600 filing fee at that time. As a result, he or she may file a Form I-600 petition based on that Form I-600A approval without an additional fee. If the approved Form I-600A authorized the parent(s) to adopt more than one child, he and/or she may file petitions for each additional child to the maximum number approved. If the children are siblings, no additional fee is required. If the children are not siblings, the parent(s) must pay the Form I-600 filing fee for each child beyond the first. [See 8 CFR 103.7(b) for the appropriate fee for the filing of the Form I-600.]

9 FAM 42.21 N13.3-6 Effect of Local Laws

(TL:VISA-372; 03-18-2002)

a. In order to adjudicate an orphan visa case, it is essential that the consular officer be well versed in the host country's adoption and guardianship laws and procedures. 8 CFR 204.3 requires that certain documents used in the filing of an orphan petition must have been secured in accordance with the laws of the foreign-sending country. (Foreign-sending country is defined as the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan 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.) These laws are relevant in determining whether the child has been fully adopted abroad, or whether the adoptive parents or their agent have obtained legal custody of the child.

b. Consular officers should rely on competent local authorities to make responsible decisions about the facts surrounding parental abandonment, child custody and final adoptions. At the same time, consular officers should keep in mind that the definitions of terms used in U.S. immigration law may not be the same as those used by foreign authorities. Posts should report to CA/OCS/CI, CA/VO/F/P, and CA/FPP substantiated concerns that a competent authority is abusing its powers.

9 FAM 42.21 N13.3-7 Legal Custody

(TL:VISA-372; 03-18-2002)

a. Since child custody laws and regulations vary considerably from country to country, evidence that the parent(s) or their agent obtained legal custody may vary greatly depending upon local laws and regulations. Generally, this evidence will consist of documentation from a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage authorized to act in such a capacity.

b. A foreign adoption that is not valid as an adoption for U.S. immigration purposes (such as a proxy or simple adoption) may still serve as legal custody for IR-4 issuance. If the foreign adoption is less than a full adoption, however, the consular officer must verify that the petitioner's custody is permanent and the rights of any living natural parent have been irrevocably terminated.

9 FAM 42.21 N13.3-8 Proxy Adoptions

(TL:VISA-372; 03-18-2002)

a. A foreign adoption is not valid for U.S. immigration purposes unless the adoptive parent(s) actually saw the child at some point prior to or during the foreign adoption procedures. If the petitioner is married, the spouse must also have been a party to the adoption and must also have seen the child prior to or during the adoption proceedings. If neither or only one of two adoptive parents actually saw the child, the foreign adoption is not considered a valid adoption for U.S. immigration purposes (although the adoption may be considered to have established legal custody for IR-4 purposes.)

b. If the laws of the foreign-sending country allow proxy adoptions, U.S. citizen prospective adoptive parents may effect an adoption abroad without ever traveling to a foreign-sending country or meeting the child prior to the child's entry into the United States. The Form I-600, *Petition to Classify Orphan as an Immediate Relative*, however, must be filed in the United States since an agent or proxy acting on the parent's behalf may not file the Form I-600. The adoptive parents in such a case must also meet the pre-adoption requirements of the intended State of the child's residence. Upon receipt of a Form I-600 approval notice, an authorized agent or representative of the parent(s) may apply for and receive the child's IR-4 visa.

9 FAM 42.21 N13.3-9 Simple or Limited Adoptions

(TL:VISA-372; 03-25-2002)

Anything less than a full adoption is not considered a valid adoption for U.S. immigration purposes. The Board of Immigration Appeals has determined that, in order to be valid for immigration purposes, an adoption be a full adoption it must accord to the adopted child the same rights and privileges which are accorded to a natural legitimate child (such as inheritance rights, etc.). Simple, conditional, or limited adoption such as those conducted under Islamic Family Law in some countries are more accurately described as guardianship and are not considered valid adoptions for U.S. immigration purposes.

9 FAM 42.21 N13.3-10 State Pre-adoption or Re-adoption Requirements

(TL:VISA-562; 08-01-2003)

a. State pre-adoption requirements must be met when:

(1) There was no adoption abroad, or

(2) Both members of the couple or the unmarried parent did not personally see the child prior to, or during the adoption abroad, or

(3) The adoption abroad is not full and valid.

b. Prospective adoptive parents expecting these situations should have provided Bureau of Citizenship and Immigration Services (BCIS)) with evidence that they have met the pre-adoption requirements of the state of the child's proposed residence. Any deficiencies should be noted on the BCIS-approved Form I-600, *Petition to Classify an Orphan as an Immediate Relative*, Form I-600A, *Application for Advance Processing of Orphan Petition*, or in the BCIS approval notice. In cases with such deficiencies, the adoptive parents must provide the consular officer with evidence that the requirements have since been met. Officers should be as flexible as possible in requiring proof of meeting pre-adoption requirements and opt for the minimum level of proof acceptable in each case. (Where there is no reason to doubt the parent's compliance with the pre-adoption requirements, officers may choose to accept faxes or photocopies vice original documents, etc.). The goal is to ensure compliance with state and federal laws while creating the least burden and delay possible for the child and his or her adopting parents.

c. Occasionally, parents who had expected to obtain a final and valid adoption abroad are unable to do so and have to apply for an IR-4 visa for their child instead of an IR-3. (For example, one parent is unexpectedly unable to travel to see the child prior to or during the foreign adoption.) In such cases, the parents must provide the consular officer with evidence that they have complied with all pertinent pre-adoption requirements of their home state, as well as evidence that their home state will permit re-adoption of the child (or legal recognition of the foreign adoption.)

d. See 9 FAM 42.21 Exhibit I for a list of the appropriate contact offices in each state.

9 FAM 42.21 N13.3-11 Returning an Approved Form I-600A, *Application for Advance Processing of Orphan Petition*, to Bureau of Citizenship and Immigration Service (BCIS)

(TL:VISA-562; 08-01-2003)

a. *Bureau of Citizenship and Immigration Services (BCIS)* establishes the ability of the prospective adoptive parents to furnish proper care to an adopted child when approving the Form I-600A, *Application for Advance Processing of Orphan Petition*. Consular officers have no authority to review this determination.

b. If the consular officer has a well-founded and substantive reason to believe that the Form I-600A approval was obtained on the basis of fraud or misrepresentation, or has knowledge of a change in material fact subsequent to the approval of the Form I-600A, the consular officer should consult with the appropriate *Department of Homeland Security (DHS)* office abroad.

9 FAM 42.21 N13.4 Orphan Investigations

9 FAM 42.21 N13.4-1 Requirement for Form I-604, *Request For and Report On Overseas Adoption Investigation*

(TL:VISA-372; 03-18-2002)

a. A Form I-604, *Request For and Report On Overseas Orphan Investigation* must be completed in every orphan case (see 8 CFR 204.3(k)). The Form I-604 is a report that addresses the child's eligibility under INA 101(b)(1)(F) and relates to the second half of the Form I-600, *Petition to Classify Orphan as an Immediate Relative*. It focuses on those elements that specifically pertain to the validity of the petition, such as the child's status as an orphan, custody of the child, evidence of child buying, and any medical conditions for which the petitioner(s) must specifically be approved.

9 FAM 42.21 N13.4-2 Responsibility for Form I-604, *Request For and Report On Overseas Adoption Investigation*, for Orphan Investigations

(TL:VISA-562; 08-01-2003)

Primary responsibility for the Form I-604, *Request For and Report On Overseas Adoption Investigation*, rests with *Bureau of Citizenship and Immigration Services (BCIS)*. If there is no *Department of Homeland Security (DHS)* office in country, the Form I-604 investigation is completed by a consular officer at the Immigrant Visas (IV) issuing post having jurisdiction over the orphan's place of habitual residence. If the IV issuing

post is not located in the country of the orphan's residence, that post may seek assistance from consular officers, if any, located in the child's home country.

9 FAM 42.21 N13.4-3 Orphan Investigation Procedures

(TL:VISA-372; 03-18-2002)

Orphan investigation procedures vary from post to post, since the best means of collecting necessary information regarding the child's status and history often depend on local conditions. Most Forms I-604, *Request For and Report On Overseas Adoption Investigation*, are conducted at the time of the visa interview and are based on document review. An investigation can also include interviews with the child (if of sufficient age), social workers, orphanage representatives, the prospective adopting parents, or biological parent(s), if available. When fraud is detected or indicated, a full field investigation may be warranted. A fraud investigation should be conducted as expeditiously as possible.

9 FAM 42.21 N13.4-4 Form I-604, Request For and Report On Overseas Adoption Orphan Investigation, Conducted Prior to Petition Approval

(TL:VISA-562; 08-01-2003)

When the Form I-600, *Petition to Classify Orphan as an Immediate Relative*, is filed at an abroad post, the Form I-604, *Request For and Report On Overseas Adoption Orphan Investigation*, must be completed before the petition can be adjudicated. In this situation, the Form I-604 investigation plays an essential role in determining if the child qualifies under INA 101(b)(1)(F) and thus if the petition is "clearly approvable". Documents required for completion of the Form I-604 investigation will vary because local conditions differ. [See guidelines in 9 FAM 42.21 N13.3-6 and 9 FAM 42.21 N13.3-10.] If the Form I-604 investigation either is inconclusive or indicates the child does not qualify for status, the Form I-600 petition should be referred along with the completed report to the appropriate *DHS* office abroad for adjudication.

9 FAM 42.21 N13.4-5 Orphan Investigations Conducted Subsequent to Petition Approval

(TL:VISA-562; 08-01-2003)

a. When the Form I-600, *Petition to Classify Orphan as an Immediate Relative* is filed in the United States, the Form I-604, *Request For and Report On Overseas Adoption Orphan Investigation*, is generally completed subsequent to the petition approval but prior to visa issuance. In this situation, the Form I-604 investigation serves to verify, to the extent possible, information listed about the child in the approved Form I-600 petition.

b. If the investigation uncovers substantive evidence that places into question the child's status as an orphan under INA 101(b)(1)(F), the consular officer should return the petition to the approving *Bureau of Citizenship and Immigrations Services (BCIS)* office in the United States for possible revocation, along with a copy of the Form I-604 investigation report and any supporting documents. [See 9 FAM 42.43 N1 and N2.] A Form I-600 petition that has already been approved by *BCIS* should only be returned for possible revocation if the derogatory evidence is sufficient to justify a revocation or denial in a court or administrative appeals office. Consular officers may not dispute the approving *BCIS* office's application of the law to the facts of particular Form I-600, since the petition process is under the jurisdiction of *BCIS* and the *Secretary of Homeland Security's* interpretation of the law is dispositive.

c. If the evidence generated by the Form I-604 investigation is at variance with that originally submitted to *BCIS*, but does not contradict the fact that the child qualifies under INA 101(b)(1)(F), the Form I-600 should not be returned to *BCIS* and the case should be processed to conclusion. For example, a late registered birth certificate may be irregular, but is not sufficient proof to sustain a revocation of an approved petition if other factors are favorable.

9 FAM 42.21 N13.5 Determining Orphan Status under INA 101(b)(1)(F)

(TL:VISA-372; 03-18-2002)

a. A child may be the beneficiary of an approved Form I-600, as an immediate relative only if he or she is an orphan as defined in INA 101(b)(1)(F). There are two general categories of orphans:

(1) A child who has no parents because of the death or disappearance of, abandonment or desertion by, or separation or loss from its parents; or

(2) A child whose sole or surviving parent is unable to provide proper care and has, in writing, irrevocably released the child.

b. These two categories are distinct and separate. For example, a child whose sole parent is unable to provide proper care does not have to have been abandoned in order to qualify as an orphan. The definition of each of the terms used to determine orphan status is described in detail below.

9 FAM 42.21 N13.5-1 Child with No Parents

(TL:VISA-372; 03-18-2002)

An orphan is a child who has no parents due to any combination of the following six reasons: death, disappearance, abandonment, desertion, separation, or loss. For example, if one parent disappeared and the second parent was legally separated from the child, the child may qualify as an orphan. Consular officers should note that a parent-child relationship is terminated by any one of these conditions; a child "separated" from a parent, for example, does not also have to have been "abandoned" by that parent.

9 FAM 42.21 N13.5-2 Death of Child's Parent(s)

(TL:VISA-372; 03-18-2002)

a. A child whose natural parents are deceased and who has not acquired another parent (such as a stepparent or legal adoptive parent) under the INA is considered an orphan. For example, a legitimate child whose natural parents were just killed in an accident is an orphan. That child would continue to qualify as an orphan even after a court named her grandmother as her guardian, as long as the child was not legally adopted.

b. Primary evidence that the biological parent has died is a death certificate in the name of the parent.

9 FAM 42.21 N13.5-3 Disappearance of the Child's Parent(s)

(TL:VISA-372; 03-18-2002)

a. "Disappearance" means that the parent(s) has unaccountably or inexplicably passed out of the child's life; his or her or their whereabouts are unknown; there is no reasonable hope of reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

b. Primary evidence of disappearance consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such disappearance and unconditionally divesting the parent(s) of all parental rights over the child.

9 FAM 42.21 N13.5-4 Abandonment by the Child's Parent(s)

(TL:VISA-562; 08-01-2003)

a. Abandonment as it relates to INA 101(b)(1)(F) has specific meanings established by *Department of Homeland Security (DHS)* regulations [See 8 CFR 204.3.] A declaration by a foreign authority that a particular child has been abandoned is not, in itself, sufficient for U.S. immigration purposes. The term "abandonment" as used in foreign jurisdictions, however, may equate to the *DHS* definitions of abandonment, desertion, disappearance, loss, or separation. Officers should explore such a possibility when trying to determine "orphan status".

b. Abandonment means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parent(s) to the prospective adoptive parents or for a specific adoption does not constitute "abandonment." Similarly, the relinquishment or release of the child by the parent to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute "abandonment" unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child released to a government-authorized third party, however, could be considered to have been abandoned even if the parent(s) knew at the time that the child would probably be adopted by a specific person or persons, so long as the relinquishment was not contingent upon adoption by a specific person or persons.

c. Primary evidence of abandonment is a document signed by the parent(s) unconditionally releasing the child to an orphanage, or a decree from a court or other competent authority making the child a ward of the state and unconditionally divesting the parent(s) of all parental rights over the child.

9 FAM 42.21 N13.5-5 Desertion by the Child's Parent(s)

(TL:VISA-372; 03-18-2002)

a. "Desertion" means that the parent(s) has willfully forsaken the child and has refused to carry out normal 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 foreign-sending country. Desertion does not mean that the parent(s) has disappeared, but rather that he and/or she refuses to carry out his or her parent rights and obligations towards the child. Desertion differs from abandonment in that the parent(s) has not taken steps to divest him or herself of parental duties, but that parent's inaction has caused a local authority to step in and assume custody of the child.

b. Primary evidence of desertion consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such desertion and unconditionally divesting the parents of all parental rights over the child.

9 FAM 42.21 N13.5-6 Separation from the Child's Parent(s)

(TL:VISA-372; 03-18-2002)

a. "Separation" means the involuntary severance of the child from his or her parent(s) by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. This is often called "termination" of parental rights and often occurs because of child abuse or neglect, or because a competent authority deems the parent to be "unfit." The parent(s) must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

b. Primary evidence of separation consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such separation and unconditionally divesting the parent(s) of all parental rights over the child.

9 FAM 42.21 N13.5-7 Loss from the Child's Parent(s)

(TL:VISA-372; 03-18-2002)

a. "Loss" means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

b. Primary evidence of loss consists of a decree from a court or other competent authority (such as an empowered international organization) making the child a ward of the state by virtue of such loss and unconditionally divesting the parent(s) of all parental rights over the child.

9 FAM 42.21 N13.5-8 Irrevocable Release by Sole or Surviving Parent

(TL:VISA-372; 03-18-2002)

a. Under the second clause of INA 101(b)(1)(F), an orphan is also a child whose sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption. This is the only circumstance where a child released directly by its birth parent to the adoptive parent(s) can qualify as an orphan for the purposes of INA 101(b)(1)(F). Consular officers should look at each of the following three questions in turn:

(1) Does the child have a sole or surviving parent?

(2) Is that parent unable to provide proper care? and

(3) Has that parent, in writing, irrevocably released the child for emigration and adoption?

NOTE: The standards used to answer these questions are discussed below. The answer to each of these questions must be "yes" before a child can qualify as an orphan under the second clause of INA 101(b)(1)(F).

b. A "surviving parent" is defined as a child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of INA 101(b)(2) (i.e., marriage by the surviving parent has not created a stepparent relationship). Primary evidence would be a death certificate in the name of the deceased parent.

c. A "sole parent" is defined as the mother of a child if:

(1) The child was born out of wedlock (regardless of whether or not local law deems all children to be legitimate at birth); and

(2) The child has not been legitimated under the law of the child's residence or domicile or under the law of the natural father's residence or domicile while the child was in the legal custody of the legitimating parent or parents; and

(3) The child has not acquired a stepparent; and

(4) The natural father of the child:

(a) Is unknown, or

(b) Has disappeared or abandoned or deserted the child or

(c) Has in writing irrevocably released the child for emigration and adoption.

d. "Incapable of providing proper care" means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign sending country. A parent could be unable to provide proper care due to a number of reasons, including extreme poverty, mental or emotional difficulties, or long-term incarceration.

e. The sole or surviving parent's release or relinquishment must be in writing, in a language that the parent is capable of reading and signed by the parent. The release must be irrevocable and without stipulations or conditions which would cause custody of the child to revert to the birth parent. The release may, however, identify the person(s) to whom the parent is releasing the child, even if that person is the prospective adoptive parent. If the parent is illiterate, but in an interview satisfies the consular officer that he or she had full knowledge of the contents of the document and understood the irrevocable nature of the release, the officer may also treat the document as primary evidence.

9 FAM 42.21 N13.6 Elements of Form I-604, *Request For and Report on Overseas Adoption Orphan Investigation*

9 FAM 42.21 N13.6-1 Identity and Age of Child

(TL:VISA-372; 03-18-2002)

Primary evidence of the child's identity and age consists of a birth certificate showing timely registration of the birth.

9 FAM 42.21 N13.6-2 Child's Living Arrangements

(TL:VISA-372; 03-18-2002)

The sources of information relating to the child's current or previous living arrangements will vary depending on the circumstances of each case. If the information is not readily apparent (e.g. the child is in an orphanage), the consular officer should seek the information from the persons having care of the child prior to the adoption.

9 FAM 42.21 N13.6-3 The Child's Mental, Emotional, and Physical Development.

(TL:VISA-562; 08-01-2003)

During the Form I-600A, *Application for Advance Processing of Orphan Petition*, (or Form I-600, *Petition to Classify Orphan as an Immediate Relative*, if there was no prior Form I-600A) process, *Bureau of Citizenship and Immigration Services (BCIS)* determines whether the petitioner is a suitable adoptive parent for a child with special needs. *BCIS* records that decision on the approved Form I-600A (or Form I-600.) The Form I-604, *Request For and Report of Overseas Adoption Investigation*, should establish whether the child has any significant physical or mental affliction or disability relevant to the Form I-600A approval (or any significant condition undisclosed to *BCIS* during adjudication of the petition.) The consular officer must:

(1) Ensure that any significant medical condition is not excluded by special conditions established in the Form I-600A approval; and

(2) Verify that any significant medical condition is known and accepted by the adoptive parents.

b. Consular officers should take care to inform adoptive parents that the Form I-604 investigation and the immigrant visa examination are not meant to provide comprehensive evaluations of the child's health. If adopting parents have any questions, they should arrange private evaluations by qualified medical professionals, preferably ones versed in childhood development.

c. If a significant medical condition is discovered, including one that is not grounds for exclusion under INA 212(a)(1), the consular officer must furnish the adoptive parents all pertinent details concerning the affliction or disability. This is especially important in cases where the parents have not physically observed the child.

9 FAM 42.21 N13.6-4 Medical Conditions Known and Accepted by Both Adoptive Parents

(TL:VISA-562; 08-01-2003)

a. If a serious medical condition is discovered, processing should be suspended until the consular officer receives a notarized statement from the adoptive parent, or parents if married, indicating awareness of the child's affliction and willingness to proceed with orphan processing. An abstract of

a home investigation made by a social service agency, countersigned by the adoptive parent(s), is acceptable if it notes the parent(s) are aware of the child's condition and nevertheless willing to adopt the child. An appropriate entry in item 20 of the Form I-600, *Petition to Classify Orphan as an Immediate Relative*, is also acceptable. (If the child is found to have a Class A medical condition, the child will be ineligible for a visa under INA 212(a)(1) until and/or unless that condition is waived or otherwise overcome.)

b. *Bureau of Citizenship and Immigration Services (BCIS)* approval of the Form I-600A, *Application for Advance Processing of Orphan Petition*, may indicate specific restrictions to an adoption such as the child's nationality, age or gender. It will also indicate if the prospective adoptive parents have been approved for a special needs adoption. If a child clearly does not meet the special considerations identified by the *BCIS*, the consular officer should suspend processing, document the circumstances in the Form I-604, *Request For and Report of Overseas Adoption Investigation* report, and promptly forward the case to the appropriate *BCIS* office. The consular officer should notify the prospective adoptive parents of the action.

c. If the Form I-600 petition has been filed at a Foreign Service post, the information about any significant affliction or disability should be incorporated in item 20 of the Form I-600 and initialed by the adoptive parents, or a signed letter from the parents acknowledging the affliction or disability should be attached. If the adoptive parents choose not to pursue the petition, the consular officer shall forward it, along with the Form I-604 investigation report and all other pertinent information to the regional *BCIS* overseas office.

d. A Form I-600 petition approved by an *BCIS* stateside office must be returned to *BCIS* if a medical examination discloses a history or the existence of a physical, mental, or emotional condition that would affect the child's normal development, other than one noted in the approved petition or accepted in writing by the adoptive parents in accordance with paragraph "a" above. In such circumstances, the consular officer should notify the prospective adoptive parents and return the petition to the *Bureau of Citizenship and Immigration Services (BCIS)* approving office with a report of the condition disclosed.

9 FAM 42.21 N13.6-5 Siblings of Child

(TL:VISA-372; 03-18-2002)

The consular officer should attempt to determine whether the child has any siblings, including half-siblings. The enactment of Public Law 106-139 means that a particular child's qualifications may depend on the existence of natural siblings. The purpose of that legislation is to prevent the separation of natural siblings through adoption where the circumstance of the older child are essentially the same as those of the younger child, except that the older child is age 16 or 17. If a 16 or 17-year old child is qualifying under INA 101(b)(1)(F) based on a younger natural sibling, the younger child must travel prior to or together with the elder sibling.

9 FAM 42.21 N13.6-6 Evidence of Orphan Status of Child

(TL:VISA-372; 03-18-2002)

See 9 FAM 42.21 N13.5.

9 FAM 42.21 N13.7 Child Buying as Grounds for Denial

(TL:VISA-562; 08-01-2003)

a. An orphan petition must be returned to *Bureau of Citizenship and Immigration Services (BCIS)* for possible revocation if the adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent, or other individual as payment for the child or as an inducement to release the child. This does not preclude, however, reasonable payment for necessary activities such as administrative, court, legal, translation or medical services related to the adoption proceedings.

b. Consular officers must seriously review allegations of child buying, and carefully weigh the evidence available to substantiate such charges. Foreign adoption services are sometimes expensive and their costs can often seem disproportionately high in comparison with other social services. Further, in many countries there is a network of adoption facilitators, each playing a role in processing an individual case and thus reasonably expecting to be paid for their services. In most adoption cases the expenses incurred can be explained in terms of "reasonable payments". Even cash given directly to a biological mother may be justifiable if it relates directly to expenses such as pre-natal or neo-natal care, transportation, lodging or living expenses. Investigations of child buying, therefore, should focus on concrete evidence or an admission of guilt.

c. Cases in which there is clear and documented evidence or an admission of child buying should be promptly returned to the appropriate office of *Bureau of Citizenship and Immigration Services (BCIS)*

9 FAM 42.21 N13.8 Immigrant Visa Processing in Orphan Cases

9 FAM 42.21 N13.8-1 Authority to Issue Immigrant Visas in Orphan Cases

(TL:VISA-562; 08-01-2003)

Immigrant visa-processing posts shall process orphan visa cases based on receipt of:

(1) An approved Form I-600, *Petition to Classify Orphan as an Immediate Relative*, whether approved in the U.S. or at an overseas *Department of Homeland Security (DHS)* or consular office;

(2) A cabled notice of approval of a Form I-600 petition (VISAS THIRTY-EIGHT or VISAS THIRTY-NINE) from *BCIS*;

(3) A faxed notice of the Form I-600 petition approval, if transmitted directly from the approving *BCIS* office or from the Department, or

(4) An e-mailed notice of the Form I-600 petition approval, if transmitted directly from *BCIS* or the Department.

9 FAM 42.21 N13.8-2 Intent to Establish Bonafide Parent-Child Relationship is Required

(TL:VISA-372; 03-18-2002)

An orphan may be classified as the "child" of a petitioner under INA101(b)(1)(F) only if that petitioner (and spouse, if applicable) intends to enter into a bona fide parent-child relationship with that orphan. If the orphan has not been validly adopted abroad, the petitioner must also intend to pursue a full and valid adoption of the orphan in the United States.

9 FAM 42.21 N13.8-3 Determining Visa Classification in Orphan Cases

(TL:VISA-562; 08-01-2003)

a. The correct classification of immigrant visas issued to orphans is particularly important due to the passage of the Child Citizenship Act of 2000 (Public Law 106-395.) As a result of that Act, most orphans admitted to the United States as IR-3s will automatically acquire U.S. citizenship upon admission as legal permanent residents, while those admitted as IR-4s will not. Consular officers should take particular care to classify orphan visas correctly and to inform adoptive parents of the significance of the immigrant visa classification their child receives.

b. INA 101(b)(1)(F) defines a child as an orphan either adopted abroad or to be adopted in the United States. The approval of an I-600, *Petition to Classify Orphan as an Immediate Relative*, is considered prima facie evidence that the beneficiary satisfies the requirements of that subsection. An orphan who satisfies the requirements of subsection F, however, may qualify for either an IR-3 or and IR-4 immigrant visa. The Form I-600 does not determine which of these two immigrant visa classifications is appropriate for the beneficiary. Although the *Department of Homeland Security (DHS)* may indicate on an approved Form I-600 (or through the use of a VISAS THIRTY-EIGHT or VISAS THIRTY-NINE approval notice) which of the two classifications will likely relate to the beneficiary, the final determination rests with the adjudicating consular officer.

c. The IR-3 visa classification signifies that the orphan has been adopted abroad prior to the issuance of the immigrant visa. In order to issue an IR-3 visa, the adjudicating officer must be satisfied that the adoption was both legal in the country where it occurred and valid for U.S. immigration purposes. It is possible for an adoption to be considered legal even in the United States, but not valid for U.S. immigration purposes. (See 9 FAM 42.21 N13.3-8 and 9 FAM 42.21 N13.3-9). A child adopted by proxy, meaning the single adoptive parent or both married adoptive parents did not see the child prior to or during the foreign adoption procedures, cannot be classified as an IR-3.

d. The IR-4 visa classification signifies that the orphan will be fully and validly adopted by the petitioner (and spouse, if applicable) after being admitted to the United States. In order to issue an IR-4 visa, the consular officer must be satisfied that the petitioner both intends to adopt the beneficiary in the United States and is legally able to do so. The petitioner (or someone working on his and/or her behalf) must have secured custody of the orphan under the laws of the foreign sending country. That custody must be sufficient to allow the child to be taken from the foreign sending country and adopted elsewhere. In addition, the petitioner must have fulfilled any applicable pre-adoption requirements of his/her home state.

e. When issuing an IR-4 visa, a consular officer should remind the petitioner of the obligation to adopt (or re-adopt) the child in the United States. The officer should also remind the petitioner that his/her child will not automatically acquire U.S. citizenship under INA 320 unless he/she obtains a full and final adoption decree in the U.S. while the child is still under age 18.

f. Travel plans and circumstances do change. Adoptive parents who expected to apply for an IR-3 visa may not be able to complete a full valid adoption abroad and thus may request that the child be processed for an IR-4 visa (an orphan coming to the United States for adoption). Consular officers may process an IR-4 immigrant visa in lieu of the IR-3 only if the requirements for an IR-4 have been met, including evidence that the prospective adoptive parents have met all State pre-adoption requirements.

9 FAM 42.21 N13.8-4 Relating Public Charge to Orphan Cases

(TL:VISA-562; 08-01-2003)

a. *Bureau of Citizenship and Immigration Services (BCIS)* evaluates the prospective adoptive parents' ability to care for a child during adjudication of the Form I-600A, *Application for Advance Processing of Orphan Petition* (or the Form I-600, *Petition to Classify Orphan as an Immediate Relative*, if no Form I-600A was filed.) An IR-3 or IR-4 visa applicant, therefore, will seldom be likely to become a public charge. An approved Form I-600A serves as proof that the underlying requirements of INA 212(a)(4) have been met. Additional financial evidence should only be required if the child has an illness or defect not addressed by the approved I-600A, which would entail significant financial outlay or if other unusual circumstances prevail.

b. In addition, *BCIS* has determined that a Form I-864, *Affidavit of Support*, is not required for any IR-3 immigrants who will automatically acquire U.S. citizenship under INA 320 upon admission to the U.S. as legal permanent residents.

9 FAM 42.21 N13.8-5 Transferring Orphan Cases

(TL:VISA-562; 08-01-2003)

It is not unusual for adopting parents to consider children from several different countries. Upon a request from the adoptive parent(s), another IV post, or *BCIS*, an IV issuing post shall transfer an approved Form I-600A, (or repeat a VISAS THIRTY-SEVEN approval notice via cable) to the immigrant visa processing post which has responsibility for a newly-identified child's nationality or place of habitual residence.

9 FAM 42.21 N13.8-6 Vaccination Exemption

(TL:VISA-562; 08-01-2003)

a. INA 212(a)(1)(a)(ii), as amended, exempts applicants for IR-3 and IR-4 visas from the immigrant vaccination requirements provided that the adoptive parent signs an affidavit attesting that the child will receive the required vaccinations within 30 days of the child's admission to the United States or at the earliest time that is medically appropriate. Only children whose adoptive parents have signed such an affidavit will be exempt from the vaccination requirement. In situations where the adopting parent(s) object to the child receiving vaccinations on religious or moral grounds, the applicant will still require an individual INA 212(g)(2)(c) waiver from *Bureau of Citizenship and Immigration Services (BCIS)*. [See 9 FAM 40.11 N7.6.]

9 FAM 42.21 N13.8-7 Medical Ineligibilities

(TL:VISA-562; 08-01-2003)

a. Applicants for IR-3 and IR-4 visas are subject to INA 212(a)(1) ineligibilities. If an orphan is ineligible under INA 212(a)(1) due to a condition for which a waiver is available and the petitioner wishes to apply for one, the consular officer should expedite submission of a waiver application to *BCIS*. Consular officers should refer to 9 FAM 40.11 N10 for a discussion of waivers of medical ineligibilities for immigrant visa applicants.

b. The consular officer cannot issue an immigrant visa to a child afflicted with tuberculosis and on whose behalf INA 212(g) has been invoked, or a child suffering from any condition leading to the issuance of a Class B medical certificate, until the conditions concerning the adoptive parent's notification and consent in 9 FAM 42.21 N13.6-4 have been met.

9 FAM 42.21 N13.9 Adoption Fraud

(TL:VISA-372; 03-18-2002)

a. Orphan adoption cases are susceptible to fraud; that is, efforts to obtain by deception U.S. visas for children who do not qualify. In many cases, however, both the U.S. citizen adoptive parents and the adoptive children may be unwitting victims of a fraud which was actually perpetrated upon them by unscrupulous agents misrepresenting important facts about these children. If the fraud involves stolen or kidnapped children, biological parents may also be victims.

b. Consular officers, therefore, must scrutinize documentation presented in support of orphan cases. At the same time, anti-fraud efforts must be balanced with the mandate to provide service to U.S. citizens and the need to be sensitive to the victims of fraud. Effective anti-fraud programs for orphan cases involve efforts beyond normal immigrant visa processing. They often focus on procedures and pre-screening techniques which limit the vulnerability of the visa process to fraud, but which do not unnecessarily delay processing for other cases and avoid, to the extent possible, further hardship for fraud victims.

c. Because orphan adoption cases are multifaceted, a successful anti-fraud program should engage the entire adoption community including agents, lawyers, orphanages, foster care providers, medical personnel, judges, local officials, and law enforcement personnel. Consular officers should keep in mind, however, that the responsibility for enforcing local laws and for protecting the rights of children and biological parents rests primarily with local authorities.

d. Posts are urged to keep the Department informed about emerging orphan fraud issues and to discuss any significant anti-fraud efforts with CA before they are implemented.

9 FAM 42.21 N13.10 B-2 vs. IR-3 or IR-4

(TL:VISA-562; 08-01-2003)

a. Consular officers should not issue a nonimmigrant visa to an orphan who is immigrating to the U.S. to reside with his or her adoptive parents. The issuance of a nonimmigrant visa to an orphan to effect a child's immigration violates the law, places the child in an untenable immigration predicament, and circumvents the scrutiny intended to protect the orphan and the adoptive parents. *Department of Homeland Security (DHS)* regulations prohibit the approval of a Form I-600, *Petition to Classify Orphan as an Immediate Relative*, for any child who is in the United States either illegally or in nonimmigrant status. In cases with strong humanitarian considerations, the adoptive parents may seek humanitarian parole. (See 9 FAM 42.1 N4).

b. As with any other visa applicant, a non-immigrant visas (NIV) may be issued to an adopted child who qualifies for the NIV, subject to the provisions of INA 214(b). For example, a child who is permanently residing abroad with his U.S. citizen adoptive parents and wishes to accompany them on a short visit to the United States may qualify for a B-2 visa, irrespective of his adoptive status.

9 FAM 42.21 N13.11 B-2 Issuance for Naturalization Purposes

(TL:VISA-562; 08-01-2003)

In order to facilitate naturalization under INA 322, consular officers may issue a B-2 visa to the adopted child of a U.S. citizen who resides abroad and does not intend to reside permanently in the United States in the near future. The B-2 applicant must:

(1) Present an *Department of Homeland Security (DHS)* issued Form G-56, *General Call-in Letter*, or otherwise provide evidence that he or she has made arrangements for naturalization with an *Bureau of Citizenship and Immigration Service (BCIS)* office in the United States;

(2) Establish eligibility under INA 101(a)(15)(B);

(3) If an adopted child, satisfy the two-year residency and custody requirement of INA 101(b)(1)(E); or

(4) If an orphan, be the beneficiary of an approved I-600, *Petition to Classify Orphan as an Immediate Relative*, and establish that the Form I-604, *Request For and Report of Overseas Adoption Investigation*, has been conducted showing that the applicant meets the criteria of INA 101(b)(1)(F).

9 FAM 42.21 N13.12 Advisory Opinion Requests

(TL:VISA-372; 03-18-2002)

Officers are encouraged to refer any legal or procedural questions about orphan visa processing to the Visa Office (slugged for CA/VO/L/A and CA/VO/F/P with an information copy to CA/OCS/CI).

9 FAM 42.21 N14 Children Adopted from Hague Convention Countries

(TL:VISA-372; 03-18-2002)

Section 302 of Public Law 106-279, the Inter-country Adoption Act of 2000, added a new category of immediate relative for certain children adopted from Hague Convention countries. To qualify under this category the child must meet the criteria in 9 FAM 42.21 N14.1 below.

9 FAM 42.21 N14.1 Child Adopted in a Foreign State Party to the Hague Convention

(TL:VISA-372; 03-18-2002)

To qualify as an immediate relative under INA 101(b)(1)(G), the child must be adopted in a foreign state that is party to the Hague Convention or must be emigrating from such foreign state to be adopted in the United States. The child must be under age 16 at the time the petition is filed. The child must be adopted by, or will be adopted by, a U.S. citizen and spouse jointly, or by an unmarried U.S. citizen at least 25 years of age. The child's natural parent(s), or the institution having legal custody, must freely give irrevocable consent for the child's emigration and adoption or the child's natural parents must be incapable of providing care for the child. The Attorney General must be satisfied that the child will be properly cared for, and that the purpose of the adoption is to form a bona fide parent-child relationship. In the case of a child who has not been adopted, the competent authority in the foreign state must approve the child's emigration and the prospective parents must have complied with any pre-adoption requirements of the child's proposed residence.

9 FAM 42.21 N15 Classification of Amerasian Children Under Public Law 97-359

9 FAM 42.21 N15.1 Classification Under INA 204(f)(1)

(TL:VISA-170; 10-01-1997)

a. Public Law 97-359 of October 22, 1982, added section 204(g) (now 204(f)(2)) to the INA to provide preferential treatment in the immigration of certain illegitimate Amerasian children of U.S. citizen fathers who are unable to immigrate under any other section of the INA. Prior to enactment of Public Law 97-359, these children were unable to gain any benefits from their relationship to their father. The provisions of INA 204(f)(1) enable them to do so without requiring their father to file a petition on their behalf.

b. To qualify for benefits under INA 204(f)(1) the beneficiary must have been:

(1) Born in Korea, Vietnam, Laos, Cambodia, or Thailand after December 31, 1950, and before October 22, 1982; and

(2) Fathered by an U.S. citizen.

c. Beneficiaries under age 21 and unmarried are entitled to classification as immediate relatives; unmarried sons and daughters over the age of 21 to classification as family first preference; and married sons and daughters to family third preference.

9 FAM 42.21 N15.2 Alternative Classification

(TL:VISA-170; 10-01-1997)

An Amerasian child may, of course, immigrate under another provision of the INA, if so qualified. For example, an alien may be classified as an orphan under INA 101(b)(1)(F) [see 22 CFR 42.24] or may qualify as a Vietnamese Amerasian under Public Law 100-102, as amended by Public Law 101-167 and Public Law 101-513, for whom no petition is required. [See 22 CFR 42.24]

9 FAM 42.21 N15.3 Petition Procedures for Amerasian Child

(TL:VISA-170; 10-01-1997)

Consular officers may not approve petitions for Amerasian children who are beneficiaries under Public Law 97-359. [See 8 CFR 204.4.]

9 FAM 42.21 N15.4 Revocation of Petition for Amerasian Child

(TL:VISA-170; 10-01-1997)

Department of Homeland Security (DHS) regulations for the revocation of petitions for Amerasian beneficiaries under Public Law 97-359 are provided in 8 CFR 205.1(a)(ii).

9 FAM 42.21 N16 Effect of Foreign Laws and Customs on Petitions for Adopted Children

(TL:VISA-562; 08-01-2003)

a. Some foreign states have no statutory provisions governing adoption and in some of these states the concept of adoption is not legally recognized. Legal adoption for the purpose of immigration does not exist in foreign states that apply Islamic law in matters involving family status.

b. Accordingly, *Department of Homeland Security (DHS)* and the Department hold that relationships through claimed adoptions in such countries cannot be established for visa petition purposes. *DHS* and the Department also hold that an adoptive relationship claimed to have been effected in a country which has no statutory provisions governing adoption cannot be recognized for visa classification purposes unless the relationship is sanctioned by local custom or religious practice, judicially recognized in the country, and the relationship embraces all the usual attributes of adoption, including the same irrevocable rights accorded a natural born child.

c. If the consular officer finds that any of the facts in the case are not as stated in the petition or if the adoption occurred abroad and is not valid under the laws of the country in which it took place, the consular officer shall suspend action and submit a report. [See 22 CFR 42.43(a).]

d. Form I-604, *Request For and Report On Overseas Orphan Investigation*, is sent by the *National Visa Center* with the approved petition.

9 FAM 42.21 N17 Expedited Naturalization Under INA 322 for Children Adopted Abroad

(TL:VISA-329; 10-26-2001)

INA 322(a)(4) enables a U.S. citizen parent to apply for a certificate of citizenship for his or her adopted children born abroad if the conditions noted in revised INA 322 have been fulfilled, and the child was adopted by the U.S. citizen parent before the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (E) or (F) of INA 101(b)(1).

9 FAM 42.21 N17.1 Aliens Eligible for Expedited Naturalization

(TL:VISA-350; 01-25-2002)

a. An orphan child who has lived with and been in the legal custody of the U.S. citizen adoptive parent for less than two years must be or have been the beneficiary of an approved Form I-600, *Petition to Classify Orphan as an Immediate Relative*, to classify orphan as an immediate relative in order for the citizen parent to apply for expeditious naturalization of such child. (An approved Form I-600 presumes that a Form I-604, *Request for and Report on Overseas Orphan Investigation*, has been completed.)

b. An orphan child who has been adopted abroad by a U.S. citizen parent and who has lived with and been in the legal custody of the adoptive citizen parent for at least two years may be processed as an adopted child.

c. The adoptive citizen parent must meet the following conditions for the approval of the application for a certificate of citizenship for his/her foreign-born adopted child:

(1) At least one of the adoptive parents is a citizen of the US, whether by birth or naturalization.

(2) The adopted child is physically present in the US, pursuant to a lawful admission.

(3) The adopted child is under the age of 18 and in the legal custody of the adoptive citizen parent.

(4) If the adoptive parent has not been physically present in the United States, or its outlying possessions, for a period or periods totaling not less than five years, at least two of which were after attaining the age of 14 years:

(a) The adopted child must reside permanently in the United States with the adoptive citizen parent, pursuant to a lawful admission for permanent residence, or

(b) A citizen parent of the adoptive citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of 14 years. (The citizen grandparent of the child may be living or deceased at the time of the application. If deceased, the grandparent must have been a citizen prior to and at the time of death.)

(5) Whether transmission of citizenship was satisfied by the adopted child's citizen parent or his or her citizen grandparent, the transmission requirements must be met before or at the time of application. The physical presence requirement in the United States may have been satisfied at any time by the parent or grandparent before or after the birth of the child.

(6) For the citizenship benefit to be granted, the application must be filed, adjudicated and approved, with the oath administered, unless waived, prior to the child's 18th birthday.

9 FAM 42.21 N17.2 Application Instructions

(TL:VISA-562; 08-01-2003)

To receive an application package, or for further details, applicants residing abroad should contact the *Department of Homeland Security (DHS)* forms centers or *Bureau of Citizenship and Immigration Services (BCIS)* offices in the United States or its outlying possessions. The package will consist of Form N-643, *Application for Certificate of Citizenship in Behalf of an Adopted Child* with supplement, two Forms FD-258, *Fingerprint Charts*, without originating agency identifier (ORI) designations and a list of the *DHS* domestic field offices.

9 FAM 42.21 N17.3 Filing the Application

(TL:VISA-562; 08-01-2003)

a. If the U.S. citizen adoptive parent is residing in the United States, the application should be filed by mail or in person at the *BCIS* office having jurisdiction over the adoptive citizen parent's residence.

b. If the U.S. citizen parent resides abroad, the application may be filed by mail or in person at any *BCIS* district, sub-office, or other files control office located in the United States or its outlying possessions. Parents should contact the proposed filing site to determine whether Form N-643, *Application for Certification of Citizenship in Behalf of an Adopted Child*, may be accepted at that *BCIS* office, because not all sub-offices or files control offices process these applications.

c. The application submitted by the applicant for a certificate of citizenship for an adopted child under INA 322 must include:

(1) Form N-643 application with supporting documents (child's birth certificate, etc.), filed by the U.S. citizen adoptive parent, accompanied by the \$125.00 fee payable in U.S. currency;

(2) Evidence of the adoptive parent's U.S. citizenship;

(3) An adoption decree showing that the child was adopted before the child's 16th birthday;

(4) Evidence of the child's lawful admission to the United States, either as a nonimmigrant or for lawful permanent residence. (If the child is not now in the United States, this evidence must be provided at the interview.);

(5) If the physical presence requirement is met by the adoptive citizen parent, that adoptive citizen parent must sign and attach to Form N-643, *Application for Certificate of Citizenship in Behalf of an Adopted Child*, a separate written statement accompanied by relevant documentation, that details how the adoptive citizen parent meets the physical presence requirements;

(6) If the physical presence requirement is met by the citizen grandparent of the adoptive citizen parent, a Form N-600A, *Application for Transmission of Citizenship Through a Grandparent*, supplement must be completed and submitted, along with documents detailing how the citizen grandparent meets the physical presence requirements. The supplement form and documentation must be attached to the N-643 application packet;

(7) The Form N-600A supplement or the separate written statement concerning the physical presence requirements from the adoptive citizen parent is not required if the adopted child is a lawful permanent resident of the United States, and that child is in the legal custody of and residing with the adoptive citizen parent. Only a Form N-643 application, without the supplement form, is required in such situations;

(8) A completed Form FD-258, *Fingerprint Chart*, must be submitted with the Form N-643 application if the child will be more than 14 years of age when the certificate of citizenship is issued;

(9) Evidence of the child's qualification as either an adopted child or as an orphan, which includes:

(a) Adopted child: the parent's written statement that the child has resided with and been in the legal custody of the citizen adoptive parent for at least two years prior to the child's sixteenth birthday and prior to the date the Form N-643 was filed (the U.S. citizen parent should be prepared to present documentary evidence upon request by the *Bureau of Citizenship and Immigration Services (BCIS)* but need not provide it with the initial application); or

(b) Orphan: evidence that the child is or was the beneficiary of an approved Form I-600, *Petition to Classify Orphan as an Immediate Relative*, (this presumes that an I-604, *Request for and Report on Overseas Orphan Investigation*, has been completed), such as:

(1) A copy of the alien registration card showing the child's admission for lawful permanent residence under the IR-3, IR-4, IR-8, or IR-9 classification;

(2) A copy of the child's admission for lawful permanent residence under the IR-3, IR-4, IR-8, or IR-9 classification; or

(3) A copy of the notice showing that the *Bureau of Citizenship and Immigration Services (BCIS)* has approved Form I-600, *Petition to Classify Orphan as Immediate Relative* on the child's behalf accompanied by the citizen parent's written statement that, to the best of his or her knowledge, the approval has not been revoked. If abroad, the citizen parent's written statement must be signed under oath and attested to by a U.S. consular officer or magistrate of a foreign country where the orphan resides; and

(10) An applicant who is residing abroad, or whose child is residing abroad, may include with the application a request noting the date(s) that the adoptive citizen parent prefers the child to be interviewed. A lead time of at least 60 days should be allowed to enable the field office to preliminarily adjudicate the application, schedule the interview, and issue the appointment notice.

9 FAM 42.21 N17.4 Preliminary Processing

(TL:VISA-562; 08-01-2003)

a. Upon receipt of the Form N-643, *Application for Certification of Citizenship in Behalf of an Adopted Child*, the *Bureau of Citizenship and Immigration Service (BCIS)* field office will preliminarily adjudicate the application to determine eligibility in less than 60 days. Immediate priority will be accorded applications for children approaching their 18th birthday. In such cases, post-auditing of the FBI fingerprint checks is authorized. If the child appears prima facie eligible for a certificate of citizenship, the field office will send the U.S. citizen adoptive parent Form G-56, *General Call-In Notice*, advising that the application has been preliminarily approved and noting the date, time and place of the interview.

b. For applicants abroad, interviews will be scheduled within 60 days, or later, of the date(s) requested. If the child is in the United States pursuant to a lawful admission, he or she will be scheduled for the first possible interview date.

9 FAM 42.21 N17.5 Expedited Naturalization for Non-Adopted Children

(TL:VISA-329; 10-26-2001)

Expedited naturalization is also possible, in some cases, for non-adopted children of U.S. citizens. For example, a natural child of a U.S. citizen who could not transmit citizenship but whose citizen parent can, or the natural child of a U.S. citizen who naturalized subsequent to the child's birth and is residing abroad. Such cases must also follow the above process for expedited naturalization, and may be issued B-2 visas if

qualified. Applicants must present proof of relationship to the petitioner at the time of the interview. In order to qualify for a B-2 visa it must be established that the child will continue to reside abroad after naturalization and will enter the United States specifically for the purpose of such naturalization. (**NOTE:** The naturalization must be completed prior to the child's 18th birthday.)