

## **The ABC's of Immigration: Adoption and Orphans**

by Gregory Siskind

In the past few decades, the number of children born abroad who are adopted by American parents has increased dramatically. Often, immigration concerns are a major issue in the international adoption process.

### **What requirements that must be met for obtaining permanent residence are specific for adopted foreign orphans?**

Special rules apply for obtaining permanent residence for adopted foreign orphans that do not apply in other family based immigrant categories. For these special rules to apply, the following five requirements must be met:

- The child's country of origin must permit adoptions by foreign nationals, and the prospective US citizen parents must comply with all of the rules of that country relating to adoptions;
- The child to be adopted must be under 16 years old and must either have no surviving parent or only one parent who cannot care for the child and has authorized the child's adoption and immigration;
- The adoptive parent must be a US citizen, although in the case of a married couple, who must make a joint petition, only one needs to be a US citizen. Single adoptive parents must be at least 25 years of age;
- The child must have been formally adopted in its country of origin, or the adoptive parents must have custody of the child for immigration and an adoption to be finalized in the US; and
- A designated agency must make a favorable recommendation about the suitability of the home into which the adopted child will move.

People interested in foreign adoptions should be aware of all the rules relating to adoption in the country from which they want to adopt. These rules can vary greatly, and are often quite complex. However, trying to avoid these rules will result in the USCIS denying the orphan application. While these rules are beyond the scope of this article, the State Department website provides a great deal of helpful information on foreign adoptions at <http://travel.state.gov/adopt.html>.

### **What is an orphan?**

Whether a person qualifies as an orphan depends on US law, not on the law of their home country. An orphan must be under 16, except in one circumstance. Last December, President Clinton signed into law a bill that allows a person under 18 who is adopted with a natural sibling under 16.

A child can become an orphan in a number of ways. The death or disappearance of both parents will cause a child to be an orphan. Abandonment by both parents will also render a child an orphan. Abandonment is strictly defined in USCIS regulations. It is a willful relinquishing of all parental rights and obligations when the child is no longer in the control and possession of the parents, where the parents have not transferred those rights to another person. Releasing a child to the prospective adoptive parents is not abandonment.

Desertion will also cause a child to be an orphan. Desertion occurs when the parents are not involved with the child and their whereabouts are unknown and they cannot be found.

When the child has only one surviving parent, and the parent is not able to provide adequate care, the child is considered an orphan. The mother of a child born out of wedlock and not legitimated can be considered a sole parent if the father has died, disappeared, deserted or abandoned the child. Not being able to provide adequate care means being unable to provide for the basic needs of the child in accordance with local standards.

### **What requirements must the adoptive parents meet?**

The person seeking to adopt a foreign orphan must be a US citizen. If the person is married, the couple must file the petition jointly. However, in this case, only one of the prospective parents needs to be a US citizen. For a single person to file an orphan petition, he or she must be at least 25. Furthermore, if the single adoptive parent was under 25 at the time of a foreign adoption, the adoption will be considered invalid for immigration purposes and the child must be readopted in the US.

If the child was not adopted abroad, or if the foreign adoption was invalid, the child must be adopted in the US. For this to occur, the following requirements must be met:

- The parent, or a person or organization acting on the parent's behalf, must have legal custody of the child under the laws of the child's home country
- The parent must obtain an irrevocable release for adoption and immigration from the person or entity that last had legal custody of the child
- The parent must comply with all preadoption requirements of the state in which they will live with the adoptive child
- The state in which the adoptive parent and child will live must allow a readoption or else provide for judicial recognition of a foreign adoption that was invalid for immigration purposes.

### **What is included in the home study requirement?**

Before an adopted child can be classified as an orphan, the parent and any other adults that will be living with the adopted child must be evaluated. This is part of the home study, which is to be conducted by an USCIS authorized organization. Each adult in the home must be interviewed at least once, and the home must be visited at least once. The home study report must detail the physical, mental, and emotional ability of the prospective parents to properly care for the child. If the person conducting the home study feels that they are not able to render an opinion on any of these issues, they must refer the parents to a licensed professional.

Along with interviews and psychological evaluations, the home study must contain the following:

- An assessment of the prospective parent's finances
- An analysis of the suitability of the home if there is any history of substance abuse, child abuse, sexual abuse or domestic violence by anyone in the home in which the orphan will live. The examiner must search any available child abuse registry, and if no such registry is available, that fact must be noted in the report. A history of

abuse will not automatically result in an unfavorable recommendation if the person shows that they have been rehabilitated.

- A discussion of any previous denial of an adoption or unfavorable home study report
- A discussion of any criminal history or arrests of any adult in the household
- A thorough description of the home in which the orphan will live
- If the orphan is handicapped or has other special needs, there must be an evaluation of the suitability of the home in light of those needs
- A summary of required preadoption counseling about processing and problems in international adoptions
- If the home study results in a favorable recommendation, there must be a discussion of the reasons for that recommendation

The home study must be submitted to USCIS while it is less than six months old. If there are significant changes after it has been submitted, it must be amended.

### **How do I go about petitioning for an adopted orphan?**

There are two steps in petitioning for an adopted orphan. The first, called advance processing, examines the ability of the prospective parents to provide a suitable home for the child. The second focuses on whether the child can properly be classified as an orphan.

In the advance processing step, the prospective parents must submit evidence of at least one spouse's US citizenship, and, in the case of a single parent, that the parent is of the proper age. The advance processing application can be filed by a single parent at 24 years of age. If married, the marriage certificate must be submitted as well as evidence of the termination of any prior marriages. The home study is also submitted at this stage. The application is submitted to the local USCIS office with jurisdiction over the place where the adoptive parent lives.

If the application is approved, the parents will be notified and the application sent to either an USCIS office overseas where the child lives, or, if there is not an USCIS office, to the closest consulate that issues immigrant visas. The petition for the orphan must be filed within 18 months of the approval of the advance processing application. The orphan petition must include a copy of the advance processing application approval notice, proof of the orphan's identity and age, and evidence that they are in fact an orphan. If the child is in the US, the parent can seek to have the child classified as an orphan, and also file for adjustment of status at a local USCIS office, but only if the child has been paroled into the US. Children who are in the US in a nonimmigrant status or who are here without USCIS authorization are not eligible to receive orphan status or to adjust status. If the child is abroad, they will receive an immigrant visa from the consulate. Once the consulate adjudicates the case, the child will be admitted as a permanent resident.

### **What are the different visa types for orphans traveling to the United States to be adopted?**

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.

The IR-4 visa classification signifies that the orphan will be adopted by the petitioner 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 U.S. and is legally able to do so. The petitioner must have secured permanent legal custody of the orphan under the laws of the orphan's home country. That custody must be sufficient to allow the child to be taken from the country and adopted abroad. In addition, the petitioner must have fulfilled any applicable pre-adoption requirements of their home state.

### **How can the adopted orphan be naturalized?**

The Child Citizenship Act of 2000 confers automatic citizenship upon IR-3 orphans upon their admittance to the United States. IR-4 orphans must be readopted in the United States before they are automatically U.S. citizens.

---

**Gregory Siskind** (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, Haas and Devine (www.visalaw.com), which has offices in the United States and around the world. He is an active member of the American Immigration Lawyers Association (AILA). He is a member of the American Bar Association (ABA), where he currently serves as Chairman of the Law Practice Management Publishing Board and on the Governing Council of the Law Practice Management Section. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is a co-author of *The J Visa Guidebook* published by LexisNexis Matthew Bender, and the author of *The Lawyer's Guide to Marketing on the Internet*, published by the ABA. He graduated magna cum laude from Vanderbilt University and received his law degree from the University of Chicago.