

DOMESTIC ADOPTION BY FOREIGN NATIONALS

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The framework of adoption in the United States changed drastically in 2008 when the Hague Convention on Intercountry Adoption became effective in the United States. Not only does the Hague Convention alter the adoption process for U.S. citizens wishing to adopt internationally, the Convention also impacts non- U.S. citizens residing in the U.S. who wish to adopt domestically and U.S. citizens living abroad who wish to adopt in the United States. Since failure to comply with the highly technical requirements of the Convention can have severe consequences, it is critical to determine at the outset whether the Convention applies to your situation.

The Convention establishes international standards of practice regulating intercountry adoption. The aim of the Convention is to protect adoptive children and to ensure that an intercountry adoption is in the best interest of the child involved. The Convention requires each country to establish a Central Authority, which is both the authoritative source of information on that country's intercountry adoption requirements as well as the point of contact for that country when questions arise. The Convention only applies to adoptions when the sending country (where the child was born) and the receiving country (where the potential adoptive parents reside) are both parties to the Hague Convention. Therefore, adoptions from non-Hague countries such as Ethiopia and South Korea are not covered by the Hague Convention. However, Canada, Australia, New Zealand, China, and EU member states are some of the 70 parties to the Convention.

Prior to April 1, 2008 (the Convention "implementation date" in the U.S.) significant numbers of non-U.S. citizens adopted children from the United States. The relative ease of the U.S. adoption process, combined with the greater number of children available for adoption, made this choice a very attractive option. The recent implementation of the Convention by the United States, however, has transformed the adoption process for such adoptive parents. Unfortunately, for non U.S. citizens living in the U.S. or U. S. citizens living abroad, it is not always obvious when an adoption will be considered an intercountry adoption.

FOREIGN NATIONALS LIVING IN THE UNITED STATES

The U.S. Department of State (the State Department) is the United States' Central Authority for adoption matters. The State Department has issued a *Guide to Outgoing Cases* which explains when the adoption of a child in the U.S. is an intercountry adoption and thus will be governed by the Hague Adoption Convention.(the "Guide".)¹ According to the State Department, an adoption is subject to Convention rules when the child is a "habitual resident" of the United States and the adoptive parents are "habitual residents" of another Convention country to which they will move (i.e. from the U.S.) with the child

¹ The State Department *Guide to Outgoing Cases* is available on line at:
<http://adoption.state.gov/pdf/OutgoingCasesFAQs.pdf>.

after adoption. The determination of whether prospective adoptive parents are habitually resident in the U.S. is therefore critical. The State Department clearly indicates that it will defer to habitual residency determinations made by the Central Authority of the Adoptive Parents' country of citizenship. This is presumably true regardless of the length of time the adoptive parents have resided in the U.S. and regardless of whether the adoptive parents have a present intention to remain in the U.S. indefinitely.

Foreign nationals who are not "habitual residents" of the United States must comply with the requirements of the Hague Convention. They must therefore initiate the adoption process, and be approved to adopt in the United States, by their country's Central Authority. While most U.S. states are expansive with regard to their adoption eligibility criteria, that is not the case in many other Convention Countries. Some families may even be denied approval to adopt because they fail to meet the age, marital status, or health qualifications imposed by the Central Authority of their country of citizenship. Unfortunately, the Central Authority in some countries also takes years to process adoption applications. Once the adoptive parents are approved to adopt, the Convention requires that the adoptive parents work only with United States adoption agencies which are "Hague accredited". Since only a relatively small number of U.S. adoption agencies are currently Hague accredited, this requirement is also limiting.

On the other hand, a determination that the foreign national adoptive parent is habitually resident in the U.S. means that the adoption of a child in the U.S. would be considered a "domestic" rather than an "intercountry" adoption and Convention rules would not apply. Foreign nationals residing in the United States who have the ability and intention to remain in the United States indefinitely should thus attempt to obtain a ruling from their Central Authority confirming their U.S. habitual residency status. The Office of Children's Issues in the State Department Bureau of Consular Affairs may be able to assist prospective adoptive parents in this effort. It also may be necessary to retain the services of an attorney in both the United States and the foreign country in order to resolve this important issue.

In the absence of a determination of habitual residency from the foreign Central Authority, the state court judge presiding over the U.S. adoption should rule on the habitual residency issue. Significantly, the State Department Guide, which is intended to assist state officials to make a determination of habitual residence status, instructs that: *"In the Department's view, a rebuttable presumption should apply to those prospective adoptive parents(s) who were admitted into the United States under any of the non immigrant visa categories that they are not resident in the United States."* (See the Guide at Section II(A)(4). In other words, any foreign national living in the United States, without legal permanent residency status likely will presumptively be considered *not* a habitual resident of the United States.

Even where the U.S. state court determines that adoptive parents are habitually resident in the U.S., the adoptive parents' country of citizenship is not bound by the state court ruling. The relevant court or administrative body of the adoptive parents' country of citizenship could decide, *after the fact*, that the adoptive parents were not habitually

resident in the U.S. Thus, absent compliance with the rules in force in the country of citizenship, the adoptive parents would not be in compliance with the Convention and the adoption would not be recognized. As a result, the child would not be entitled to citizenship in the foreign country and could even be denied admission to that country. In such a situation, the adoptive parents' ability to remain in the U.S. would expire with their visa and the parents' request for their child to enter and remain in his or her parents' country could be denied. They would truly be a family without a country!

UNITED STATES CITIZENS RESIDING ABROAD

United States citizens residing abroad, who seek to adopt a child from the United States, are also strongly advised to address at the outset of the adoption process the issue of their habitual residency status. It should be reassuring to those families that the U.S. Department of State's position, as expressed in the Guide, is that *"The Department of State generally considers a U.S. citizen residing in a Convention country to be resident in the United States if the U.S. citizen is domiciled in the United States or intends to establish a domicile in the United States at any point before the child's 18th birthday."* See The Guide at Part B.4. The State Department warns, however, that the state court with jurisdiction over the adoption is not required to follow the State Department's guidance. Additionally, the following warning was recently posted on the State Department website: *"The Department of State wishes to notify U.S. citizens living abroad in another Hague Adoption Convention country who plan to adopt a child residing in the United States or a third country, that the country where the adoptive parents live may require them to follow local adoption laws and procedures as the receiving country in a Convention adoption, in order for the child to enter that country legally. Prospective adoptive parents should therefore consult the Central Authority of the receiving country prior to initiating an adoption."*

Whether you are a foreign national who is living in the U.S. or an American citizen who is not, the importance of addressing the issue of whether you will be considered habitually resident in the United States before undertaking the adoption process cannot be overstated. Potential adoptive parents must obtain guidance from both the relevant foreign Central Authority and the U.S. Department of State. In many cases it may also be necessary to retain the services of an attorney with experience in this area of the law. The consequences of a wrong decision are simply too serious for anyone to ignore.

Article by Denise Seidelman and Diane Kunz
Rumbold & Seidelman, LLP
116 Kraft Avenue
Bronxville, NY 10708
914-779-1050
914-779-1050
info@adoptionlawny.com