U.S. Citizenship and Immigration Services

WHAT JUDGES NEED TO KNOW

Domestic Adoption of Foreign-Born Children in the United States

September 2024

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PRESENTATION OUTLINE

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- Foreign-Born Children and State Courts: An Introduction
- Adoption of Foreign-Born Children: An Overview
- Adoption of Children from Hague Adoption Convention Countries Living in the U.S.
- Special Immigrant Juvenile Classification Summary
- State Court Scenarios
- Adoption and Special Immigrant Juvenile Resources

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FOREIGN-BORN CHILDREN & STATE COURTS: AN INTRODUCTION

FOREIGN-BORN CHILDREN ENCOUNTERS WITH IMMIGRATION

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- Children may first encounter the immigration system in many ways, including:
  - Apprehension by U.S. Customs and Border Protection (CBP) at the border or by U.S. Immigration and Customs Enforcement (ICE) inside the U.S., or
  - By affirmatively filing an immigration application or petition with USCIS.

- Unaccompanied children apprehended by CBP are placed in the care of the Department of Health and Human Services Office of Refugee Resettlement (ORR) and may be released to a family member, friend, other vetted sponsor, or state foster care.

How do children end up in State Court?

- Attorneys or Community-Based Organizations may assist the child to identify immigration and custody options, which often involve state court proceedings. Others may already be in the state child welfare system.

IMMIGRATION PATHS FOR FOREIGN-BORN CHILDREN IN THE U.S.

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Foreign-born children living in the United States may be eligible to become lawful permanent residents (LPRs) and U.S. citizens in several ways, including:

- As relatives of U.S. citizens or LPRs;
- Through the asylum process;
- After adoption by a U.S. citizen or an LPR; or
- As a Special Immigrant Juvenile (SIJ).

This presentation addresses the **domestic adoption of foreign-born children living in the United States with additional notes about the **SIJ process**, when applicable.

FOREIGN-BORN CHILDREN & STATE COURTS: ADOPTIONS

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State courts may be involved in a child's immigration-related **adoption** process in various ways, including:

- Finalizing adoptions begun abroad, issuing readoptions, or recognizing the foreign adoption of children who have immigrated through the **orphan or Hague Adoption Convention process**;
- Issuing readoption orders or judicially recognizing the foreign adoption of children who have immigrated through the **family-based petition process**; or
- Issuing an adoption order for a child who did not come to the U.S. through an adoption related process and who will adjust status as the relative of a U.S. citizen or LPR.

THE HAGUE ADOPTION CONVENTION

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- The Hague Adoption Convention (Convention) is an international treaty to prevent the abduction, sale, or trafficking of children and to ensure that intercountry adoption is in the best interests of a child.
- It entered into force for the United States on April 1, 2008.
- More than 105 countries are party to the Convention.
- Convention countries have a *Central Authority* or other legal entity that is responsible for ensuring that adoptions comply with the Convention.
- A list of Convention countries with dates the Convention entered into force for each country is on the Hague Conference On Private International Law website (hcch.net).
- **Adoptions subject to the Convention generally must follow the Convention rules and rules established by their Central Authority.**

PREVIEW OF SOME FACTORS TO CONSIDER

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- What is the immigration status of the child and the legal parent (or prospective adoptive parent)?
- Where was the child born?
- Does the Convention apply to the adoption?
  - Is the child from a Convention country?
  - Is the adoptive parent a U.S. citizen?
- If the child is from a Convention Country, where is the child considered habitually resident?
- Was the child adopted outside the United States, and the court is issuing a readoption, recognition, or final adoption?
- Could the court also consider a Special Immigrant Juvenile determination (for a child without LPR or other status)?

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ADOPTION OF FOREIGN-BORN CHILDREN: OVERVIEW

ADOPTION-BASED IMMIGRATION PATHS

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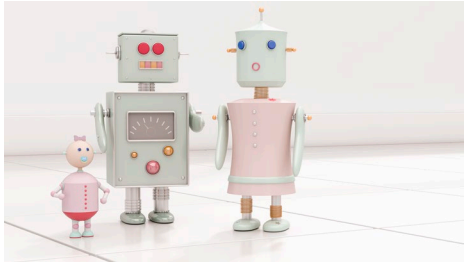
There are three different adoption-related avenues for children to immigrate to the United States:

1. **Hague Adoption Convention process** (for children from a Convention country adopted by, or coming to the U.S. for adoption by, a U.S. citizen, and who meet the definition of Convention adoptee per INA 101(b)(1)(G)).
2. **Orphan process** (for children from a non-Convention country adopted by, or coming to the U.S. for adoption by, a U.S. citizen and who meet the definition of orphan per INA 101(b)(1)(F).
3. **Family-based visa process** (for children from non-Convention* countries adopted by U.S. citizens or lawful permanent residents).

Some children may need to be adopted, readopted or have their adoption recognized in the United States.

*Certain exceptions may allow using the family-based visa process for children from Convention countries.



ORPHAN & CONVENTION ADOPTION PROCESSES: STEPS AND SIMILARITIES

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- Prospective adoptive parents (PAPs):
  - Have a home study completed.
  - Apply to USCIS to be found suitable and eligible to adopt.
  - File an immigrant petition with USCIS for a specific child who they have adopted or will adopt.

  USCIS approves petition if the child is eligible to immigrate under U.S. immigration law as an "orphan" or Convention adoptee.
- PAPs living in the United States apply to the Department of State (DOS) to obtain a visa for the child and the child enters the United States (as an LPR or U.S. citizen, depending on the circumstances), or the child would apply with USCIS for adjustment to lawful permanent resident status.

THE FAMILY-BASED PETITION PROCESS

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State courts sometimes issue final adoption orders for children living in the United States who will later seek to apply for an immigration benefit as the relative of a U.S. citizen or LPR.

The family-based adoption immigration process requires the adoptive parent to have:

- A final adoption before the child reaches age 16 (or age 18 if the sibling exception applies);
- 2 years of legal custody of the child; and,
- 2 years of joint residence with the child.

Certain exceptions may allow using the family-based visa process for children from Convention countries, however, these requirements still apply even if the adoption is exempted from the applicability of the Convention.

Key Points:

- Adoption must be completed before age 16 (or age 18 if the sibling exception applies).
- It is helpful for the adoption order to include available information about how long the child lived with the adoptive parent(s) and if legal custody began prior to the adoption proceeding.

FAMILY-BASED PETITION PROCESS AGE PROVISIONS

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The adoption must be **finalized before the child turns 16** unless the sibling exception applies (which permits adoption up to age 18 if the child is the birth sibling of a child who qualifies as an adopted child or orphan and is adopted by the same parents).

***Retroactive Adoption Orders (or Nunc Pro Tunc* Adoption Orders):** Generally, USCIS will not consider a retroactive adoption order entered on or after the child's 16th or 18th birthday to establish the child meets the age requirement at the time of adoption, unless:

- The petitioner initiated the adoption proceeding before the child's 16th birthday (or 18th birthday if the sibling exception applies);
- The law of the jurisdiction where the order was issued **expressly** permits an adoption decree to be dated retroactively; and
- The court's order grants the adoption with an effective date before the adoptee beneficiary's 16th birthday (or 18th birthday if the sibling exception applies).

FAMILY-BASED PETITION PROCESS
LEGAL CUSTODY & JOINT RESIDENCE

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2 Years Legal Custody

- Legal custody must be a formal grant of custody from a foreign or domestic court or authorized governmental entity.
- Legal custody typically begins with the issuance of the final adoption order but can be granted and begin counting before the adoption is final, most commonly in the form of a guardianship.
- If a judge orders an adoption retroactively, as expressly permitted by the law of the jurisdiction where the order was issued, the time may count toward legal custody.

2 Years Joint Residence

- The petitioner must establish that the adoptive parent(s) jointly resided with the child in a familial relationship with the adoptive parent(s), with the adoptive parent(s) exercising parental control over the child for two years.

Legal custody and joint residence may be accrued inside or outside the United States unless a restriction applies because the child is from a Convention country.

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ADOPTION OF FOREIGN-BORN CHILDREN LIVING IN THE UNITED STATES FROM CONVENTION COUNTRIES

STATE COURTS & THE CONVENTION

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When do U.S. judges need to consider Convention implications in the context of U.S. adoptions of foreign-born children?

- If the child is from a **Convention country**, and
- At least one adopting parent or their spouse is a **U.S. citizen**.
- The adoption at issue occurred when the Convention was in effect in both countries.

The Intercountry Adoption Act of 2000 (IAA) § 301(c) limits state courts' authority to issue an order declaring a Convention adoption final in cases where the child entered the United States from another Convention country for purposes of adoption, unless DOS has certified compliance with the Convention procedures by issuing a Hague Adoption Certificate or Hague Custody Certificate.

IMMIGRATION STATUS OF ADOPTING PARENT/SPOUSE

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Common documents that demonstrate U.S. citizenship:

- Birth certificate, issued by a state or by DOS;
- U.S. passport;
- Certificate of Citizenship; or
- Naturalization Certificate.

KEY CONVENTION DATE: APRIL 1, 2008

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All adoptions occurring on or after April 1, 2008:

- Involving a **U.S. citizen habitually resident** in the United States
- Seeking to adopt and bring to the United States a **child habitually resident** in another Convention country. . .

***Exceptions may apply**

THE HAGUE ADOPTION CONVENTION- RULE

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- **General rule**: A state court generally should **not** issue an adoption order for a child who is habitually resident in a Convention country being adopted by a U.S. citizen, (or where the spouse is a U.S. citizen) unless the Convention mandates are followed.

- Otherwise, the child may face delays, complications, or be unable to obtain lawful immigration status in the United States or become a U.S. citizen.

FAMILY-BASED IMMIGRATION

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- There are restrictions on approving a family-based adoption petition if the petitioner (or their spouse) is a U.S. citizen and the adoptee beneficiary is from a Hague Adoption Convention country.
- USCIS cannot approve a family-based adoption petition filed by a U.S. citizen (or LPR married to a U.S. citizen) who is habitually resident in the United States on behalf of an adoptee beneficiary who is habitually resident in another Hague Adoption Convention country, unless the petitioner establishes that the Hague Adoption Convention does not apply because either:
  1. The U.S. citizen is not habitually resident in the United States; or
  2. The child is not habitually resident in the other Hague Adoption Convention country.

CHILD IN THE UNITED STATES FROM A CONVENTION COUNTRY

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- If a child is a citizen of a Convention country and is present in the United States, the child is still generally considered habitually resident in their country of citizenship, and a U.S. citizen must generally follow the Hague Adoption Convention process.
- However, USCIS is a competent authority under the Convention that can determine a child in the United States is habitually resident in the United States rather in their country of citizenship.
- If USCIS makes this determination, the Convention does not apply, and the U.S. citizen (or their LPR spouse) can use the family-based petition process.

USCIS HABITUAL RESIDENCE POLICY

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There are two ways to establish a child in the United States is not habitually resident in their Convention country of citizenship, and therefore the Convention does not apply to the adoption:

1. Prospective or adoptive parents obtain a written statement from the child's country of origin indicating the child is no longer habitually resident there; or
2. Prospective or adoptive parents are unable to obtain such written statement, and can establish the intent, actual residence, and notice criteria are met in accordance with USCIS guidance.

Note: In the context of the immigrant visa petitions, only USCIS can determine whether the Convention applies based on the petitioner's and beneficiary's habitual residence.

CONVENTION EXCEPTION ONE

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Habitual Residence Letter from the Central Authority

A U.S. citizen petitioner may demonstrate the child is not habitually resident in the Convention country of citizenship if:

- The Convention country's **Central Authority issues a written statement** that it is aware of the child's presence in the United States and the proposed adoption, and it has **determined that the child is no longer habitually resident in the Convention country**;
- The U.S. adoption order must expressly incorporate this statement from the Central Authority; and
- The adoptive parent must provide the adoption order and Central Authority statement to USCIS with the immigration petition.

The petitioner may obtain a Central Authority statement **after** the adoption or during the immigration process and obtain an amended adoption order with the required language.

CONVENTION EXCEPTION TWO

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No Habitual Residence Statement from the Central Authority: Intent, Actual Residence, and Notice Criteria* Must be Met.

If the petitioner cannot obtain a written statement from the Convention country's Central Authority because:

- DOS has confirmed the Central Authority of the child's country of origin does not issue statements of habitual residence (currently only applies to Mexico);
- The Central Authority has informed the petitioner in writing it will not determine the child's habitual residence; or
- The petitioner shows they requested a written habitual residence statement from the foreign Central Authority with no response for at least 120 days.

Then, a U.S. citizen petitioner may demonstrate the child is not habitually resident in the Convention country of citizenship if the **intent, actual residence and notice*** criteria are met.

CONVENTION EXCEPTION TWO (*cont.*)

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Intent, Actual Residence, and Notice Criteria

If the petitioner cannot obtain a written habitual residence statement from the foreign Central Authority, the petitioner must establish that the following criteria are met:

- **Intent:** When the child entered the United States, it was not for purposes of adoption;
- **Actual Residence:** Before the U.S. domestic adoption, the child actually and physically resided in the United States for a substantial time period, establishing compelling ties in the United States; **and**
- **Notice:** For any case in which the adoption took place on or after Feb. 3, 2014, the adoption order or amended adoption order confirms that the country of origin's Central Authority was notified of the adoption proceeding (or amended adoption proceeding) in a manner satisfactory to the court and that the country of origin did not object to the proceeding with the court within 120 days after receiving notice or within a longer time-period as determined by the court.

CONVENTION EXCEPTION TWO *(cont.)*

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Notice Criteria, continued: The notice to the foreign Central Authority must include a copy of the adoption petition or the motion for amended adoption order and must clearly specify:

- The name, place, and date of birth of the adoptee, and the name(s) of the birth parent(s), if known;
- The country of nationality of the adoptee;
- The name of the Central Authority in the adoptee's country of origin;
- The names of the adopting parents;
- The date of the adoptee's departure from the country of origin, if known;
- The date of the adoptee's arrival in the United States, if known;
- The court name and the date, time, and place of the court's hearing on the adoption petition or motion for amended adoption order; and
- An indication that the Central Authority should notify the court if the Central Authority does not intend to object or requires additional time beyond 120 days.

The **court order** must indicate that proper notice was given to the Central Authority and that the Central Authority did not object to the adoption within 120 days.

TIPS FOR COURT ORDERS

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What information is helpful to include in the U.S. court order when the case involves a U.S. citizen adoptive parent and a child from a Convention country?

- **Language confirming the Central Authority of the child's country of origin:**
  - Provided a letter advising the court that it is aware of the child's presence in the United States and of the proposed adoption; and
  - The Central Authority has determined the child is not habitually resident in the country of origin (if obtainable); **or**
- **Any findings, as applicable, that:**
  - The child did not enter the United States for the purpose of adoption;
  - The child resided in the United States for a substantial time-period and had compelling ties in the United States before the adoption; and
  - The petitioner provided notice of the adoption proceedings to the foreign Central Authority in a manner satisfactory to the court and provided the Central Authority with 120 days to object.

TIPS FOR COURT ORDERS *(cont.)*

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What other information is helpful to include in the U.S. court order?

- **Birth parent's consent:** The court's determination regarding consent, whether the court dispensed with consent of one or both birth parents, and on what basis.

- **Adoption process and factors:** A description of the adoption process and the factors the court considered in granting the adoption.

- **Child's living arrangements prior to adoption:** Whether the child was a ward of the state court prior to the adoption.

RECAP: SOME FACTORS TO CONSIDER

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- **Does the Hague Adoption Convention apply to the adoption?**
  - Is the child from a Convention country (look at DOS list of signatory countries)?
  - The adoptive parent, or the spouse, is a U.S. citizen?
  - If the child is from a Convention country **and the adoptive parent or the spouse** is a U.S. citizen, the Convention may apply.

- **Is the petitioner able to establish the Hague Adoption Convention does not apply because the child is not habitually resident in a Hague Convention country?**
  - Has the Central Authority issued a written statement regarding habitual residence?
  - If it has not,
    - Did the petitioner provide 120 days to object; and
    - Does the child meet the intent actual residence, and notice criteria?
    - Notice criteria applies if the adoption took place after Feb. 3, 2014.

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SPECIAL IMMIGRANT JUVENILE CLASSIFICATION: BRIEF SUMMARY

SIJ ELIGIBILITY

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To be eligible for SIJ classification, the child must:

- Be unmarried and present in the United States at the time of filing and adjudication by USCIS;
- Be under 21 when USCIS receives the SIJ petition; and
- Have a valid SIJ predicate order from the State juvenile court with required determinations.

USCIS must **consent** to SIJ classification by finding that the petition is *bona fide,* meaning that a primary reason the child sought the juvenile court determinations was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under state law.

SIJ DETERMINATIONS

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A juvenile court must issue the following judicial determinations **under state law**:

- The child is **dependent** on the court or placed in the **custody** of an individual or entity;
- The child **cannot reunify** with one or both parents because of abuse, abandonment, neglect, or a similar basis under state law; and
- It is not in the child's **best interest** to be returned to their or their parent(s)' country of nationality or last habitual residence.

SIJ DETERMINATIONS *(cont.)*

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For USCIS to consent to the grant of SIJ classification, the record must also contain evidence of:

- A **factual basis*** for each of the judicial determinations; and

- **Relief** from parental abuse, abandonment, or neglect, or a similar basis under state law (which may include custodial placement, dependency for child welfare services, and/or other protective or remedial relief, including recognition of placement in ORR custody).

***Factual basis:** the factual basis for the court's determinations demonstrates that the juvenile court order was sought to protect the child, and the record shows the juvenile court provided relief from abuse, neglect, abandonment, or a similar basis under state law.

SIJ COURT ORDER TIPS

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- Establish that determinations were **issued under state law** (for example, with a citation to relevant state law). Do not just mirror or cite to immigration law and regulations.
- Establish that the court **exercised jurisdiction over the petitioner as a juvenile, minor or equivalent** under state law at the time the order was issued.
- Include the **names of parent(s)** if known. If parent(s) are unknown, the record should reflect that they are unknown.
- **Age-Outs:** the child must obtain the juvenile court order before they age out of the court's jurisdiction. The child must also submit the SIJ petition to USCIS before they reach age 21, even in states where juvenile court jurisdiction may extend beyond 21.

SIJ vs. HAGUE ADOPTIONS

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Note: Convention restrictions do not apply to SIJ predicate orders or SIJ adjudications.

However, SIJ is generally not an appropriate option for those children who come to the United States for the primary purpose of adoption. Although the Convention does not apply to SIJ cases, SIJ classification is not meant to provide a way to circumvent the Hague Adoption Convention or other requirements for obtaining lawful immigration status through adoption.

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STATE COURT SCENARIOS

STATE COURT SCENARIO 1

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A 14-year-old from a Convention country entered the United States as a student and has been living in the United States for several years. Her aunt, who is an unmarried LPR, seeks to adopt her.

- If the child meets other eligibility requirements, she may be eligible for SIJ.
- Note: SIJ classification is not meant to provide a way to circumvent the Hague Adoption Convention or other requirements for obtaining lawful immigration status through adoption.
- The Convention does not apply because the adoptive parent is not a U.S. citizen and is not married to a U.S. citizen. There are no Convention-related implications if the court grants a domestic adoption.

STATE COURT SCENARIO 2

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An 8-year-old from a Convention country entered the United States as a visitor and is staying with her U.S. citizen aunt, who files an adoption petition within a month of arrival.

- If child meets other eligibility requirements, she may be eligible for SIJ.
- The Convention might apply to the adoption, unless:

  (1) The petitioner obtains a habitual residence letter from the Central Authority stating the child is not habitually resident in the country of origin; or

  (2) If the petitioner is unable to get a letter, the child meets the intent, actual residence, and notice criteria of USCIS' habitual residence policy.

Meeting all these criteria may be challenging because it appears the child entered the United States for the purpose of adoption and so may not be able to meet the intent and actual residence criteria.

STATE COURT SCENARIO 3

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A 16-year-old from a Convention country entered the United States without inspection and has been residing in ORR custody. A U.S. citizen family friend seeks to adopt the child.

- If the child meets other eligibility requirements, they may be eligible for SIJ. Convention restrictions do not apply to SIJ orders.

- Even if the court grants an adoption, because the child is already 16 years old, they generally will not qualify for LPR or U.S. citizenship based on the adoption (unless the sibling exception applies).

STATE COURT SCENARIO 4

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A 13-year-old from a Convention country entered the United States without inspection three years ago with her father. She was removed from the home and placed in foster care due to alleged abuse by her father. Her U.S. citizen grandmother seeks to adopt her.

- She may be eligible for SIJ if she meets the other eligibility criteria.

- The Convention might apply to the adoption, unless:
  (1) The petitioner obtains a habitual residence letter from the Central Authority stating the child is not habitually resident in the country of origin; or
  (2) If the petitioner is unable to get a letter, the child meets the intent, actual residence, and notice criteria of USCIS' habitual residence policy.

STATE COURT SCENARIO 5

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A 15-year-old from a Convention country entered the United States as a visitor to visit Disney World. When issued his visa, he told DOS that he intended to return home to his parents in his country of origin. He has been living with a U.S. citizen family friend for four months, and the friend has filed an adoption petition.

- The child may be eligible for SIJ if he meets other eligibility requirements.
- The Convention might apply to the adoption, unless:
  - The petitioner obtains a habitual residence letter from the Central Authority stating the child is not habitually resident in the country of origin; or
  - If the petitioner is unable to get a letter, the child meets the intent, actual residence, and notice criteria of USCIS' habitual residence policy. Meeting the intent and actual residence criteria may be difficult because the child entered the United States just four months before the adoption.

STATE COURT SCENARIO 6

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A 9-year-old from Mexico (a Convention country) entered the United States with her mother without inspection as a baby. Her mother married a U.S. citizen who seeks to adopt her as her stepparent. They live together as a family.

- The child may be eligible for SIJ if she meets other eligibility requirements.
- Note: Mexico does not issue Habitual Residence determinations for children in the United States. The Convention might apply to the adoption, unless the petitioner establishes to USCIS that the child meets the intent, actual residence, and notice criteria.

STATE COURT SCENARIO 7

A child entered the United States through the orphan processes because only one parent adopted the child and now needs to be readopted by both parents in the United States to have a final adoption to acquire U.S. citizenship (assuming other citizenship requirements are met).

- Court can issue the readoption.
- Based on these facts, it is not apparent that the child would be eligible for SIJ.

STATE COURT SCENARIO 8

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The child entered the United States through the orphan or Convention intercountry adoption process and has a legal custody order from the foreign country. The parents now seeks to finalize the adoption in the United States in a state court where they reside.

- The court can issue the final adoption.
- Based on these facts, it does not appear that SIJ would apply because the child generally becomes a U.S. citizen by operation of law after they receive a final adoption and all necessary requirements for acquisition of citizenship are met.

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RESOURCES

ADOPTION RESOURCES

- Statutory and Regulatory Citations:
  - 8 USC 1101 (b)(1)(E), (F), or (G) for definitions of adopted child, orphan, and Convention adoptees.
  - 8 CFR 204.3 for orphan petitions; 8 CFR 204.300 – 204.314 for Convention adoptee petitions; and 8 CFR 204.2(d)(2)(vii) for adoption-related family-based petitions
  - 22 CFR 96 governs the provision of adoption services, Central Authority responsibilities, and accrediting entity responsibilities.

- USCIS Policy Manual: uscis.gov/policy-manual/volume-5

- Website: uscis.gov/adoption
  - Sign up for automatic updates

SIJ RESOURCES

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- Regulatory Citations: 8 CFR 204.11; 205.1(a)(3)(iv); 245.1(e)(3)
- SIJ Final Rule: 87 FR 13066
- USCIS Policy Manual guidance
  - Volume 6, Part J: Special Immigrant Juveniles
  - Volume 7, Part F: Special Immigrant-Based Adjustment of Status, Chapter 7, Special Immigrant Juveniles
- SIJ Landing Page: uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-juveniles
- SIJ FAQ: uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-juveniles/special-immigrant-juvenile-sij-frequently-asked-questions

QUESTIONS

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Any questions?

Thank you!

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