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Re: *Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes; Updates to Adjudicator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10 (PM-602-0070)*

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the interim policy memorandum, "*Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes; Updates to Adjudicator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10*" (PM-602-0070).¹

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA appreciates the opportunity to comment on this interim policy memorandum and believes that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

AILA appreciates the opportunity to comment on PM-602-0070, which provides guidance to all USCIS employees on whether an adoption is valid for immigration purposes. AILA believes, however, that several errors and omissions in the referenced interim policy memorandum should be addressed.

¹ *USCIS Interim Memo on Adoption Validity for INA Purposes*, AILA Doc. No. 12071944,
<http://www.aila.org/content/default.aspx?docid=40581>;

<http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/guidance-adoption-valid-ina-july-9-12.pdf>

A. Correct the Memo to Reflect INA section 101(b)(1)(E)

1. On the first bullet point of the first page under “Background,” the text should read:

“INA section 101(b)(1)(E), which applies to adopted children if certain requirements are met, including where the parent or parents have two years of *legal* custody and *physical* residence.”²

B. The Derivation of the Two-Prong Test

2. On the second page under “Background,” the two-prong test for a valid adoption for immigration purposes from the Board of Immigration Appeals (BIA) does not include citations. Since *Matter of Mozeb* does not definitively articulate such a test, please provide the citations from where the test is being gleaned in the final memorandum.³

C. The Three-Prong Test Is a Guideline and Not a Rule

3. On the second page under “Policy,” the three-prong test articulated for the definition of adoption should be acknowledged as a guideline and not a rule, which would require notice and comment.

In 21.15 (b), *Matter of Mozeb* is cited as the origin of the three-prong test, but *Matter of Mozeb* does not in fact refer to a three-prong test of validity for an adoption.⁴ Instead, it would be more accurate to use the *Matter of Mozeb* statement that an adoption must create "a legal status comparable to that of a natural legitimate child" between the adopter and adopted as the test for the validity of an adoption.⁵ States have struggled for years to articulate a coherent definition of adoption. The Policy Memorandum should specifically state that it is providing guidance and examples to clarify the range of situations that could count as a valid adoption for immigration purposes.

Please find below two examples which illustrate why the three-prong test should be referenced solely as guidance.

- a. The second prong of the test states that the legal parent-child relationship with the prior legal parent must be terminated in an adoption. However, this is not always the case. In a step-parent adoption, the rights of the spouse of the adopting parent [the legal parent of the child] are not terminated, and only the rights of the other legal parent cease.

² INA section 101(b)(1)(E)

³ *Matter of Mozeb*, 15 I&N Dec. 430 (BIA 1975)

⁴ *Id.*

⁵ *Matter of Fakalata*, 18 I&N Dec. 213, (BIA 1982)

b. As another example, if a parent dies and the child is adopted by the surviving-parent's spouse, the legal relationship between the child and the deceased parent does not terminate. In Massachusetts for example, M.G.L. ch. 210 section 7 states:

“...a person shall by adoption lose his right to inherit from his natural parent or kindred, except when one of the natural parents of a minor child has died and the surviving parent has remarried subsequent to such parent's death, subsequent adoption of such child by the person with whom such remarriage is contracted shall not affect the rights of such child to inherit from or through the deceased parent or kindred thereof...”

D. Clarifying Other Issues Not Mentioned in the Memorandum

4. **Regarding 21.4 and 21.15:** AILA appreciates the issuance of PM-602-0070, but if one of the purposes of the new guidance is to provide clarity as to when an I-130 can properly be filed, the guidance fails to address one of the most pressing problems that practitioners face.

Many AILA members express uncertainty on whether an I-130 can be filed for a child who is present in the U.S. and a citizen of a Hague Adoption Convention country. The uncertainty arises under the current definition of “habitual residence” of the child.⁶ The second note in the current AFM 21.4(d)(5)(F), attempts to clarify this point to correlate with guidance found in the [September 29, 2008, USCIS FAQs](#) and the [October 31, 2008, Scialabba & Neufeld memo](#) on Intercountry Adoptions (AILA Doc. Nos. 08093064 and 08103190).⁷ The content of this note should be put in a more prominent place, such as in the new 21.15 of the *AFM*. Further, [USCIS recently stated](#) that if the habitual residency determination is obtained after the adoption decree is entered and the state court issues a supplemental order with the findings, USCIS would treat the supplemental order as part of the adoption decree and allow the case to proceed as a Form I-130 case (AILA Doc. No. 12011863).⁸ This clarification should also be incorporated in the appropriate section.

5. **Regarding 21.4 and 21.15:** Similarly, the guidance by USCIS should address issues of physical residency. Many Requests for Evidence (RFEs) received by AILA members relate to proof of

⁶ 8 CFR §204.303(b)

⁷ USCIS FAQ on Intercountry Adoptions, pgs 6-7, AILA Doc. No. 08093064, <http://www.aila.org/content/default.aspx?bc=6715|12053|26284|27849|26688>, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=0dc16c30c3fac110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>; *Scialabba & Neufeld Memo on Intercountry Adoption Under Hague Convention*, AILA Doc. No. 08103190, <http://www.aila.org/content/default.aspx?docid=31201>, http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/Hague_AFM_memo31oct08.pdf

⁸ *AILA/USCIS International Operations Liaison Teleconference Q&As (10/05/2011)*, Q9, AILA Doc. No. 12011863, <http://www.aila.org/content/default.aspx?docid=38230>, http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/October%202011/AILA_IO_100511_FINAL.pdf

the two-year physical residency requirement, especially in a close-relative adoption. The standard RFE asks for a timeline of the exact dates and locations when the adoptive parents and child lived together under the same roof.

The applicable standard is whether the adopted parents exerted “primary parental control” over the child during the two year period.⁹ The emphasis of the case law and the underlying statute is to ensure that a valid parent-child relationship has been formed over time and not merely to obtain an immigration benefit. The three-prong test articulated by this memo should be the lens that is applied to the two-year residency requirement. Therefore, the physical residency requirement should be satisfied regardless of whether the adoptive parents and child lived together under the same roof if:

1. a new relationship has been formed between the adoptive parents and child,
2. the relationship with the birth parent has been severed according to the law of the country or place granting the adoption, and
3. the adoptive parents have clearly assumed primary parental control over the child as evidenced by the criteria found in the above case law for a period of two years..

Using the criteria listed above, a child who is no longer living with his/her birth parents but is living in a boarding school and the adoptive parents are exercising primary parental control would be eligible for adoption. Additionally, a child living with one adoptive parent while the other adoptive parent is on assignment elsewhere would also meet the requisite criteria.

Conclusion

AILA appreciates the opportunity to comment on this interim memorandum, and we look forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

⁹ 8 *CFR* §204.2(d)(2)(vii)(B); 9 *FAM* 42.21 N12.4. See *Matter of Cuello*, 20 *I&N Dec.* 94 (BIA, 1989); *Matter of Yuen*, 14 *I&N Dec.* 71 (BIA 1972); *Matter of Tang*, 14 *I&N Dec.* 180 (BIA 1972)