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Stephanie Zeppa

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"Let Me In, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act

By STEPHANIE ZEPPA

I. Introduction

"Every day, an average of 20 American couples adopt babies from overseas. Most of them come from Third World nations where orphanages overflow, abandoned children sleep in the streets, and poor parents see foreign adoption as one of the few ways to give their kids a decent life." However, "what the West has generally viewed as charitable, humane, even noble behavior, developing countries have come to define as imperialistic, self serving, and a return to a form of colonialism in which whites exploit and steal natural resources." Although opinions diverge greatly on the ethics of intercountry adoption, no one can deny that the number of children entering the United States through intercountry adoption is growing rapidly.

During 1997, 13,620 children entered the United States through...
intercountry adoption. This number included 3,816 children from Russia, 3,597 children from China, 1,654 children from Korea, 788 Guatemalan children and 621 Romanian children. Of the primary receiving states within the United States, California ranked the second highest with 856 intercountry adoptions in 1996. The Encyclopedia of Adoption defines intercountry adoption as "[t]he adoption of a child who is a citizen of one country by adoptive parents who are citizens of a different country." This simplistic definition does little to reveal the complicated social process involved in intercountry adoption. The complex web of laws regulating intercountry adoption, however, confirms that the process is time consuming and difficult.

Countries are learning more about the practices and views of their neighbors and expanding their knowledge from national security or commercial issues to concerns such as family values, social welfare and children's rights. Additionally, "all over the world, increasing numbers of children are crossing their national borders, due to a variety of reasons, such as poverty, war or other internal problems ...." Intercountry adoption is one piece of a growing body of domestic and international discourse and law regarding the rights of children within the international system. For example, the United Nations expressly addressed these concerns by establishing rights for children. Often, however, the economic and social realities of these children's homelands deprive them of these basic rights.

4. See id.
5. See id.
8. C.M.I. Moolhuysen-Fase, Opening Speech, in CHILDREN ON THE MOVE: HOW TO IMPLEMENT THEIR RIGHT TO FAMILY LIFE 3, 4 (Jaad Doek et al. eds., 1996) [hereinafter CHILDREN ON THE MOVE].
9. See id.
The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interest of the child shall be the paramount consideration.
Developing international standards for adoption law involves a fusion of international norms of human rights with different domestic, political and social policies. Adoption, although a legal process, is dependent in many ways on the cultural aspects of a country's population. Therefore, the international law that develops with regard to this subject must be sensitive to these distinctions while at the same time laying down minimal standards for treatment of children. Although no easy task, I believe that the recent Hague Convention represents a significant step in the right direction by recognizing the autonomy of individual countries, but at the same time establishing a system to facilitate the adoption process for individual families by easing access to important information.

Nevertheless, the enactment of the Hague Convention domestically presents a number of issues that must be overcome in order to successfully follow the Convention's provisions. It remains uncertain as to whether these issues will prevent the implementation of the Hague Convention. The federal government has been steadily moving toward implementation since the United States signed the treaty in 1993. Recently, the President submitted the Hague Convention to Congress with the recommendation that the Senate give its advice and consent to ratification, including the implementation of legislation that is required to bring the Convention into force within the United States. The passage of domestic legislation presents the biggest challenge to the success of the treaty in the United States.

This Note discusses the growth of intercountry adoption in the United States and the complexity of the current process. Part II explores the origins and history of international adoption. Part III examines the actual process of international adoption, discussing the variety of laws involved. Part IV provides an overview of the latest treaty promulgated by the Hague Conference on Private International Law. Finally, Part V suggests that the continued popularity and growth of intercountry adoption necessitate amendments to current U.S. immigration laws and the difficulty presented by these changes in the law. Finally, this Note will take a

look at the social ramifications of easing access to intercountry adoption.

II. History of Intercountry Adoption in the United States

Prior to World War II, America paid scant attention to intercountry adoption. In the aftermath of the war, the American public was introduced to the concept of intercountry adoption, and as a result, the practice became popular in the United States. Concern for dislocated families and refugee children, coupled with a increase in demand for adoptable children in the United States, fueled public awareness of intercountry adoption as a family option. Partly in response to public interest in intercountry adoption, Congress enacted the Displaced Persons Act (DPA) in 1948. The DPA provided for the immigration of over 200,000 refugees from Germany, Austria and Italy. Congress included a provision in the DPA to admit, regardless of their country's immigration quota, 3,000 displaced orphans. Congress did not intend for the DPA to function as the regulatory framework for intercountry adoption, but as a temporary solution to the immediate welfare problems in Europe after the war.

The onset of the Korean War, however, kept intercountry adoption at the forefront of immigration law issues. In July 1953, Congress enacted emergency legislation allowing the issuance of non-quota orphan visas for military personnel who adopted or wanted to adopt Korean children. Significantly, this legislation permitted intercountry and interracial adoption. This important advance contributed to the breakdown of social barriers to intercountry

14. See id. at 192.
16. See id. § 1951.
17. See id.
18. See id. The non-quota provision of the act expired automatically after two years.
Between 1953 and 1961 Congress continued to extend and amend temporary immigration laws to allow for intercountry adoption. Finally, in 1961 Congress amended the Immigration and Nationality Act (INA) to create a permanent provision for the immigration of adoptable children.21 By contrast, the majority of the international law created to facilitate and safeguard intercountry adoption was enacted after 1961.22 As a result, current domestic laws should be updated to complement international laws and policies.

While Congress worked to keep up with wartime immigration, the social policies of the American people changed. More single women decided to keep their children.23 Also, legalization of abortion and increased use of birth control reduced the number of unwanted births.24 International adoption became the solution to a growing shortage of "adoptable" American babies.25 Further, "lingering institutional prejudices, local laws prohibiting interracial adoption, and a backlash by some minority groups has reversed any trend toward interracial adoption of American born children."26 Finally, two recent U.S. Supreme Court decisions convinced adoptive parents that intercountry adoption is the better solution to ensuring that they can keep their baby.27 "It was a very scary case [Baby Richard] to be watching every night on the news when you were at the fork of deciding whether or not to adopt here or internationally because

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21. See Alien Adopted Children: Hearing Before the Subcomm. on Immigration, Citizenship, and International Law of the House Committee on the Judiciary, 95th Cong. 31 (statement of John W. DeWitt, Bureau of Security and Consular Affairs, Department of State) [hereinafter Alien Adopted Children].
26. Carlson, supra note 20, at 332. See also Leslie Mann Smith, Babies from Abroad, AM. DEMOGRAPHICS, Mar. 1, 1988, at 38.
27. See Mike Austin, Increasingly, Adoption Hunt Taking Lawyers—and Parents—Far Afield, CHICAGO DAILY L. BULL., May 9, 1996, at 2.
nobody wants to go through what any of those people did."\textsuperscript{28} In \textit{Darrow v. Deboer}, the Court upheld the decision of the supreme court of Michigan granting custody rights to the biological father of "Baby Jessica" over the rights of the legally adoptive parents.\textsuperscript{29} In the following year, the Court upheld a decision of the Illinois Supreme Court, which granted legal custody to the biological father of "Baby Richard."\textsuperscript{30} In that case, the biological father was told for the first few months of the child's life that his son was dead.\textsuperscript{31} Upon discovering that his son was placed for adoption by the biological mother, he asserted his rights as biological father.\textsuperscript{32} As a result the adoption was vacated, and after spending the first four years of his life with his adoptive parents, the Supreme Court ordered that Baby Richard be returned to his biological father.\textsuperscript{33} These cases illustrate the hazards associated with domestic adoption that have increased the interest of prospective parents in seeking adoptable children outside of the United States. America's motives for intercountry adoption are several: the shorter wait involved; the family's ability to specify gender, age and other characteristics of their prospective adopted child due to the huge availability of foreign orphans; and, of course, the risk factor of domestic adoption as illustrated by the Baby Richard and Baby Jessica cases.\textsuperscript{34}

\section*{III. An Overview of Procedures and Requirements}

\subsection*{A. The Country of Origin}

The process of intercountry adoption begins for most people by selecting a country to adopt from and learning about that country's adoption process. Until 1997, more Americans adopted from China than any other country. However, as Russia opened up to the West,

\begin{itemize}
\item \textsuperscript{28} Adrienne Drell, \textit{Frightening Cases Send More Couples Overseas}, \textsc{Chicago Sun-Times}, Apr. 28, 1996, at 22.
\item \textsuperscript{29} See Darrow v. Deboer, 509 U.S. 938, (1993) (J. Blackmun dissenting). The Deboers had the full consent of the biological mother throughout the adoption process, however, the court still awarded the biological father custody regardless of whether the action was in the child's best interest. See id.
\item \textsuperscript{30} O'Connell v. Kirchner, 513 U.S. 1138 (1995).
\item \textsuperscript{31} See id.
\item \textsuperscript{32} See id.
\item \textsuperscript{33} See id.
\item \textsuperscript{34} See Austin, supra note 27.
\end{itemize}
American adoption of Russian children surpassed Chinese adoption. Certainly the trend reflects America's preference for homogeneous adoption. Whether the numbers from Russia will continue to climb remains an open question. This Note briefly examines the laws of China and Russia regarding adoption by foreigners. 35

B. Intercountry Adoption in China

The process of adopting a child from China can be lengthy and is very involved; the U.S. Department of State approximates one and a half years including the domestic adoption process. 36 Chinese law specifies what children are available for adoption and what adoptive parents are acceptable. 37 The popularity of adoption from China has a number of sources: China's one baby policy and a cultural preference for male children over female children create a plentiful supply of healthy baby girls; 38 and the preference of Western societies to adopt female children and of Asian societies to adopt male children as a "symbol of status and propriety." 39 Furthermore, two-thirds of all foreign children adopted in the United States in 1996 were female. 40

The Ministry of Civil Affairs is the department responsible for processing and approving all foreign adoptions in China. 41 First, however, foreign adoptive parents must apply through China's central authority for international adoption (CCAA). This is the only agency

35. See Significant Sources of Orphans Immigrating to the United States (FY '89-'96) (visited Nov. 18, 1998) <http://travel.state.gov/orphan_sources.html> (table) [hereinafter Significant Sources of Orphans].

36. See U.S. Department of State, International Adoption-China (visited Jan. 19, 1998) <http://travel.state.gov/adoption_china.html> [hereinafter International Adoption-China]. This estimate does not include the time it takes for the prospective parents to collect the documents necessary to complete the adoption. This does include the time from the initial application to obtaining the visa required for the child to enter the United States, but it does not include the adoption process that must take place back in the United States. See id.

37. See id.

38. R.A. Sheehan, From a Distance Chinese Children Find Homes and Love in the Southwest Suburbs, CHICAGO TRIBUNE, Apr. 21, 1996, at 1.


40. See National Adoption Information Clearinghouse, supra note 6.

41. See International Adoption-China, supra note 36.
through which foreign adoptive parents may obtain a child. The CCAA accepts applications for adoption submitted by licensed U.S. adoption agencies whose credentials are on file with the CCAA. They then match children with prospective parents. Only intercountry adoptions completed by an adoption agency approved by the U.S. government are valid in China. The only exception to this rule is that the CCAA will accept applications for adoptions directly from individuals if they live and work in China for one or more years.

The Adoption Law of the People's Republic of China provides that children under the age of fourteen who fall into the following categories are adoptable: orphans who lost their parents; abandoned children whose birth parents cannot be found; and children whose birth parents are incapable of providing for them because of unusual hardship and handicapped children. An “orphaned” child is a child whose parents are deceased or are declared deceased by a Chinese court. By contrast, an “abandoned” child’s parents are still living. Notably, the definition of orphan under Chinese law, as with most other countries, differs from the definition for orphan under U.S. immigration law. This distinction will be discussed below in conjunction with U.S. immigration requirements and the Hague Convention.

Chinese law also imposes requirements on the prospective parents who must assume personal responsibility for clarification of their eligibility to adopt. As previously noted, Chinese law
differentiates between abandoned and orphaned children. This distinction affects the number of children that prospective parents may adopt. For example, adoption of healthy abandoned children with one or more parents living is limited to childless persons thirty-five years and older.\textsuperscript{51} This is further limited to one child per couple or unmarried parent.\textsuperscript{52} An exception may apply if the prospective parent is a relative.\textsuperscript{53} If the parents are under thirty-five years of age, already have children or both, Chinese law limits adoption to children who are orphans or handicapped.\textsuperscript{54} Adoption of either orphaned or handicapped children is not limited in number.\textsuperscript{55} Chinese adoption law sanctions married couple and single person adoptions.\textsuperscript{56}

Prospective parents must furnish proof of age, marital status, health condition, a statement that the parents are childless, a police record, proof of employment and salary and a “home study” prepared by a licensed social agency.\textsuperscript{57} All of these documents must be accompanied by a certified Mandarin Chinese translation that is notarized as to the validity of the translation.\textsuperscript{58}

Chinese adoption law also imposes residency requirements on the prospective parents. In order to execute and finalize the documents required for adoption, the adoptive parent(s) must appear in person before the appropriate Chinese officials.\textsuperscript{59} The CCAA notifies the prospective parents through their adoption agency that their application is accepted for a specific child.\textsuperscript{60} If interested in that child, the parents, through their agency, respond that they would like to finalize the adoption.\textsuperscript{61} The CCAA will then send a formal notice

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\textsuperscript{51} See ADOPTION LAW, art. 6.
\textsuperscript{52} See id. at art. 8.
\textsuperscript{53} See International Adoption-China, supra note 36, at 5.
\textsuperscript{54} See ADOPTION LAW art. 8.
\textsuperscript{55} See International Adoption-China, supra note 36, at 5.
\textsuperscript{56} See ADOPTION LAW art 9.
\textsuperscript{57} See id. at art. 20.
\textsuperscript{58} See id.
\textsuperscript{59} See International Adoption-China, supra note 36, at 6, 14.
\textsuperscript{60} See id.
\textsuperscript{61} See id. at 14.
of approval that the parents must bring with them to China. The parents must appear before the Civil Affairs Bureau in the city where the child resides. There, the parents will be interviewed and sign a contract for adoption that is registered with the Civil Affairs Bureau. Lastly, the Bureau issues a notarized adoption decree.

Once this process is complete, the parents may apply through the local Public Security Bureau for a Chinese passport and an exit visa. The parents now face the challenge of the U.S. Immigration and Naturalization Service requirements.

C. Intercountry Adoption in Russia

Adoption of children from many regions of Russia has steadily increased. The “adoption market” in Russia exploded after the fall of the Soviet Union and the influx of capitalism. Like many markets in the Russia economy, adoption has become prey to a “black market,” in this case, for healthy white infants. The current legal regime governing adoption does not adequately address this problem, and a reform movement is underway in Russia to create safeguards.

The U.S. Embassy in Moscow plays an important role. The Embassy can assist in determining whether the Russian government followed the proper procedures which will allow the Embassy to issue an immigrant visa for the child. The Russian government agencies that regulate adoption are the Ministry of Education and the Ministry

62. See id at 15-16. The prospective parents may meet the child before the adoption is complete, and if they wish to have a private physical exam done, the examination must take place near the child’s location. See id. at 15.

63. See id. The interview questions include: “Why are you adopting a Chinese child?”, “What is your family background?” or “Why do you not have any children now?” See id. at 15.

64. See id. at 16.

65. See id.

66. See Significant Source Countries of Orphans, supra note 35.

67. See Olga A. Dyuzheva, Drafting a Russian Law on Intercountry Adoption, in CHILDREN ON THE MOVE, supra note 8, at 181, 182-83.

68. See id. at 184-85; see also International Adoption in Russia Department of State (visited Jan. 26, 1998) <http://travel.state.gov/adoption_russia.html> (reporting that bills amending Russia’s current law governing adoption passed both the Russian Duma, the lower legislative body, and the Federation Council, the upper legislative body, and are now before President Yeltsin for his approval or veto) [hereinafter International Adoption in Russia].

69. See id.

70. See id.
of Health. The Ministry of Education has general authority over foreign adoptions and will intervene to ensure individual adoptions conform to Russian law. The local court in the area where the child lives has jurisdiction to approve individual adoptions.

In order to begin the adoption process, prospective parents first must identify a child by asking the local office of the Ministry of Education in the area where they would like to adopt for information on children available for adoption and then submit an application to the court of the child's residence. A local child welfare representative must submit the following items to the judge: documents certifying that the child is registered with the central data bank of orphans through the Federal Ministry of Education for the requisite period of time; proof that no Russian citizens have shown interest in adopting the child; a statement concluding that the adoption is in the child's best interest; the child's birth certificate; a medical report of the child's health; if the child is over ten years of age, his/her consent to the adoption; if the child is less than ten years old, a statement from his/her biological parents consenting to the adoption or a letter explaining why parental consent is not required; and a statement of consent from the director of the institution in which the child lives. Currently, the most stringent proof required is that no Russian family is interested in adopting the child.

71. See id.
72. See id.
73. See id.
74. See id. The application must include the following documents: a copy of the prospective parents' marriage license, and if not married, the prospective parents' birth certificate; a medical report on the prospective parents; a certificate from the prospective parents' employers verifying their job position and income or a declaration of income; evidence that the prospective adoptive parents have permanent housing, or proof of home ownership; the result of a home study conducted by competent state authorities in the United States; and the decision of a competent authority in the United States granting the child the right to enter the United States and become a permanent resident. With the assistance of a local adoption agency and the U.S. Embassy in Moscow, the prospective parents can obtain a form letter stating that a visa may be issued if the criteria under U.S. law are satisfied. This letter can only be issued if the parents I-600A form is approved by the Immigration and Naturalization Services. This letter is routinely accepted by Russian courts. See id.; see also RUSSIAN FEDERATION FAMILY CODE art. 125.
75. See International Adoption in Russia, supra note 68.
76. See Dyuzheva, supra note 67, at 182-83 (discussing the inability of the current legal regime to deal adequately with the black market situation). Often Russian families are unable to adopt for years when foreigners are adopting in two weeks.
The judge reviews the appropriate documents, including proof of orphan status and a home study and a hearing takes place. Russian law requires the prospective parents to attend the hearing. Once all of the documents are submitted, the judge has twenty days to prepare for the court hearing. After this period expires, the hearing must be conducted within the next thirty days. The U.S. Department of State reports that normally the hearings are scheduled promptly. The court issues its decision on the day of the hearing. The decision becomes final after ten days during which the decision may be appealed. Once the adoption is final, it is officially registered and the new parents may apply for a new birth certificate, passport and visa for the child.

As one can see from comparing the process of adoption in China and Russia, each country has different requirements, different standards by which to meet those requirements and different procedures necessary to complete the adoption. Therefore, a couple looking to adopt abroad must investigate the laws of each country they are considering adopting from.

D. U.S. Requirements

The INA provides three methods by which an adoptable child can be approved for immigration. The most common method is to have the child declared an "immediate relative" pursuant to INA section 1101(b)(1)(F). This method is most applicable to parents who recently traveled overseas to adopt a child and are returning to the United States or who are intending to adopt overseas. The other two methods are less applicable in the context of this Note and will not be discussed. However, a brief mention of each method is appropriate. The second method is primarily used by adoptive parents who resided overseas for an extended period of time during which they adopted a foreign child. The child must have lived with the family for at least two years. The requirements under this subsection are less strict. The third method is to call upon the Attorney General's exercise of discretionary parole authority. This is limited to emergency situations.

77. See International Adoption in Russia, supra note 68.
78. See id.
79. See id.
80. See id.
82. See id. The other two methods are less applicable in the context of this Note and will not be discussed. However, a brief mention of each method is appropriate. The second method is primarily used by adoptive parents who resided overseas for an extended period of time during which they adopted a foreign child. The child must have lived with the family for at least two years. The requirements under this subsection are less strict. Id. § 1101(b)(1)(E). The third method is to call upon the Attorney General's exercise of discretionary parole authority. This is limited to emergency situations. Id. § 1182(d)(5).
the prospective parents completed the adoption under Chinese or Russian law, the Immigration and Naturalization Service (INS) "Petition to Classify an Orphan as an Immediate Relative" must be filed, and the parents may do so in China at an INS office or at a U.S. Consulate or Embassy in Russia. 53

One advantage adoptive children enjoy is avoiding quota requirements normally imposed on immigrants based on their country of origin. This is done by categorizing them as "immediate relatives." However, before the adopted child can obtain a visa as an "immediate relative," federal law requires that the adoptive parents and child meet federal and state law requirements. 54 Although the INS cannot make a legally binding decision on the state law requirements, it can require that prospective parents complete all state law pre-adoption requirements before the visa is issued. 55 In effect the federal official predicts what the state court will decide on the finality of the adoption. 56 Thus, the federal officer does act as an adjudicator of the state law requirements because if he finds that the new family does not meet the state requirements, the child can be denied a visa to enter the United States.

1. Adoptive Parents' Requirements

The INS drafted federal regulations interpreting the INA's requirements including an outline of the exact procedures petitioners must follow to adopt a child, such as home study, fingerprinting, checking criminal records and providing financial statements. 7 By enacting these regulations, the INS seeks to determine the overall fitness of the prospective parents including financial stability and moral character. 58

Also, the prospective parents must demonstrate to the INS that

83. See Alien Adopted Children, supra note 21. The INS may have already approved an I-600A advanced processing petition, and if this is the case, the I-600A petition may be filed and adjudicated at the office to which the I-600A was sent. See id. In Russia, for example, the I-600A is a prerequisite for the Russian officials. See International Adoption in Russia, supra note 68.

84. See Alien Adopted Children, supra note 21; see also 8 C.F.R. § 204.3(e) (1997) (outlining the exact procedures petitioners must follow to adopt including a home study, fingerprinting, criminal records check and providing financial statements).

85. See Alien Adopted Children, supra note 21.

86. See id.

87. See 8 C.F.R. § 204.3.

88. See Liu, supra note 13, at 207.
they completed all necessary state pre-adoption requirements. Even though a family meets the state requirements, federal officials are empowered to make their own judgment on the quality of parenting the prospective parents will offer. This allows the federal government to monitor immigration of children who are likely to become “public charges” and to exclude them from entry into the United States.

2. The Child’s Eligibility

Once the parents are found fit to adopt, the child’s eligibility for the visa must also be determined. The child’s “adoptability” is usually more difficult to determine than the parent’s eligibility and is the more frequently cited reason for the denial of a petition. Whereas the parent’s eligibility is determined by a mixture of federal and state standards, the child’s qualification to enter the United States is based solely on federal rules. The same immigration officials who predict how a state will respond to the prospective parents, merely determine that the child is adoptable under a federal standard for immigration. As mentioned above, the INA defines a child eligible for adoption differently from other common definitions and many foreign countries’ definition. The INA definition reads:

[A child eligible for adoption is] under the age of sixteen at the time a petition is filed [and]... an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption . . . .

The federal standard of adoptability creates numerous problems in relating foreign, federal and state laws. Children who may qualify

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89. On the whole, the INS is attempting to expedite the adoption process by requiring prospective parents to fill out documents that may be required by the state and attempting to ensure that children brought into the country can remain here with a family interested in their welfare. See Carlson, supra note 20, at 347.
90. See Alien Adopted Children, supra note 21 (statement of David Crosland, General Counsel for the Commissioner).
91. See id.
92. See Alien Adopted Children, supra note 21.
94. Id. at (b)(1)(F) (emphasis added).
95. See Bartholet, supra note 25, at 1172-77; see also Carlson, supra note 20, at
as abandoned or orphaned in a sending State or a state of the United States may not qualify as such under the federal standard.* For example, under the INA, a child with two parents may not classify as an orphan if the parents simply wish to voluntarily surrender the child for adoption.  

In response to widespread confusion and dissatisfaction with the federal standard for a child's eligibility to enter the United States, the INS drafted a regulation amending the provisions governing petitions for foreign born adoptions.59 The new regulation is criticized for not adequately addressing the complexity of the situation created by intercountry adoption.59 Furthermore, the new regulations expressly state that they were not drafted “in connection with possible United States ratification and implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.”59 Thus, this demonstrates legislative intent to deal with the Convention separately.

An example of the confusion that can arise during the adoption process based on the child's eligibility is the difference between the definition of “orphaned” in Chinese law and U.S. immigration law. As stated above in the discussion of Chinese adoption laws, Chinese law recognizes a difference between an “abandoned child” and “orphaned child.” A child is abandoned if “both parents cannot be found or if the parents have relinquished parental rights.” A child is orphaned if a court has declared that both parents are dead. According to Chinese law, whether a child is abandoned or orphaned affects what type of parents can adopt that child.

For purposes of immigration into the United States of a foreign adoptee, the INA includes within the definition of an orphan, a child

348-50 (outlining arguments for the restrictiveness and the breadth of this definition).

96. See Carlson, supra note 20, at 348-50.
98. 8 C.F.R. § 204.3 (1997).
100. 8 C.F.R. § 204.3(a).
101. See International Adoption-China, supra note 36, at 6.
102. See id (emphasis added).
103. See id.
104. See id.
that is abandoned by both parents. However, under current regulations, abandonment must include, "not only the intention to surrender all parental rights, obligations, and claims to the child, ... but also the actual act of surrendering such rights ... [however] relinquishment or release by the parents to the prospective adoptive parents ... or for a specific adoption does not constitute abandonment." Also, a child is not abandoned if the child is turned over to an adoption agency to find parents for it, unless the agency is an authorized adoption agency. Moreover, a child whose parents cannot be found is not considered abandoned. Therefore, a child may qualify as abandoned under Chinese law to be adopted by American parents but may not qualify under United States law to enter the country. Where does this leave the parents and child? They have a Chinese birth certificate proclaiming that this is their child, but the child cannot enter the United States because of their inability to meet federal immigration regulations due to definitional differences.

E. State Requirements

The final step in an intercountry adoption is the issuance of an adoption decree in the prospective parents' home state. As mentioned earlier, the state must ascertain whether the child is adoptable and whether the parents meet eligibility requirements. Although the federal government decided those issues in favor of the parents, there is no guarantee that a state court will do the same. Also, even though many of the children granted visas as "immediate relative" are adopted in a foreign country, the foreign adoption decree does not have to be accorded the same full faith and credit as a decree issued by another U.S. state. Thus, problems may arise relating to the child's status under domestic laws dealing with issues such as the distribution of property, custody of the child or child support. Readopting in a state court is the only way to guarantee

106. 8 C.F.R. § 204.3(b).
107. See id.
108. See id.
109. See supra note 90 and accompanying text.
111. See U.S. CONST. art IV, § 1.
112. See Hester, supra note 110, at 1299; Ellen F. Epstein, International Adoption:
full recognition under the law.\textsuperscript{113}

However, a child's adoptability is rarely challenged, and less than two percent of all international adoptions are denied by state courts.\textsuperscript{114} Courts recognize the international adoptions as valid on numerous grounds such as the Act of State Doctrine, international comity, choice of law principles and the child's best interest standard.\textsuperscript{115} Also, some states responded to the use of intercountry adoption by enacting statutes that preclude reexamination of a child's adoptability.\textsuperscript{116} For example:

A minor child shall be considered free for adoption... if any of the following have occurred... in the case of a child from outside the United States, its territories or the Commonwealth of Puerto Rico placed for adoption by the commissioner of children and youth services or by any child-placing agency, the petitioner has filed an affidavit that the child has no living parents or that the child is free for adoption and that the rights of all parties in connection with the child have been properly terminated under the laws of the jurisdiction in which the child was domiciled before being removed to the state of...\textsuperscript{117}

This type of statute codifies the choice of laws principle, by providing that the validity of the relinquishment shall be governed by the law of the country in which it was granted.\textsuperscript{118} Another approach is to validate any adoption that U.S. immigration officials already approved.\textsuperscript{119} In other words, if the parents and child met the federal standards including the "orphan" requirements, then the state should give deference to those decisions. Yet another statutory method used by states is to require only a written relinquishment from the last foreign guardian in custody of the child\textsuperscript{120} thereby eliminating any need for proof that the child's parents relinquished the child for

\textsuperscript{113} See Hester, \textit{supra} note 110, at 1298-1300.
\textsuperscript{114} See Carlson, \textit{supra} note 20, at 354.
\textsuperscript{115} See id. at 358-65.
\textsuperscript{116} See N.J. STAT. ANN. § 9:3-45(b)(5) (West 1997).
\textsuperscript{117} See CONN. GEN. STAT. § 45a-725 (1997).
\textsuperscript{118} See id.
\textsuperscript{119} See OHIO REV. CODE ANN. § 3107.07(h) (Anderson 1998); N.Y. DOM. REL. LAW § 115-a (McKinney 1998); COLO. REV. STAT. § 19-5-203(1) (1997).
\textsuperscript{120} See OR. REV. STAT. § 109.318(1) (1997).
Finally, some states combine elements of the other approaches and use an administrative agency to review the documents supporting the foreign adoption and determine the child’s eligibility for adoption in that state. Some of the uncertainty that accompanies intercountry adoption is eliminated by these statutes, but not all states have these provisions, and there is a broad range within the statutes as to who actually determines adoptability. In Ohio, for example, the state completely defers to federal immigration officials, and in Connecticut, a state court determines whether the applicable foreign law is satisfied.

IV. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

The international community responded to the growing popularity of intercountry adoption by promulgating the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention). The goals of creating uniformity and cooperation between countries with regard to intercountry adoption has been a major theme in many countries in recent years. These goals led to numerous efforts domestically and internationally. They include the following: the National Conference of Commissioner on Uniform State Laws, which has produced a Draft Uniform Adoption Act; the Inter-American Convention of the International Return of Children; the Convention on the Civil Aspects of International Child Abduction; and the Organization of American States’ Convention on Conflict of Laws Concerning the Adoption of Minors.

121. See id.
122. See IOWA CODE § 600.15 (1997); WIS. STAT. § 48.839 (1997).
123. See N.J. STAT. ANN. §9:3-45(b)(5); CONN. GEN. STAT. § 45a-725.
125. See Hester, supra note 110, at 1272-73.
Nevertheless, the Hague Convention is the first international piece of law completely dedicated to safeguarding the process of intercountry adoption. The Hague Convention received the unanimous approval of the delegates present at the conference during which it was created. Now it is up the individual States to ratify the treaty and implement its safeguards. 

The purpose of the Hague Convention is laid out in the preamble which states:

recognizing that the child, for full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding ... [recognize] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin. 

Therefore, although the Hague Convention recognizes that a State should “first take [as a priority] measures to enable the child to remain in the care of his or her family of origin,” the goal of the Hague Convention is to create a safe, healthy and happy living environment for a child regardless of location.

The Hague Convention applies to all adoptions between countries that are a party to it with an exception for adoptions in which the child is over eighteen. The Hague Convention requires that competent authorities of the “State of origin” establish that the child is adoptable, the intercountry adoption is in the child’s best interests, the requisite consent is given freely and without any inducement expressed or evidenced in writing after appropriate

127. See Jaffe, supra note 126. The participating countries include: Argentina, Australia, Austria, Belgium, Canada, Chile, China, Cyprus, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, The Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Uruguay and Venezuela as member States; and as invitee States, Albania, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Columbia, Costa Rica, El Salvador, Ecuador, Haiti, the Holy See, Honduras, India, Indonesia, Kenya, the Republic of Korea, Lebanon, Madagascar, Mauritius, Nepal, Panama, Peru, the Philippines, the Russian Federation, Senegal, Sri Lanka, Thailand and Vietnam.


130. See id.
counseling regarding the effects of the consent, especially if the adoption will terminate an existing parent-child legal relationship, and on the part of the mother, consent is given after the birth of the child.\textsuperscript{131} In addition, the competent authorities of the receiving State must determine that the parents are eligible for adoption, they are counseled as necessary and the child is or will be authorized to enter and reside permanently within the State.\textsuperscript{132} Once these requirements are met, the Hague Convention authorizes intercountry adoption.

Adoptions certified in accordance with the Convention shall be recognized by operation of law in the all party countries.\textsuperscript{133} The recognition of an adoption may be refused only if the adoption is "manifestly contrary to public policy."\textsuperscript{134} Recognition of an adoption includes recognition of the legal parent-child relationship between the child and the adoptive parents, parental responsibility for the child and the termination of a pre-existing legal relationship between the child and the mother and father, "if the adoption has this affect in the Contracting State where it was made."\textsuperscript{135}

This language also acknowledges the difference that many countries recognize between simple and full adoptions.\textsuperscript{136} A simple adoption does not terminate the pre-existing parent-child relationship, and a full adoption does include termination of this relationship. The Hague Convention handles this by including a provision for conversion of a simple adoption to a full adoption. The Convention states that a simple adoption may be converted into a full adoption if, "the law of the receiving State so permit[s], and if the consent [for the adoption] was given for the purpose of such an adoption."\textsuperscript{137} In other words, if the consent to terminate the pre-existing parent-child relationship was given, then the adoption may be converted into a full adoption, and will be recognized as such in the receiving State.

The Hague Convention also requires the establishment of a

\textsuperscript{131} See id. at art. 4.
\textsuperscript{132} See id. at art. 5.
\textsuperscript{133} See id. at art. 23.
\textsuperscript{134} See id. at art. 24.
\textsuperscript{135} See id. at art. 26.
\textsuperscript{136} See generally INTERCOUNTRY ADOPTIONS, supra note 39 (mentioning countries that distinguish between simple and full adoptions includ ing: Peru, Chile, Poland, Argentina, Bulgaria and Romania).
\textsuperscript{137} See Convention on Protection of Children, supra 124.
Central Authority with non-delegable functions to cooperate with the Central Authorities of other countries. The purpose of the Central Authority is to protect the adoption process by establishing regulations for the process and to collect information for those interested in adopting. The functions for the Central Authority may be performed by either public authorities at the state or federal level or by accredited agencies. Moreover, the Hague Convention allows for truly "private" adoptions to take place; this means a couple represented by an attorney specializing in adoption may apply to adopt a child abroad without going through a government approved adoption agency as is required in China for example.

Nevertheless, whether these functions are performed by public agencies, private accredited agencies or private individuals, all must meet the standards set forth in the Hague Convention. These standards include the following: demonstrated competence to carry out the administrative and social tasks of the Central Authority, nonprofit objectives, staffing by persons qualified to work in the field of intercountry adoption, either through work experience or education, and subject to supervision of competent authorities as to their composition, operation and financial situation. Furthermore, they must only charge reasonable fees or expenses, including reasonable professional fees.

The Hague Convention is a product of compromise in this area. These safeguards were established to protect the industry from corruption and to waylay the fears of countries that suffer from the black market baby trade. However, the United States, during the Hague Convention negotiations, insisted on the Convention containing provisions for private adoption as this is the main avenue of adoption in the United States. Therefore, the Convention also permits any member country to declare that adoptions may only take

138. See id. at art. 6.
139. See id. at art. 7.
140. See id. at art. 22(1).
141. See id. at arts. 22(4) & (5).
142. See id. at art. 10.
143. See id. at arts. 10, 11, 32.
144. See id. at art. 32.
place if the functions of Central Authorities are performed by public authorities or accredited bodies.\textsuperscript{146} This is the case, as we have seen, in China.\textsuperscript{147}

V. Conclusion: The Next Step

Intercountry adoption is growing and both domestic interests and international laws are pushing to expedite the process and increase intercountry adoption. Amendments to domestic laws must be made to accommodate the influx of foreign adopted children. This can be done either by expanding federal law to include new standards for the immigration of children to be adopted in the United States or by creating a new federal immigration law more deferential to state adoption laws. The latter suggestion is supported by the Supreme Court's traditional opposition to federal involvement in such areas as family law and domestic relations. Moreover, there is a strong state interest in regulating local family and domestic issues.

Conversely, the federal government has traditionally controlled immigration law to the exclusion of states. The essence of intercountry adoption is the process of bringing a foreign child into the United States in order to reside permanently here. The federal government has a compelling interest in regulating national boarders, and monitoring who enters the country. Therefore, resolution of this problem must accommodate the tension between these two combating interests.

The current section of the INA that defines an orphan for purposes of immigration inadequately deals with the situations which can arise in an intercountry adoption. Also, the uncertainty of who will qualify for orphan status under the INA is inconsistent with the goal of the Hague Convention which is to streamline the adoption processes without compromising safeguards. Approximately 13,000 children enter the United States annually through intercountry adoption, and the number is increasing.\textsuperscript{148} Furthermore, Americans are considering adopting from more and more countries, thereby increasing the number of potential conflicts with foreign laws and the already long wait involved in the immigration process.

\textsuperscript{146} See Convention on Protection of Children, supra note 124, at art. 22(4).
\textsuperscript{147} See supra note 37 and accompanying text.
\textsuperscript{148} See Significant Sources of Orphans, supra note 35, at 1.
One suggestion is that “orphan” be redefined in order to more easily facilitate intercountry adoptions. However, a more effective method would be to create another category of immigrant status for children adopted through intercountry adoption in compliance with the minimum requirements of the Hague Convention. This solution would create a new category under the INA by which a newly adopted child can receive an entry visa to the United States and qualify for adoption in the United States.

This new category for adoptions in compliance with the Hague Convention would accomplish two goals: First, it would grant the child an entry visa into the United States, classifying the child as a “immediate relative pursuant to the Hague Convention.” Second, it would give the federal officials’ finding of the child’s adoptability the same finality as a state court’s determination.

The requirements of “orphaned” status in the current INA are fulfilled through the safeguards in the Convention. One of the main goals of the Hague Convention is to ensure that children receive, through intercountry adoption, “the advantage of a permanent family [because] . . . a suitable family cannot be found in his or her State of origin.” Therefore, the purpose of the Hague Convention is to create a system by which permanent families can be found for adoptable children, not to allow a steam of children to flood into countries where they cannot be properly cared for.

To accomplish this goal, the Hague Convention establishes minimum standards for both the countries of origin and the countries receiving children. These guidelines include establishing the adoptability of the child and requiring the adoptive parents to meet standards established by their own country. By only creating minimum standards, the drafters of the Hague Convention left enough flexibility in the Convention to allow individual countries to include particular requirements. The current system in the United States, which requires a federal initiated home study, can still be used to determine the eligibility of the parents. The federal home study standards and other disclosure requirements are equally as strict as the state requirements. The federal government’s screening process

149. See Pfund, supra note 145, at 8.
151. Id. at arts. 4 & 5.
152. Id. at art. 4.
is also stringent.\textsuperscript{153}

However, classifying the adoption as a Hague Convention adoption, and issuing a visa for the child under the Hague Convention will greatly expedite the procedure. Further, when prospective parents look for a child from another country that is a party to the Hague Convention, federal officials will have more assurance in the integrity of the adoption. Also, more sending countries are becoming increasingly insistent on working only with other countries who are parties to the Hague Convention.\textsuperscript{154} The implementation of a new definition in the INA for Hague Convention adoptions would not alone be sufficient to bring U.S. practices in compliance with the standards articulated in the Hague Convention. Many other changes must be made in order to truly follow the treaty.

The underlying policy facilitated by requiring special status to enter the United States—to prevent unwanted children from becoming burdens on the state or federal government—is promoted because the Convention creates a valid finding of adoptability without waiting for state court approval. This would be accomplished by giving the federal officials’ decision on the child’s adoptability the weight and finality of a state’s judicial decision. The adoption must still be filed with the parent’s home state.

This Hague Convention definition would remove discretion from the state to disregard the federal officials’ conclusions of adoptability. Thus, the status of the child would be secure, and there would no longer be concern that the child would end up without parents. It is important to note when considering intercountry adoption that the relationship at issue involves a child from another country and the federal government, which has always retained power over the legal status of aliens.\textsuperscript{155} This is a unique situation with easily definable parameters. Allowing the federal government to create a legally binding relationship between a foreign child and American parents does not cripple a state’s ability to regulate family issues. Also, once the adoption is complete, the new family is subject to all of their

\textsuperscript{153} See supra note 68 and accompanying text.


\textsuperscript{155} See Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating that the federal government has plenary and exclusive authority over the admission of aliens into the United States).
home state's laws governing family matters such as child support and probate.

However, the use of intercountry adoption as a family solution is not without negative implications. The cost of intercountry adoption makes it a family planning option only available to a small class of people. Easing access to international adoption of children of the same ethnic background as the adopting parents will slow the domestic adoption market and leave more healthy adoptable minority children without homes. The noticeable increase in adoptions from Russia shows the continued preference for healthy white babies over babies of ethnic minorities. Recall the concern of scholars that the "unavailability" of infants within the United States is truly a shortage of healthy white babies. With the ability to go outside the United States to countries suffering economic instability and bring home a baby of their choice, couples with the financial means will do so thus ignoring the minority children already in the United States who need homes. The problems associated with domestic adoption can only influence the decision of whether to regulate intercountry adoption, and how to regulate it.

Intercountry adoption is a viable solution for white couples open to interracial adoption but frustrated by domestic adoption practices, in other words, race-conscious adoption laws and racially conscious practices of private adoption agencies. Although this is a separate policy concern, it should not be dismissed when considering this issue.

Finally, on an international scale, the United States as a world leader in intercountry adoption, should take the lead in implementing the Hague Convention. One of the major concerns of the countries of origin is the growing black market in babies. The United States is the top country for receiving children through intercountry adoption, by implementing the Hague Convention the United States will be taking the lead in eradicating the black market.

The Hague Convention provides an opportunity for the United States to streamline its immigration process without compromising its integrity. Further, it gives the United States ammunition to address the concerns of its global neighbors and earn their respect in an area desperately needing regulation.

156. See Carlson, supra note 20, at 332.
157. Liu, supra note 13, at 208-09.
158. See Balanon, supra note 11, at 124.