9 FAM 42.21 Notes

(TL:VISA-179; 08-21-1998)

9 FAM 42.21 N1 "Immediate Relative" Defined

(TL:VISA-170; 10-01-1997)

The Immigration and Nationality Act defines "immediate relative" to include the following:

(1) Spouse of a U.S. citizen [see 9 FAM 40.1 N1];

(2) Certain spouses (and the accompanying or following-to-join children) of deceased U.S. citizens [see 9 FAM 42.21 N1.2];

(3) Child of a U.S. citizen [see 9 FAM 40.1 N2];

(4) Orphan adopted by a U.S. citizen abroad [see 9 FAM 42.21 N12];

(5) Orphan to be adopted by a U.S. citizen residing in the United States [see 9 FAM 42.21 N12]; and

(6) Parent of an adult U.S. citizen [see 9 FAM 40.1 N5].

9 FAM 42.21 N1.1 "Spouse", "Child" and "Parent" Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 40.1 Notes.

9 FAM 42.21 N1.2 "Spouse and Child of Deceased U.S. Citizen" Defined

(TL:VISA-170; 10-01-1997)

a. INA 201(b)(2)(A)(i) as amended by sec. 101(a) of Pub. L. 101-649 changed the definition of "immediate relatives" to include the spouse of a deceased U.S. citizen, provided the spouse:

(1) Was married to the U.S. citizen for at least two years prior to the U.S. citizen's death;

(2) Was not legally separated at the time of the spouse's death;

(3) Has not remarried; and

(4) Files a petition under INA 204(a)(1)(A)(ii) within two years after the death of the spouse.

b. Section 219(b)(1) of Pub. L. 103-416 further amended the definition to include the child(ren) of the spouse of the deceased U.S. citizen. Such children, however, may not petition in their own behalf but are derivatives of the principal beneficiary. Consequently, they can obtain status only as derivatives by accompanying or following to join the principal beneficiary. Derivative status does not extend to unmarried sons or daughters of widows or widowers.

9 FAM 42.21 N1.3 "Orphan" Defined

(TL:VISA-170; 10-01-1997)

See 9 FAM 42.21 N12.1.

9 FAM 42.21 N2 Entitlement to Status

9 FAM 42.21 N2.1 IR Petition Beneficiaries

(TL:VISA-170; 10-01-1997)

An alien is entitled to status as an immediate relative if the consular officer has received a properly approved petition from the Immigration and Naturalization Service and the consular officer is satisfied that the claimed relationship exists.

9 FAM 42.21 N2.2 Derivative IR Status for Spouses or Children

9 FAM 42.21 N2.2-1 Generally No Derivative Status

(TL:VISA-179; 08-21-1998)

The INA does not generally [see exception under 9 FAM 42.21 N2.2-*3]* accord derivative status for family members of immediate relatives as it does for preference applicants. INA 203(d) does not apply to the classes described in INA 201(b). A U.S. citizen must file separate immediate relative petitions for the spouse, each child, and each parent.

9 FAM 42.21 N2.2-2 Spouse/Child of IR-5 Not Entitled to Derivative Status

(TL:VISA-170; 10-01-1997)

"Parents" of U.S. citizens are accorded IR-5 status only upon INS approval of a Form I-130 petition establishing that the appropriate child-parent relationship exists. In certain circumstances, a U.S. citizen may be entitled to petition for only one parent, such as when the beneficiary's spouse does

not meet the definition of “parent” as set forth at INA 101(b)(2). For example, an alien who becomes a stepparent of an eighteen year old is not considered to be the “parent” of that child for immigration purposes (see INA 101(b)(1)(B)). Consequently, should that stepchild become a U.S. citizen, INS would be unable to approve a Form I-130 petition (for IR-5 status) for that stepparent. Further, spouses and children of IR-5s cannot benefit from derivative status through the principal alien. Spouses who cannot qualify in their own right for IR-5 status, and any children of an IR-5, would require the filing of a separate Form I-130 petition (family-based second) upon the principal’s admission to the United States as a permanent resident.

9 FAM 42.21 N2.2-3 Exception

(TL:VISA-170; 10-01-1997)

Sec. 219(b)(1) of Pub. L. 103-416 makes an exception to the general rule by providing derivative status for the accompanying or following-to-join children of spouses of deceased U.S. citizens**.**

9 FAM 42.21 N3 Petition Procedures for U.S. Citizens Abroad

(TL:VISA-23; 4-4-89)

See 9 FAM 42.41 N4.

9 FAM 42.21 N4 Refusal to File IR Petition

(TL:VISA-170; 10-01-1997)

In general, the spouse, child, or parent of a U.S. citizen who is entitled to classification as an immediate relative should be processed as an immediate relative. However, if the consular officer is fully satisfied that the U.S. citizen relative has refused to file a petition on behalf of the spouse, child, or parent, for reasons other than financial consideration or inconvenience, the officer may consider the applicant for any other type of immigrant visa for which he or she is qualified.

9 FAM 42.21 N4.1 Alien Classifiable as IR or Preference Immigrant

(TL:VISA-170; 10-01-1997)

If an alien is classifiable both as an immediate relative and a preference immigrant, and the alien’s spouse refuses to file an immediate relative petition to avoid conditional status, the consular officer may process the alien case as that of a preference immigrant. [See 9 FAM 42.21 N7.]

9 FAM 42.21 N4.2 Spouse/Child of Abusive U.S. Citizen or Lawful Permanent Resident (LPR)

(TL:VISA-179; 08-21-1998)

Abusers generally refuse to file relative petitions because they find it easier to control relatives who do not have lawful immigration status. Section 40701 of Pub. L. 103-322 contains provisions that allow the qualified spouse or child of an abusive U.S. Citizen or LPR to self-petition for immigrant classification. [See 9 FAM 42.42 N3.2.]

9 FAM 42.21 N5 Alien Classifiable as Immediate Relative and Special Immigrant

(TL:VISA-49; 10-30-91)

An alien classifiable as an immediate relative who is also classifiable as a special immigrant under INA 101(a)(27)(A) or (B) may establish entitlement to classification under either category, depending upon which of the two may be more easily established. Since special immigrants under INA 101(a)(27)(A) and (B) are not subject to numerical limitations, this procedure is in accord with the original intent of Congress in enacting INA 201(b), namely, to prevent the use of immigrant visa numbers by aliens who are able to immigrate in a visa category not subject to numerical limitations.

9 FAM 42.21 N6 Petitioner's Naturalization Subsequent to Approval of Family Second Preference Petition

(TL:VISA-170; 10-01-1997)

a. In the event of the petitioner's naturalization after approval of a family second petition but before visa issuance, INS regulations [8 CFR 204.2(h)(3)] the petition is automatically converted as of the date of the petitioner's naturalization to accord immediate relative status under INA 201(b) for the spouse (automatically converted from F21 to IR1) or child (automatically converted from F22 to IR2), or first preference status under INA 203(a)(1) for an unmarried son or daughter (automatically converted from F24 to F11).

b. Proof of naturalization must be submitted to the consular officer considering the visa application and the consular officer must include it in the issued visa. The petition need not be returned to INS for reapproval. If notification of the naturalization has been received from INS in the form of a letter, the consular officer shall attach it to the petition.

c. Automatic conversion of a petition is not authorized for an alien who is a derivative beneficiary (F23 or FX3) of a petition filed by an LPR who subsequently becomes a U.S. citizen. The principal beneficiary must file (and obtain INS approval of) a Form I-130 petition (family second preference) upon the principal's admission to the United States before the derivative alien may be granted a visa.

9 FAM 42.21 N7 Conditional Status for Certain Immediate Relatives

(TL:VISA-49; 10-30-91)

a. The Immigration Marriage Fraud Amendments Act of 1986 (Pub. L. 99-639) amended the Immigration and Nationality Act by adding section 216 which provides conditional permanent resident status for certain immediate relative categories at the time of admission.

b. The consular officer shall classify the spouse of a U.S. citizen or the child of a U.S. citizen as a conditional immigrant at the time of visa issuance if the basis for immigration is a marriage which was entered into less than two years prior to the date of visa issuance.

9 FAM 42.21 N8 Marriage Between Relatives

(TL:VISA-170; 10-01-1997)

Under INA 204, INS has the responsibility for determining whether an alien is entitled to immediate relative or preference status by reason of the alien's relationship to a U.S. citizen or permanent resident alien. If INS approves a petition with the knowledge that the parties concerned are related to each other such as uncle and niece or as first cousins, the consular officer shall accept such determination and not attempt to reach an independent conclusion. [See 9 FAM 42.43 N1.1.] [For information on petitionable marriage relationships, see 9 FAM 40.1.]

9 FAM 42.21 N9 Stepparent/Stepchild Relationship

(TL:VISA-170; 10-01-1997)

A stepparent or stepchild may confer or derive immigrant status even when parties to a marriage creating the stepparent/stepchild relationship have legally separated provided the family relationship has continued to exist between the stepparent and stepchild. Note, however, that the stepparent-stepchild relationship must have been established prior to the stepchild's 18th birthday (INA 101(b)(1)(B)).

9 FAM 42.21 N10 Effect of Private Legislation According "Child" Status

(TL:VISA-49; 10-30-91)

A petition according preference status shall be regarded as approved to accord immediate relative status under INA 201(b)(2) if the beneficiary has been declared a "child" of the petitioner by private legislation. The consular officer shall regard such a petition as approved for that purpose as of the date of the enactment of the private legislation or of the effective date stated in the language of the private law.

9 FAM 42.21 N11 Effect of Foreign Laws and Customs on Petitions for Adopted Children

(TL:VISA-170; 10-01-1997)

a. Some foreign states have no statutory provisions governing adoption and in some of these states the concept of adoption is not legally recognized. Legal adoption for the purpose of immigration does not exist in foreign states which apply Islamic law in matters involving family status.

b. Accordingly, INS and the Department hold that relationships through claimed adoptions in such countries cannot be established for visa petition purposes. INS and the Department also hold that an adoptive relationship claimed to have been effected in a country which has no statutory provisions governing adoption cannot be recognized for visa classification purposes unless the relationship is sanctioned by local custom or religious practice, judicially recognized in the country, and the relationship embraces all the usual attributes of adoption, including the same irrevocable rights accorded a natural born child.

c. If the consular officer finds that any of the facts in the case are not as stated in the petition or if the adoption occurred abroad and is not valid under the laws of the country in which it took place, the consular officer shall suspend action and submit a report. [See 9 FAM 42.43(a) Related Statutory Provisions.]

d. Form I-604, Request For and Report On Overseas Orphan Investigation [see 9 FAM 42.21 Exhibit I] is sent by the NVC with the approved petition.

9 FAM 42.21 N12 Orphans

9 FAM 42.21 N12.1 "Orphan" Defined

(TL:VISA-170; 10-01-1997)

a. Under INA 101(b)(1)(F), an orphan is a child, under the age of sixteen at the time a petition is filed on his or her behalf:

(1) Who has no parents because of the death or disappearance of, abandonment or desertion by, or separation from or loss of both parents; or

(2) Whose sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption.

b. INS regulations establish very specific meanings for terms such as "abandonment", "irrevocably released", and "sole or surviving parent". [See INS definitions in 9 FAM 42.21 Exhibit II.] The meanings of these terms are discussed in more detail in 9 FAM 42.21 N12.7.

9 FAM 42.21 N12.2 Consular Goals in Orphan Visa Processing

(TL:VISA-170; 10-01-1997)

a. The Bureau of Consular Affairs considers orphan visa cases to be of the highest priority. Consular sections should provide helpful, courteous and expeditious assistance to U.S. citizens and maintain sound visa-issuance policies.

b. Consular sections should be responsive to inquiries, schedule interviews quickly, and make prompt decisions. An adoption involves both the adopting parents and the child. Even if the final resolution is that the child is ineligible for immigration, the consular officer best serves all parties by making this determination as quickly as possible. Any required field investigations or record checks must be given the highest priority and done expeditiously so that the case may be resolved in a timely manner. Petitions that are not "clearly approvable" and INS-approved petitions that may have been approved in error must be written up and forwarded to the appropriate INS office without delay once the consular officer completes the investigation.

c. Correspondence on orphan and adoption issues should be shared with other concerned offices outside the Visa Office—in particular CA/OCS/CI and, when appropriate, CA/FPP. Posts should use CVIS, CASC, KOCI and KFRD tags respectively, to ensure timely distribution of cables to these offices. Posts should keep the Department and INS informed of general adoption issues, especially changes in local documentation or procedural requirements.

9 FAM 42.21 N12.3 Orphan Visa Processing

(TL:VISA-170; 10-01-1997)

a. The processing of orphan visas (IR3/IR4) involves two distinct determinations. The first determination concerns the application for processing which focuses on the ability of the prospective adoptive parents to provide a proper home environment, and on their suitability as parents. The second determination focuses on whether the child is an orphan under INA section 101(b)(1)(F). Only INS has the authority to make the first determination and to approve the application for advanced processing. The second determination may be made by the INS, or under certain circumstances, by the consular officer.

b. There are two INS forms that are used in orphan cases: the Form I-600A, Application for Advance Processing of Orphan Petition, which is used when the petition hasn't identified a specific child for adoption but wants to get preapproved; and the Form I-600 Petition to Classify Orphan as an Immediate Relative, which establishes that a particular child meets the INA definition of "orphan". The Form I-600A has to be approved by INS. The Form I-600 can be approved by a consular officer in countries where there isn't a regional INS office (countries other than Austria, Germany, Greece, Hong Kong, Italy, Korea, Mexico, the Philippines, Singapore, Thailand and Uruguay), however, an INS-approved Form I-601A has to accompany the petition in order to obtain consular approval.

9 FAM 42.21 N12.4 Form I-600A, Application for Advance Processing of an Orphan Petition

9 FAM 42.21 N12.4-1 Application Process and Approval

(TL:VISA-170; 10-01-1997)

a. The Form I-600A, Application for Advance Processing of an Orphan Petition, was designed to speed up the issuance of visas to orphans by "preclearing" the parents. The Form I-600A with its accompanying instruction sheet are shown as 9 FAM 42.32 Exhibit IV. The prospective petitioner (the person who will execute the Form I-600) fills out the application and the spouse co-signs. The application is sent to the INS office having jurisdiction over the applicant's place of residence.

b. Along with a completed Form I-600A, prospective adoptive parents must provide to INS proof of citizenship and marriage, a fingerprint check for prospective adoptive parents and all adult members of the household, proof of compliance with pre-adoption requirements, if applicable, and a favorable home study. INS determines if the parents are able to properly care for a child or children. INS will also determine, and indicate on the approved Form I-600A, any specific restrictions or limitations concerning state pre-adoption requirements, the number of children the parents are eligible to adopt, and any approval for children with special medical, physical, or emotional needs.

c. Notifications of Form I-600 approval are routinely sent by INS to consular offices when the prospective parents plan to travel abroad to adopt a child. Consular officers are to accept the following methods of notification:

(1) The original of the approved Form I-600A;

(2) Cabled notice of approved Form I-600A (VISAS Thirty-seven); and

(3) Faxed notice of approved Form I-600A, if transmitted directly from the approving INS field office.

9 FAM 42.21 N12.4-2 Validity of Form I-600A Approval

(TL:VISA-170; 10-01-1997)

The Form I-600A approval is valid for 18 months. If an orphan petition is not properly filed within 18 months of the approval date of the Form I-600A, Advance Processing Application, the application shall be deemed abandoned. After the approval expires, a new Form I-600A, including all relevant documentation, must be filed.

9 FAM 42.21 N12.5 Form I-600, Petition to Classify an Orphan as an Immediate Relative

9 FAM 42.21 N12.5-1 Approved Form I-600 Required for Visa Issuance

(TL:VISA-170; 10-01-1997)

A child immigrating to the United States under INA 101(b)(1)(F) must be the beneficiary of an approved Form I-600, Petition to Classify an Orphan as an Immediate Relative [see 9 FAM 42.21 Exhibit III], filed by the U.S. citizen adopting parent(s) before a visa can be issued.

9 FAM 42.21 N12.5-2 Where to File Form I-600 Petition

(TL:VISA-170; 10-01-1997)

a. Adoptive parents residing in the United States may file the Form I-600 petition with their local INS office. INS sends notification of the Form I-600 approval to the U.S. embassy or consulate having jurisdiction over the child's case. All immigrant visa processing posts shall process orphan visa cases based on receipt of:

(1) An approved Orphan Visa Petition (Form I-600), or

(2) A cabled notice of approval of a Form I-600 petition (VISAS Thirty-eight for IR-3 or Thirty-nine for IR-4), or

(3) A faxed notice of Form I-600 petition approval, transmitted directly from the approving INS field office.

b. Adoptive parents residing abroad or traveling abroad to complete the adoption can file the petition at a designated overseas INS office, or, if there is no INS office in the country, at the immigrant visa issuing post having jurisdiction over the area where the child lives.

c. If the Form I-600 petition is filed abroad at a Foreign Service post, it must be supported by an approved Form I-600A, Application for Advance Processing of an Orphan Petition. [See 9 FAM 42.21 Exhibit IV.]

9 FAM 42.21 N12.5-3 Form I-600 Petition Procedures

(TL:VISA-170; 10-01-1997)

Documents necessary to file the Form I-600 include:

(1) Evidence of approval of the advanced processing application, which must be either telegraphic or faxed notification from INS (VISAS Thirty-Seven) or

(2) A receipt of the approved I-600A application. Consular officers may not process a case to conclusion on the basis of the adoptive parents' Form I-171H notice of approval only.

(3) The child's birth certificate, or if such a certificate is not available, an explanation together with other proof of identity and age.

(4) Evidence that the child is an orphan, as defined by INA 101(b)(1)(F). [See also INA regulations at 9 FAM 42.21 Exhibit VI.]

(5) Evidence of adoption abroad, or proof of custody and proof that pre-adoption requirements in the proposed state of residence have been met. Evidence of adoption abroad consists of a legible, certified copy of a full and final adoption decree and evidence that the petitioner and spouse (if married) saw the child prior to or during adoption proceedings. If there was no adoption abroad or if the adoption did not meet the requirements listed, evidence must be submitted that the prospective adoptive parents have, or a person or entity working on their behalf has:

(a) Secured custody of the child for emigration and adoption in accordance with the laws of the foreign-sending country; and

(b) Evidence of compliance with all pre-adoption requirements, if any, of the state of the child's proposed residence. Generally, the approval of the Form I-600A signifies that INS has verified the pre-adoption requirements. [See 9 FAM 42.21 N12.5-8.] The INS approval notice or cable will specify any pre-adoption requirements that must still be met. Any such requirements that cannot be met prior to the child's arrival in the United States because of state law must be noted and explained; and

(c) Evidence that the state of the child's proposed residence allows readoption or provides for judicial recognition of the adoption abroad. Again, the approval of the Form I-600A signifies that INS has confirmed this.

9 FAM 42.21 N12.5-4 Other Requirements for Status Under INA 101(b)(1)(F)

(TL:VISA-170; 10-01-1997)

a. For a child to qualify as an immediate relative under INA 101(b)(1)(F):

(1) The Form I-600 petition must have been filed before the child's sixteenth birthday; (the final adoption does not have to be completed before the child’s 16th birthday but there has to be some legal custodial relationship established before the 16th birthday, which allows the child’s emigration to the United States and his or her eventual adoption);

(2) The child must meet the definition of an orphan [see 9 FAM 42.21 N12.1];

(3) If married, the petitioners (one of whom must be a U.S. citizen) may be of any age; or

(4) If unmarried, the petitioner must be a U.S. citizen who is at least 24 years old when filing the Form I-600A and at least 25 years old when filing the Form I-600 petition.

b. In addition, when the child is adopted abroad, the petitioner must also establish that:

(1) The petitioner and spouse (if married) personally saw and observed the child prior to or during the adoption proceedings; and

(2) The formal adoption decree reflects that both spouses were parties to the adoption.

c. If, however, the child is to be adopted in the United States, the petitioner must establish the following:

(1) The child will be adopted in the United States by the petitioner and spouse (if married) and that the pre-adoption requirements, if any, of the state of proposed residence have been met; and

(2) The petitioner and spouse, or someone acting on their behalf, have obtained legal custody of the child for emigration and adoption in accordance with the laws of the foreign-sending country. This is defined as the child's country of citizenship or, if permanently residing outside that country, the place of the child's habitual residence.

9 FAM 42.21 N12.5-5 Evidence of Custody

(TL:VISA-170; 10-01-1997)

Since child custody laws and regulations vary considerably from country to country, evidence that the parent(s) or their agent obtained legal custody may vary greatly depending upon local laws and regulations. Generally, this evidence will consist of documentation from a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage authorized to act in such a capacity.

9 FAM 42.21 N12.5-6 Proxy Adoptions

(TL:VISA-170; 10-01-1997

a. U.S. citizen prospective adoptive parents may effect an adoption without ever traveling to a foreign-sending country or meeting the child prior to the child’s entry into the United States if the local laws allow such “proxy adoptions”. However, Form I-600 must be filed in the United States. An agent or proxy acting on the parent’s behalf may not file Form I-600 at the post abroad. The adoptive parents in such a case must also meet the pre-adoption requirements of the intended state of the child’s residence.

b. If the Form I-600 is approved by INS and notification is received at post, agents (usually social workers or adoption agency employees) may process the child's immigrant visa application at post. An officer may require the agent to provide a power of attorney or notarized affidavit authorizing representation on behalf of the adoptive parent(s). That individual may be then given the child's immigrant visa to pass on to the adoptive parents or to escort the child to the United States.

9 FAM 42.21 N12.5-7 Effect of Local Laws

(TL:VISA-170; 10-01-1997

a. In order to properly adjudicate an orphan visa case, it is essential that the consular officer be well versed in the host country's adoption and guardianship laws and procedures. These laws are relevant in determining whether the child has been fully adopted abroad, or whether the adoptive parents or their agent have obtained legal custody of the child.

b. Consular officers should rely on competent local authorities to make responsible decisions about parental abandonment, child custody and final adoptions. Posts should report to CA/OCS/CI, CA/VO/F/P, and CA/FPP substantiated concerns that a competent authority is abusing its powers.

9 FAM 42.21 N12.5-8 State Pre-adoption or Re-adoption Requirements

(TL:VISA-170; 10-01-1997

a. State pre-adoption requirements must be met when:

(1) There will be no adoption abroad, or

(2) Both members of the couple or the single parent will not have personally seen the child prior to, or during the adoption abroad, or

(3) The adoption abroad will not be full and final.

b. Prospective adoptive parents in these situations must provide INS with evidence that they have met the pre-adoption or re-adoption requirements of the state of the child's proposed residence. Any deficiencies are noted in the INS approval notice cable. In cases with such deficiencies, the adoptive parents must provide the consular officer with evidence that the requirements have since been met. Officers should be as flexible as possible in requiring proof of meeting pre-adoption requirements and opt for the minimum level of proof acceptable in each case. (Where there is no reason to doubt the parent’s compliance with the preadoption requirements, officers may choose to accept faxes or photocopies vice original documents, etc.). The goal is to ensure compliance with state and federal laws while creating the least burden and delay possible for the child and his or her adopting parents.

b. Rarely, the officer may have questions unanswered by the Form I-600A notification of approval as to whether pre-adoption requirements have been met:

Examples:

(1) The adopting parents have moved to a new state after the Form I-600A was approved. An amended home study must be filed with INS and the new state of residence's pre-adoption requirements, if any, must be met.

(2) The Form I-600A was approved on the understanding that both parents would see the child prior to the adoption but unforeseen circumstances have not allowed this to happen. The parents would have to establish that pre-adoption requirements, if any, were met.

c. See 9 FAM 42.21 Exhibit V for lists of the appropriate contact offices in each state.

9 FAM 42.21 N12.5-9 Consular Authority to Approve Form I-600 Petitions

(TL:VISA-170; 10-01-1997

a. INS has delegated to consular officers the authority to approve Form I-600 petitions when:

(1) The consular officer has received notification from INS of an approved Form I-600A, Application for Advanced Processing;

(2) A U.S. citizen petitioner has traveled abroad to a country where there is no INS officer; and

(3) The petition is clearly approvable.

b. In order to file a Form I-600 petition at a Foreign Service post, the U.S. citizen petitioner must be physically present in the consular district. If a petitioner is married and a U.S. citizen, the petitioner's spouse need not be present; however, the petition must be properly executed by both petitioner and spouse. One spouse may not sign on behalf of the other, even with a power of attorney. The consular officer need not verify the adoptive parents' marriage, citizenship status, and ability to support the adopted child or children. INS addresses these issues in the Form I-600A approval. A petition should not be accepted if the parents already have a petition pending with an INS office in the United States. The prospective adopting parents should be instructed to withdraw one of the petitions.

9 FAM 42.21 N12.5-10 Petitions "Not Clearly Approvable"

(TL:VISA-170; 10-01-1997)

a. If a petition is not clearly approvable, petitioners should be afforded an opportunity to respond to questions or issues that can be quickly or easily resolved. Consular officers must promptly forward petitions which cannot be approved to the INS office abroad having jurisdiction. Officers should include supporting documents, the Form I-604 investigation report, and any other relevant documentation.

b. In addition, the consular officer should notify the prospective adoptive parent(s) in writing, including an explanation of the basis for this action and the name and address of the INS office to which the petition has been forwarded.

9 FAM 42.21 N12.5-11 Fees

(TL:VISA-170; 10-01-1997)

If the prospective adoptive parents filed a Form I-600A with INS, they may file an orphan petition for one child without an additional fee. If the parents were approved to adopt more than one child, they may file a petition for each additional child to the maximum number approved. If the children are siblings, no additional fee is required. If the children are not siblings, an additional fee is required for each child beyond the first.

9 FAM 42.21 N12.6 Investigations of Orphan Cases

9 FAM 42.21 N12.6-1 Requirement for Investigation

(TL:VISA-170; 10-01-1997)

a. A Form I-604, Request For and Report On Overseas Adoption Investigation [see 9 FAM 42.21 Exhibit I] must be completed in every orphan case. A consular officer must perform the investigation unless the petition is filed at an INS office abroad, in which case, it will be done by an INS officer. When the Form I-600 petition is filed abroad, the Form I-604 investigation must be completed before the petition can be adjudicated.

b. The I-604 investigation has two purposes: to verify that a child is an orphan as defined by INA 101(b)(1)(F) and to identify any significant medical condition not shown on the petition. It should focus on those elements which specifically pertain to the validity of the petition, such as the child's status as an orphan, custody of the child, evidence of child buying, and medical conditions not indicated on the petition.

c. The investigation is usually conducted at the time of the visa interview and is based on document review. If necessary, it can include interviews with the child (if of sufficient age), social workers, orphanage representatives, the prospective adopting parents, or biological parent(s), if available. When fraud is detected or indicated, a full field investigation may be warranted. If the child is from a different country from that of the processing post, the officer may wish to request assistance from the consular post in the district of the child's origin.

9 FAM 42.21 N12.6-2 Form I-600 Petitions Filed at Foreign Service Posts

(TL:VISA-170; 10-01-1997)

When the Form I-600 petition is filed at a Foreign Service post, the Form I-604 investigation plays an essential role in determining if the petition is "clearly approvable". Because the consular officer's authority is limited to petitions which are clearly approvable, primary evidence is necessary to establish eligibility. Standards for what constitutes primary evidence cannot be absolute because local conditions differ. [See guidelines in 9 FAM 42.21 N12.7.] The Form I-600 which is not supported by primary evidence, or supported in whole or in part by secondary evidence, should be referred along with the completed Form I-604 report to the appropriate INS office abroad for adjudication.

9 FAM 42.21 N12.6-3 Form I-600 Petitions Approved by INS in United States

(TL:VISA-170; 10-01-1997)

a. When the Form I-600 petition has been approved by an INS office in the United States, the Form I-604 is used to verify to the extent possible information listed about the child in the approved petition. If the investigation uncovers substantive evidence that places into question the child's status as an orphan under INA 101(b)(1)(F), the consular officer should return the petition to the approving INS office for possible revocation, along with a copy of the Form I-604 investigation report. [See 9 FAM 42.43 N1 and 9 FAM N2.]

b. If the evidence is at variance with that originally submitted to INS, but does not contradict the fact that the child is an orphan, the Form I-600 petition should not be returned to INS and the case should be processed to conclusion. For example, a late registered birth certificate may be irregular, but is not sufficient proof to sustain a revocation of an approved petition if other factors are favorable.

9 FAM 42.21 N12.7 Elements of Form I-604 Investigation

9 FAM 42.21 N12.7-1 Identity and Age of Child

(TL:VISA-170; 10-01-1997)

Primary evidence of the child's identity and age consists of a birth certificate showing timely registration of the birth.

9 FAM 42.21 N12.7-2 Death of Biological Parent(s)

(TL:VISA-170; 10-01-1997)

Primary evidence that the biological parents have died is a death certificate in the name of the parent or parents.

9 FAM 42.21 N12.7-3 Abandonment by Parent(s)

(TL:VISA-170; 10-01-1997)

a. The term “abandonment” will be employed by local law or court decrees according to local usage. “Abandonment” as it relates to INA 101(b)(1)(F), however, has specific meanings established by INS regulations. [See 9 FAM 42.21 Exhibit I.] In essence, there must be evidence that both parents have irrevocably and unconditionally severed all aspects of the parent-child relationship. This includes not only the expressed intent to surrender all parental rights, control, obligations and claims over the child, but also the actual surrendering.

b. The term “abandonment” as used in foreign jurisdictions may equate to the INS definitions of desertion, disappearance, loss, or separation. Officers should explore such a possibility when trying to determine “orphan status”.

c. A relinquishment or release by the biological parents to the prospective adoptive parents or to any other party for a specific adoption does not constitute abandonment. Likewise, the relinquishment or release of a child to a third party for custodial care in anticipation of an adoption does not constitute abandonment, unless the third party is authorized under the child welfare laws of the foreign-sending country to act in such a capacity, and the release is unconditional.

d. However, a child released to a government-authorized third party could be considered to have been abandoned even if the parents knew at the time that the child would probably be adopted by a specific person or persons, so long as the relinquishment was not conditioned upon adoption by a specific person or persons.

e. A child who is placed unconditionally in an orphanage can be considered abandoned. A child placed temporarily in an orphanage is not considered abandoned if the parents express their intention to retrieve the child, contribute to the support of the child, or, otherwise, show ongoing parental interest in the child's welfare.

f. Primary evidence of abandonment is a document signed by the parent or parents unconditionally releasing the child to an orphanage, or a decree from a court or other competent authority making the child a ward of the state and unconditionally divesting the parent or parents of all parental rights over the child. Individual cases which are not clearly approvable should be forwarded to INS for adjudication.

9 FAM 42.21 N12.7-4 Desertion by, Disappearance or Loss of, or Separation from Parent(s)

(TL:VISA-170; 10-01-1997)

Primary evidence consists of a decree from a court or other competent authority making the child a ward of the state by virtue of such desertion, disappearance, loss or separation, and unconditionally divesting the parents of all parental rights over the child.

9 FAM 42.21 N12.7-5 Unconditional Release by Sole or Surviving Parent

(TL:VISA-170; 10-01-1997)

a. A child can be unconditionally released for adoption by a sole or surviving parent who is unable to provide for the child's basic needs, consistent with local standards.

b. A surviving parent is defined as a child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of INA 101(b)(2) (i.e., marriage by the surviving parent has not created a stepparent relationship). Primary evidence would be a death certificate in the name of the deceased parent.

c. INS regulations limit the term "sole parent" to the mother of a child born out of wedlock. The child is considered to have a sole parent only if:

(1) The biological father has disappeared or abandoned or deserted the child; or

(2) The father has, in writing, irrevocably released the child for emigration and adoption; and if the child has not acquired another parent within the meaning of INA 101(b)(2).

d. The sole or surviving parent's release or relinquishment must be in writing, in a language that the parent is capable of reading and signed by the parent. The release must be irrevocable and without stipulations or conditions. If the parent is illiterate, but in an interview satisfies the consular officer that he or she had full knowledge of the contents of the document and understood the irrevocable nature of the release, the officer may also treat the document as primary evidence.

9 FAM 42.21 N12.7-6 Abandonment Rather than Release by Sole Parent

(TL:VISA-170; 10-01-1997)

A child who does not qualify as an orphan through release by a sole parent may nevertheless qualify as an orphan because of abandonment by both parents.

9 FAM 42.21 N12.7-7 Child Buying as Grounds for Denial

(TL:VISA-170; 10-01-1997)

a. An orphan petition must be denied if the adoptive parent(s), or a person or entity working on his or her behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent, or other individual as payment for the child or as an inducement to release the child. However, this does not preclude reasonable payment for necessary activities such as administrative, court, legal, translation or medical services related to the adoption proceedings.

b. Consular officers must seriously review allegations of child buying, and carefully weigh evidence available to substantiate such charges. Foreign adoption services are sometimes expensive and their costs can sometimes seem disproportionally high in comparison with other social services. Further, in many countries there is a network of adoption facilitators, each playing a role in processing an individual case and thus reasonably expecting to be paid for their services. In most adoption cases the expenses incurred can be explained in terms of "reasonable payments". Even cash given directly to a biological mother may be justifiable if it relates directly to expenses such as pre-natal or neo-natal care, transportation, lodging or living expenses. Investigations of child buying, therefore, should focus on concrete evidence or an admission of guilt.

c. Cases in which there is clear and documented evidence or an admission of child buying should be promptly returned to the appropriate office of INS.

9 FAM 42.21 N12.8 Medical Conditions and Form I-604 Investigation

(TL:VISA-170; 10-01-1997)

a. The Form I-604 investigation must establish if the child has any significant physical or mental affliction or disability relevant to the petition. In addition to reviewing visa ineligibilities under INA 212(a)(1), the consular officer must:

(1) Verify that any medical condition is known and accepted by the adoptive parents; and

(2) Ensure that the condition is not excluded by special conditions established in the Form I-600A approval.

b. Officers should take care to inform parents that the Form I-604 investigation and the immigrant visa examination are not meant to provide comprehensive evaluations of the child's health. If adopting parents have any questions, they should arrange their own evaluations by qualified medical professionals, preferably ones versed in childhood development.

9 FAM 42.21 N12.8-1 Notification of Adoptive Parents

(TL:VISA-170; 10-01-1997)

If a significant medical condition is discovered, including one which is not specifically grounds for exclusion under INA 212(a)(1), the consular officer must furnish the adoptive parents all pertinent details concerning the affliction or disability. This is especially important in cases where the parents have not physically observed the child.

9 FAM 42.21 N12.8-2 Medical Conditions Known and Accepted by Both Adoptive Parents

(TL:VISA-170; 10-01-1997)

a. If a serious medical condition is discovered, processing should be suspended until the consular officer receives a notarized statement from the adoptive parent, or parents if married, indicating awareness of the child's affliction and willingness to proceed with orphan processing. An abstract of a home investigation made by a social service agency, countersigned by the adoptive parent(s), is acceptable if it notes the parent(s) are aware of the child's condition and nevertheless willing to adopt the child. An appropriate entry in item 20 of the Form I-600 is also acceptable.

b. If the Form I-600 petition has been filed at a Foreign Service post, the information about the affliction or disability should be incorporated in item 20 of the Form I-600 and initialed by the adoptive parents, or a signed letter from the parents acknowledging the affliction or disability should be attached. If the adoptive parents choose not to pursue the petition, the consular officer shall forward it, along with the Form I-604 investigation report and all other pertinent information to the appropriate INS office.

9 FAM 42.21 N12.8-3 Special Restrictions Identified in Approved Form I-600A

(TL:VISA-170; 10-01-1997)

a. INS approval of the Form I-600A may indicate specific restrictions to an adoption such as the child's nationality, age or gender. It will also indicate if the prospective adoptive parents have been approved for a handicapped or special needs adoption.

b. If a child clearly does not meet the special considerations identified by the INS, the consular officer should suspend processing, document the circumstances in the Form I-604 report, and promptly forward the case to the appropriate INS office. Prospective adoptive parents should be notified of the action.

9 FAM 42.21 N12.8-4 Revoking Petitions Upon Disclosure of Medical Condition

(TL:VISA-170; 10-01-1997)

An orphan petition must be returned to INS if a medical examination discloses a history or the existence of an excludable physical, mental, or emotional condition that would affect the child's normal development, other than one noted in the approved petition or accepted in writing by the adoptive parents in accordance with 9 FAM 42.21 N12.8-2. In such circumstances, the consular officer should notify the prospective adoptive parents and return the petition to the INS approving office with a report of the condition disclosed.

9 FAM 42.21 N12.9 Transferring Orphan Cases

(TL:VISA-170; 10-01-1997)

It is not unusual for adopting parents to consider children from several different countries. Therefore, upon request of the adoptive parent(s), another IV post, or INS, posts will transfer the Forms I-600A and repeat the approval by cable to another immigrant visa processing post which has responsibility for a newly-identified child's nationality or place of habitual residence.

9 FAM 42.21 N12.10 Financial Evidence

(TL:VISA-170; 10-01-1997)

INS requires an assessment of the prospective adopting parents' financial ability to raise the child as part of the home study. The approved Form I-600A serves as proof that the requirements of INA 212(a)(4) have been met. Additional financial evidence should only be required if the child has an illness or defect not addressed by the approved I-600A, which would entail significant financial outlay or if other unusual circumstances prevail.

9 FAM 42.21 N12.11 Validity of Home Study

(TL:VISA-170; 10-01-1997)

a. INS establishes the ability of the prospective adoptive parents to furnish proper care to an adopted child when approving the Form I-600A. Consular officers have no authority to review this determination.

b. If the consular officer has a well-founded and substantive reason to believe that the advanced processing approval was obtained on the basis of fraud or misrepresentation, or has knowledge of a change in material fact subsequent to the approval of the Form I-600A, the consular officer should consult with the appropriate INS office abroad.

9 FAM 42.21 N12.12 Immigrant Visa Under IR-4 Symbol Instead of IR-3

(TL:VISA-170; 10-01-1997)

Because travel plans and circumstances change, the parents of a child who has been approved for an IR-3 visa (for an orphan fully adopted abroad) may not be able to complete that adoption and thus may request that the child be processed for an IR-4 visa (an orphan coming to the United States for adoption). Consular officers may process an immigrant visa under the IR-4 symbol in lieu of the IR-3 only if the requirements for an IR-4 have been met, including evidence that the prospective adoptive parents have met all state pre-adoption requirements.

9 FAM 42.21 N12.13 Medical Ineligibilities

(TL:VISA-170; 10-01-1997)

a. Consular officers should refer to 9 FAM 40.11 N10 for a discussion of waivers of medical ineligibilities for immigrant visa applicants.

b. The consular officer cannot issue an immigrant visa to a child afflicted with tuberculosis and on whose behalf INA 212(g) has been invoked, or a child suffering from any condition leading to the issuance of a Class B medical certificate, until the conditions concerning the adoptive parent's notification and consent in 9 FAM 42.21 N12.8-2 have been met.

9 FAM 42.21 N12.14 Vaccination Exemption for Orphan Visa Applicants

(TL:VISA-179; 08-21-1998)

See 9 FAM 40.11 N5.6 and 9 FAM 40.11 N5.7.

9 FAM 42.21 N12.15 Adoption Fraud

(TL:VISA-170; 10-01-1997)

a. Orphan adoption cases are susceptible to fraud; that is, efforts to obtain by deception U.S. visas for children who do not qualify. In many cases, however, both the U.S. citizen adoptive parents and the adoptive children may be unwitting victims of a fraud which was actually perpetrated upon them by unscrupulous agents misrepresenting important facts about these children. If the fraud involves stolen or kidnapped children, biological parents may also be victims.

b. Consular officers, therefore, must scrutinize documentation presented in support of orphan cases. At the same time, anti-fraud efforts must be balanced with the mandate to provide service to U.S. citizens and the need to be sensitive to the victims of fraud. Effective anti-fraud programs for orphan cases involve efforts beyond normal immigrant visa processing. They often focus on procedures and pre-screening techniques which limit the vulnerability of the visa process to fraud, but which do not unnecessarily delay processing for other cases and avoid, to the extent possible, further hardship for fraud victims.

c. Because orphan adoption cases are multifaceted, a successful anti-fraud program should engage the entire adoption community including agents, lawyers, orphanages, foster care providers, medical personnel, judges, local officials, and law enforcement personnel. Consular officers should keep in mind, however, that the responsibility for enforcing local laws and for protecting the rights of children and biological parents rests primarily with local authorities.

d. Posts are urged to keep the Department informed about emerging orphan fraud issues and to discuss any significant anti-fraud efforts with CA before they are implemented.

9 FAM 42.21 N12.16 Advisory Opinion Requests

(TL:VISA-170; 10-01-1997)

Officers are encouraged to refer any legal or procedural questions about orphan visa processing to the Visa Office (slugged for CA/VO/L/A and CA/VO/F/P with an information copy to CA/OCS/CI).

9 FAM 42.21 N13 Classification of Amerasian Children Under Pub. L. 97-359

9 FAM 42.21 N13.1 Classification Under INA 204(f)(1)

(TL:VISA-170; 10-01-1997)

a. Pub. L. 97-359 of October 22, 1982, added section 204(g) (now 204(f)(2)) to the INA to provide preferential treatment in the immigration of certain illegitimate Amerasian children of U.S. citizen fathers who are unable to immigrate under any other section of the INA. Prior to enactment of Pub. L. 97-359, these children were unable to gain any benefits from their relationship to their father. The provisions of INA 204(f)(1) enable them to do so without requiring their father to file a petition on their behalf.

b. To qualify for benefits under INA 204(f)(1) the beneficiary must have been:

(1) Born in Korea, Vietnam, Laos, Cambodia, or Thailand after December 31, 1950, and before October 22, 1982; and

(2) Fathered by an U.S. citizen.

c. Beneficiaries under age 21 and unmarried are entitled to classification as immediate relatives; unmarried sons and daughters over the age of 21 to classification as family first preference; and married sons and daughters to family third preference.

9 FAM 42.21 N13.2 Alternative Classification

(TL:VISA-170; 10-01-1997)

An Amerasian child may, of course, immigrate under another provision of the INA, if so qualified. For example, an alien may be classified as an orphan under INA 101(b)(1)(F) [see 9 FAM 42.21 N13] or may qualify as an Vietnamese Amerasian under Pub. L. 100-202, as amended by Pub. L. 101-167 and Pub. L. 101-513, for whom no petition is required. [See 9 FAM 42.24 Related Statutory Provisions and 9 FAM 42.24 Notes.]

9 FAM 42.21 N13.3 Petition Procedures for Amerasian Child

(TL:VISA-170; 10-01-1997)

Although consular officers may not approve petitions for Amerasian children who are beneficiaries under Pub. L. 97-359, the provisions of 8 CFR 204.4 are provided in 9 FAM 42.24 Exhibit I.

9 FAM 42.21 N13.4 Revocation of Petition for Amerasian Child

(TL:VISA-170; 10-01-1997)

INS regulations for the revocation of petitions for Amerasian beneficiaries under Pub. L. 97-359 are provided in 9 FAM 42.24 Exhibit I.