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IMMIGRATION LAW

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Appeals Unit Forces INS To Re-Examine Old Assumptions

The adoption and immigration of foreign children from Eastern Europe have increased significantly during the past 10 years, in part because of large number of children orphaned by economic, civil and ethnic strife. Recently, however, many adoptive families have encountered difficulties with the U.S. Immigration and Naturalization Service in bringing their newly adopted children home to the United States.

Such difficulties have their genesis in the enactment of 8 C.F.R. 204.3(h)(1), effective Sept. 29, 1994, which states that a child cannot be considered to be an orphan of a sole parent, when both parents are living, in countries that do not recognize a legal distinction between legitimate and illegitimate children. Moreover, the INS had taken the position that none of the former Soviet countries make such a distinction because the family codes of virtually all of the former Soviet countries are closely based on the law of the Soviet Union, which did not make the distinction. This position effectively eliminated the application of the

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“orphan of a sole parent” provision to adoptions from those countries.

But attorneys handling adoptions of children from former Eastern Bloc nations should read the statutes of those countries carefully. Recently, the INS's appellate unit overturned and INS decision denying an American the opportunity to adopt a child from Lithuania. The ruling in the appeal found the INS's position to be outdated.

'Orphan' Defined

The Immigration and Nationality Act section 101(b)(1)(F) defines an “orphan” as a child, under the age of 16 at the time an immediate relative petition is filed on his or her behalf, who is parentless 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.” Once the child is adopted, the natural parents are precluded from ever deriving U.S. immigration benefits from their relationship with their natural children.

Most foreign adopted children gain immigration benefits by qualifying as “orphans” because INA section 101(b)(1)(E) (8 U.S.C. 1101(b)(1)(E)) requires that nonorphans must have been in the legal custody of, and resided

with, the adopting parent or parents for at least two years before gaining eligibility for such benefits. That section greatly limits the number of American families who can adopt and petition for foreign children who are not orphans. When, however, an adoptive child qualifies as an “orphan” under INA section 101(b)(1)(F) (8 C.F.R. 1101(b)(1)(F)), no such custody/residence is required, and the child can immediately emigrate to the United States.

In a recent decision handed down by the INS Administrative Appeals Unit, in Washington, D.C., the provisions of INA section 101(b)(1)(F) (8 U.S.C. 1101(b)(1)(F)) were interpreted and clarified with regard to the definition of “orphan of a sole parent” in the context of adoption and immigration from former Soviet countries.

In Matter of Ward, No. A71 762 733 (AAU, May 30, 1995), Bernadette Ward, an American citizen, adopted Matthew John Ward in Lithuania in August 1994. Matthew was born out of wedlock. His natural mother was found to be incapable of providing proper care for Matthew in that she was supporting herself and three other children on welfare. His natural father, upon learning of the pregnancy, had abandoned the family months before Matthew's birth.

Also during August 1994, Mrs. Ward filed the advance processing petition pro se with the INS in Baltimore. Once approved, she went to Lithuania,

intending to return with her new son. On Sept. 27, having left Lithuania with Matthew, Mrs. Ward filed the required second portion of the petition pro se at the U.S. Consulate in Warsaw, Poland. The petition was found to be deficient in that it did not include the signature of Mrs. Ward's husband, from whom she had been separated for several years.

Mrs. Ward filed another petition pro se with the U.S. Consulate in Poland on Nov. 3, 1994, Attached to that petition was an affidavit signed by Mr. Ward consenting to the emigration of Matthew.

Stranded in Poland

The INS denied the petition and refused Matthew permission to enter the United States, holding that Matthew John Ward did not qualify as an orphan because Lithuania does not legally distinguish between legitimate and illegitimate children. This effectively required the Wards to satisfy the two-year custody/residency requirement pursuant to INA section 101(b)(1)(E) (8 U.S.C. 1101(b)(1)(E)) before returning to the United States with her infant.

Stranded in Poland, Mrs. Ward retained counsel and an application for Humanitarian Parole was immediately submitted to the INS district director in Rome. In November 1994, the Wards' application for Humanitarian Parole was granted, thereby permitting Matthew to enter the United States for one year pending resolution of the underlying issue.

Simultaneously, the decision of the INS, that Matthew Ward does not qualify as an orphan of a sole parent, was certified to the INS Administrative Appeals Unit.

On appeal, Mrs. Ward argued that

Matthew John Ward should be admired as a lawful permanent resident in that he qualifies as an "orphan of a sole parent" under INA section 101(b)(1)(E) (8 U.S.C. 1101(b)(1)(E)). Specifically, counsel argued that Lithuania, unlike most former Soviet countries, legally distinguishes between legitimate and illegitimate children, and that the Lithuanian Supreme Court had in fact relied on one such distinction in granting Mrs. Ward's petition for adoption without the consent of Matthew's natural father.

This argument was based on Articles 54, 55, 56, 112 and 113 of The Marriage and Family Code of Lithuania, which distinguish between legitimate and illegitimate children by not requiring the consent of the natural father for the mother to put the child up for adoption when the child is illegitimate and paternity has not been established. Specifically, Lithuania Marriage Code Article 57 states "children born to unmarried persons, upon the establishment of paternity, shall have exactly the same rights and obligations in relation to their parents and relatives as children born to persons married to each other."

Mrs. Ward emphasized that, since paternity had not been established between Matthew and his natural father, Matthew is treated differently under Lithuanian law than if his natural father had been identified.

On appeal the INS continued to argue that Matthew could not enter the United States because he did not qualify as an orphan of a sole parent in that the Marriage and Family Code of Lithuania does not distinguish between legitimate and illegitimate children.

'Novel Issues'

On May 30, 1995, the AAU held

that the petitions filed pro se by Mrs. Ward with an affidavit from her husband were technically deficient in that Mr. Ward had not signed the actual petition. However, the AAU went on to address the issue as to whether Matthew John Ward qualifies as an "orphan," stating "it is felt that the remaining issue needs to be addressed as it involves novel issues of law that will affect similar orphan cases."

The AAU's decision held that Lithuania does in fact distinguish between legitimate and illegitimate children. "Additionally, the beneficiary's biological father has abandoned the child severing all parental ties, rights, duties and obligations to the child and cannot be considered the beneficiary's 'parent' as defined in the statute. Consequently, upon the filing of a new petition, accompanied by the appropriate documentary evidence and fee, the petitioner may be able to show that the beneficiary qualifies as the child of a sole maternal parent."

Mrs. Ward expects to refile in October 1995, on the completion of her divorce, at which point Mr. Ward's signature will not be required.

The potential effects of this decision are clearly set forth in an interdepartmental INS cable, sent from the U.S. Consulate in Vilnius, Lithuania: "As Lithuanian Law is based on Soviet Law, these distinctions may have a bearing on orphan adoption cases elsewhere in the former Soviet Union." Accordingly, adopted children from most of Eastern Europe should now be able to qualify for immigration benefits as orphans of sole parents, where paternity has not legally been established, even when both parents are living, thus avoiding the two-year residency/custody requirement. ■