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Immigration Restraints on International Adoption

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COMMENTS

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I. INTRODUCTION

Recently a shortage of adoptable American infants has caused U.S. citizens to adopt an increasing number of foreign-born children.[1] Foreign-born children placed in America must satisfy certain immigration requirements.[2] Most significantly,

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1. During the 1970's the number of children adopted from abroad averaged about 5,000 annually, with a peak of more than 6,500 adoptions in 1976. The Immigration and Naturalization Service reported 5,139 foreign adoptions in 1980, and 4,968 in 1981. Since 1981, the numbers have been growing with 5,793 children entering the country in 1982 and 7,350 in 1983. L. GILMAN, THE ADOPTION RESOURCE BOOK 60 (1984).

According to Holt International Children's Service, 859 children were placed for adoption in 1983 by Holt. Of those, 845 were placed directly from foreign countries. This indicates a 36% increase in foreign adoptions when compared with the 623 foreign placements in 1982, and a 193% increase when compared with the 289 foreign children placed in 1981. HOLT INTERNATIONAL CHILDREN'S SERVICE, 1983 ANNUAL REPORT 7-8 (1984).

Two alternative approaches are available for applicants seeking to adopt foreign-born children: (1) adoptions processed by U.S. adoption agencies and (2) "parent-initiated" or "direct" adoptions where parents have primary responsibility for locating the child and completing the adoption. Hale, *Adopting Children From Foreign Countries: A Viable Alternative for Clients Who are Stymied by the American Scene*, 4 FAM. ADVOC. 31 (1981). This comment focuses on parent-initiated adoptions where parents have resided abroad and completed the foreign adoption process without agency assistance.

Factors contributing to this current interest in adopting foreign children and also explaining the decline of adoptable U.S. infants include: a decline in the number of healthy American babies (attributed to an increase in abortions, contraceptive use, and single mothers keeping their babies due to the decreased stigma of unwed motherhood); the shorter waiting period for a foreign child (six months to one year for a foreign child, as compared with a period as long as ten years for an American child); involvement of United States adoption agencies facilitating the adoption process; an acceptance of single persons parenting children. Note, *The Law and Procedure of International Adoption: An Overview*, 7 SUFFOLK TRANSNAT'L L.J. 361 n.1 (1983).

2. 8 U.S.C. § 1101 (1982). The requirements for an international adoption are substantially different from domestic adoptions. In domestic proceedings, a legally binding parent-child relationship is created once applicant parents have satisfied requirements of parental suitability and completed the necessary documentary procedures as statutorily outlined. In foreign adoptions, parents must complete all domestic proceeding requirements and satisfy emigration and immigration prerequisites and other foreign legal pro-

the Immigration and Naturalization Service (INS) requires that the petitioning parent prove that a "legally binding" and "officially recognized" adoption proceeding was completed in the child's own country before the child will be allowed to immigrate.[3] Problems emerge when the INS denies an adopted child immigrant status because the foreign adoption would have been invalid under American law, even though the adoption was completed in accordance with a foreign country's existing legal or customary adoption procedures.[4] When this occurs, adopting parents face the predicament of either remaining abroad or returning to the U.S. without their adopted child.[5]

After briefly discussing INS rules and regulations governing immigration, this comment reviews two recent federal circuit decisions and their conflicting interpretations of U.S. immigration provisions as applied to customary adoptions proceedings recognized in other countries. It then analyzes the two cases and concludes that only one of the decisions is consistent with the intent of the INS rules.[6]

II. International Adoptions: INS Rules and Regulations Governing Immigration

The INS, an arm of the U.S. Department of Justice, regulates immigration of foreign-born citizens into the United States. Once petitioning parents complete all documentary prerequi-

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cedures before adoption is finalized. *See* Mila v. District Dir. of the Immigration and Naturalization Serv., 494 F. Supp. 998 (D. Utah 1980), *rev'd* 678 F.2d 123 (10th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); Kaho v. Ilchert, 765 F.2d 877 (9th Cir. 1985).

3. *In re* B , 9 I. & N. Dec. 521 (1961).

4. A customary adoption is an adoption created by operation of custom such as a common law adoption or an adoption pursuant to longstanding local or national tradition. *See, e.g., In re* Ng, 14 I. & N. Dec. 135 (1972); *In re* Poon, 14 I. & N. Dec. 155 (1972).

5. Comment, *Judicial Review of Administrative Denials of Immigration Visa Preferences Based on Family Relationships:* Mila v. District Director of Immigration & Naturalization Service, 1983 Utah L. Rev. 877, 878.

6. Under the Immigration and Nationality Act, a limited number of immigrant visas are allowed each fiscal year. 8 U.S.C. § 1151(a) (1982). Congress has established a preference system for the issuance of immigrant visas. *Id.* One of the primary purposes and objectives of the preference system is to reunite families. Lau v. Kiley, 563 F.2d 543, 545 (2d Cir. 1977).

sites,[7] the INS determines whether the child qualifies as an orphan[8] and is legally free to leave his native country.

Provisions central to resolving most adoption immigration disputes are found in 8 U.S.C. § 1151 and 8 U.S.C. § 1101(b)(1)(E). Under § 1151, many immigration procedures and obstacles are avoided once a party qualifies as an "immediate relative" of a U.S. citizen.[9] Therefore, adopting parents often seek to have their child classified as an immediate relative in order to facilitate the immigration process.

To establish their claim as immediate relatives, petitioning parents must prove that the child's foreign adoption was accomplished in accordance with 8 U.S.C. § 1101(b)(1)(E).[10] This section requires that the child must be "adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years . . . ."[11] For an adoption to be recognized

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7. First, applicant parents must complete a "Petition to Classify Orphan as an Immediate Relative" and obtain documentary information about themselves and the child. Next, parents must file the Petition and accompanying documents at the INS office of their domicile. Finally, the INS conducts a complete investigation of the child's situation in his/her home country to certify that the child is legally and irrevocably free for adoption. GILMAN, *supra* note 1, at 98-104.

8. To qualify as an orphan, the investigating immigration official must determine that the child was under sixteen years of age at the time the applicant parents filed the petition, and either (1) an orphan because of parental desertion or abandonment by parents, or (2) an orphan because of parental inability to provide proper care and whose parents have provided a written release for emigration and adoption of the child. 8 U.S.C. § 1101(b)(1)(F)(1982).

9. "Immediate relatives" are "the children, spouses, and parents of a citizen of the United States . . . who are otherwise qualified for admission as immigrants . . . ." 8 U.S.C. § 1151(b) (1982). Any U.S. citizen claiming that an alien is entitled to "immediate relative status" may file a visa petition for such classification. Immediate relative immigrant visa classification is the status most frequently sought by American citizens living abroad for extended periods who are able to satisfy physical and legal custody requirements of 8 U.S.C. § 1101. OFFICE OF HUMAN DEVELOPMENT, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, INTERCOUNTRY ADOPTION GUIDELINES 3 (DHEW Publ. No. (OHDS) 80-30251 (Mar. 1980)).

10. Congress enacted 8 U.S.C. § 1101(b)(1)(E) in 1957 as part of an amendment package intended to facilitate entry of certain children who were not related by blood to American citizens or immigrants. Prior to enactment, adopted children were not eligible for immigration, in part due to a fear of fraudulent foreign adoptions. However, by 1957 the lack of administrative provisions imposed a burden of extended family separation for children adopted abroad who were part of a bona fide family unit. This hardship is contrary to the Act's express purpose of providing for reunification of legitimate families. To become more consistent with this policy of family unity, the provisions for immigration of adopted children were enacted. S. Rep. No. 1057, 85th Cong., 1st Sess. 709, *reprinted in* 1957 U.S. CODE CONG. & AD. NEWS 2016.

11. 8 U.S.C. § 1101(b)(1)(E) (1982).

under the Act, petitioning applicants must prove that the adoption is "considered a lawful adoption in the jurisdiction where it occurred."[12] However, the INS has shown an unwillingness to recognize customary adoption proceedings as legally valid because of the absence in some countries of statutory authorization or an accompanying judicial act.[13]

The federal circuits disagree on whether adoption by custom satisfies the "legally valid" requirement of 8 U.S.C. § 1101(b)(1)(E). This conflict is illustrated by *Mila v. District Director of Immigration and Naturalization Service*[14] and *Kaho v. Ilchert*.[15]

III. The *Mila* and *Kaho* Cases

A. *The* Mila *Case*

Shortly after her birth, Anau Fainga was adopted by her aunt according to Tongan custom. Plaintiff Mila was a natural child of the family into which Anau was adopted. Anau and Mila grew up as brother and sister in the same household and were considered siblings by virtue of the customary adoption.

In 1977, Mila became a naturalized U.S. citizen and subsequently sought a permanent visa for Anau under the "immediate relative" classification of § 1151(b). Overlooking the legal effect of Tonga's customary adoptions the INS district director denied Mila's petition because Tonga did not have a law providing for the adoption of legitimate children. The Board of Immigration Appeals (BIA) affirmed the INS ruling on similar grounds.[16]

A federal district court reversed the BIA decision and held that Tonga's customary adoptions do in fact create a "bona fide parent-child relationship."[17] The court observed that the natural parents could not regain custody of their child once the customary adoption was final. It reasoned that since one of the objectives of applicable immigration provisions is to preserve the genuine family unit, no reasonable basis exists for distinguishing between societies that adopt according to custom and those that

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12. *In re* Palelei, 16 I. & N. Dec. 716, 719 (1979).

13. *Matter of B—*, 9 I. & N. Dec. 521 (BIA 1961); *Matter of Palelei*, 16 I & N, 717, 719 (1979).

14. 678 F.2d 123 (10th Cir. 1982).

15. 765 F.2d 877 (9th Cir. 1985).

16. Mila v. District Dir. of the Immigration and Naturalization Serv., 494 F. Supp. 998, 999 (D. Utah 1980).

17. *Id.* at 1000.

adopt by specific legal procedure.[18] Thus, the "inquiry must be to the reality of the relationship and not the manner in which it arises."[19] The court concluded that the INS interpretation was "unduly restrictive" and instructed the INS to classify Anau as Mila's legal sister.[20]

The Tenth Circuit reversed, holding that "[i]f reasonable and not contrary to the discernible intent of Congress, the [INS's] interpretation should be approved even though it is not the only reasonable interpretation the reviewing court would make if deciding the issue in first instance."[21] The Tenth Circuit concluded that if the INS's "legally valid" test under § 1101(b)(1)(E) required the equivalent of an American legal procedure, then mere Tongan custom was inadequate.[22]

B. The Kaho *Case*

Valeti and Tupou Kaho, Tongan blood siblings, were put up for adoption in 1966 following the death of their natural mother. Petitioner Kaho assumed responsibility for the care and custody of the children according to Tongan customary adoption. Kaho and his wife raised the children as their own and were regarded, according to custom, as the parents of the children.[23] In 1972, Kaho moved to America, obtained lawful residence, and sought visas for his children who had remained in Tonga for schooling. The district director denied visa petitions on grounds that customary adoptions were not legally recognized in Tonga and therefore were not valid adoptions under 8 U.S.C. § 1101(b)(1)(E). The BIA affirmed.[24]

Kaho filed an action in federal district court seeking declaratory and injunctive relief.[25] The court concluded that customary adoptions were recognized under Tongan law and remanded the matter to the INS with instructions to grant visa petitions upon finding a bona fide customary adoption.[26]

The INS appealed to the Ninth Circuit which affirmed,

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18. *Id.*
19. *Id.*
20. *Id.* at 999-1000.
21. *Mila*, 678 F.2d 123, 125 (10th Cir. 1982).
22. *Id.* at 126.
23. Kaho v. Ilchert, 765 F.2d 877, 879-80 (9th Cir. 1985).
24. In affirming, the BIA relied on its previous decisions in *In re* Fakalata, 18 I. & N. Dec. 213 (1982), and *In re* Palelei, 16 I. & N. Dec. 716 (1979). *Kaho*, 765 F.2d at 879.
25. 765 F.2d at 879.
26. *Id.* at 879-80.

holding that an adoption is valid under § 1101(b)(1)(E) if it is recognized under the law of the country where adoption occurred. The court determined that in light of the congressional intent to reunite families it is not necessary for an adoption to be recognized by a juridical act before it is a valid adoption for immigration purposes.[27]

The court also stated that:

> If the adopter and the adoptee have conformed to the behavioral rights and duties of the parent-child relationship, and moreover, if the adopted child has performed the duties of siblings in its adopted family, then the validity of the adopted tie is not only [legally] recognized but takes precedence over any competing claims or versions of the relationship, whatever the specific issue in dispute.[28]

Since adoption by custom is valid in Tonga, and therefore valid for § 1101(b)(1)(E) purposes, the Ninth Circuit concluded that the INS had abused its discretion in denying Kaho's visa petitions. Accordingly, the matter was remanded to the INS to determine whether a bona fide customary adoption existed.[29]

IV. Analysis

In *Mila* and *Kaho*, the courts were confronted with essentially the same interpretive issue: whether adoption by custom satisfies 8 U.S.C. § 1101(b)(1)(E), thereby classifying adoptees as immediate relatives of U.S. citizens and providing preferential immigration treatment under 8 U.S.C. § 1151.

In *Mila*, the Tenth Circuit embraced the INS's position that § 1101(b)(1)(E) requires a legally binding adoption before preferential immigration status is conferred.[30] The Tenth Circuit also established the standard of review and degree to which district courts should defer to INS interpretation of statutory immigration requirements.

> A federal court may reverse an INS denial of a preferential visa petition only if the INS abused its discretion. The INS abuses its discretion if it bases its decision upon an improper understanding of the law. . . . If reasonable and not contrary to the discernible intent of Congress, the agency's interpretation

27. *Id.* at 885. *See also* Matter of Kwok, 14 I. & N. Dec. 127 (1972).
28. 765 F.2d at 885.
29. *Id.* at 886.
30. *Mila*, 678 F.2d at 126.

> should be approved even though it is not the only reasonable interpretation or the one the reviewing court would make if deciding the issue in the first instance.[31]

This language suggests that if an INS interpretation of a foreign adoption proceeding is reasonable, reviewing courts may not upset the INS decision even though a reviewing court might not interpret § 1101(b)(1)(E) in the same manner.

However, the Tenth Circuit requires that deference be afforded to an INS decision when the district court determines that the law has been misinterpreted by the INS. As one author noted:

> [T]he Tenth Circuit upheld the INS' interpretation that "child adopted" requires a "legally" valid adoption, stating that any reasonable interpretation that is consistent with discernible legislative intent must be affirmed. The court drew no distinction between general statutory interpretation of "child adopted" and the application of that interpretation to the facts of the case. . . . The *Mila* court should have given plenary review to the general interpretive question of whether Congress intended the Act to recognize customary adoptions performed in countries without legal procedures for adoption.[32]

The Tenth Circuit confused deference due an INS application of law to a fact situation with deference due an INS interpretation of immigration law. If a country acknowledges that customary adoptions create binding and valid parent-child relationships, then reviewing courts should not necessarily defer to INS interpretations of the validity of such proceedings. If legal validity is exclusively determined by the INS, then there is no reason for appellate review.

According such deference to strict INS interpretation potentially gives rise to a number of difficult social problems. Such an interpretation essentially prohibits American citizens from adopting foreign children from countries whose adoption procedures are not recognized by Anglo-American legal systems. This limited recognition places an undue burden on parents who wish to adopt children from countries where adoption procedure follows only custom or tradition. U.S. citizens living abroad with approved visas face the dilemma of declining to return to the

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31. *Id.* at 125 (citations omitted). *See also* Kaliski v. District Dir. of INS, 620 F.2d 214, 216 n.1 (9th Cir. 1980).

32. Comment, *supra* note 5, at 898.

U.S. or leaving adopted family members behind, even when bona fide, long-standing, legally and socially accepted parent-child relationships exist.

The deference approach also suggests that an adoption will not be recognized under U.S. immigration law unless the adopted child is treated exactly like a natural child under the law of the place of adoption. It focuses attention only on the legal status created by the adoption, rather than on any resulting parent-child relationship. In his dissent, Judge McKay disagreed with the majority's misdirected focus.

> [T]he trial court correctly held that the Service ignored the statutory mandate in an attempt to establish something approximating a bright line test that places too much reliance on some formal juridical anglo-American notions of adoption and too little emphasis on whether the country recognizes these relationships as genuine family units.[33]

This form-over-substance approach directly conflicts with Congress's intent in enacting the Act. The House Report on the bill that later contained 8 U.S.C. § 1101 indicated congressional concern for protecting bona fide family relationships. "[The bill] implements the underlying intention of our immigration laws regarding the preservation of the family unit."[34] Certainly a position emphasizing the legality of the form of the adoption rather than the genuineness of any family relationship resulting from the adoption—a position embraced by the Tenth Circuit—flies in the face of articulated legislative intent.

The majority's approach also overlooks problems of interpreting foreign law, especially if the foreign legal system in no way compares with the Anglo-American model. Foreign adoption procedures vary among countries[35] and few countries can match the complex and sophisticated adoption laws governing U.S. adoptions. Courts interpreting foreign adoption laws according

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33. *Mila*, 678 F.2d at 127 (McKay, J., dissenting).

34. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1680. Over 10 years later, the Senate Report on the 1965 amendments to the Immigration and Naturalization Act also reaffirmed the purpose of the preference system by declaring that "[r]eunification of families is to be the foremost consideration [when bestowing preference status on entering aliens]." S. Rep. No. 748, 89th Cong., 1st Sess. 13, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3332. *See also supra* note 12 and accompanying text.

35. The primary problem facing the INS and federal courts is how to interpret applicable immigration provisions "in light of the varying practices of adoption throughout the world". Comment, *supra* note 5, at 880.

to familiar Anglo-American perceptions of legal procedure[36] assume that rules of positive law, statutes, codes, constitutions and regulations govern legal relationships within a society. Such a view is unworkable in societies not patterned after Anglo-American traditions. In many nations, law, statutes, and procedure have little or no significance in family relationships. Instead, custom,[37] religion,[38] and social behavior[39] frequently govern legal relationships within a foreign society.

Unlike the Tenth Circuit, the Ninth Circuit authorized *de novo* review of foreign law by the district court. The court was not timid in rejecting *Mila*'s position, stating specifically that it would "decline to adopt [the 10th Circuit's position] as the law of our circuit."[40]

According to *Kaho,* a customary adoption is deemed sufficient for immigration purposes under 8 U.S.C. § 1101(b)(1)(E) so long as petitioners show the existence of a bona fide parent-child relationship and demonstrate behavior indicative of a legally binding adoption. This approach not only advances the Congressional goal of preserving family units, but also remains flexible to accommodate traditional, customary, and religious adoption procedures of foreign countries.

The increased probability of adoption fraud will be a chief INS concern should the Ninth Circuit's approach achieve universal acceptance. Since customary adoptions do not have the form of a statutorily authorized adoption, there is the possibility that the grant of immigration benefits could rest on fraudulent relationships that the INS would be unable to detect or regulate. However, such fears do not provide grounds for excluding all customary adoptions from immigration consideration. For in-

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36. For an interesting discussion of the problems of applying "legalistic" concepts to a society governed by custom, tradition, religion, and other "non-legalistic" principles, see Lau v. Kiley, 410 F. Supp. 221 (S.D.N.Y. 1976).

37. In countries such as Tonga, Iraq and Yemen, adoption is performed by ancient custom without the requirement of legal sanction or documentation. *See, e.g., In re* Palelei, 16 I. & N. Dec. 716, 718 (1976) (Tongan customary adoption procedure); *In re* Benjamin, 15 I. & N. Dec. 709, 710 (1976) (Iraqi customary adoption); *In re* Ashree, Ahmed and Ahmed, 14 I. & N. Dec. 305, 306 (1973) (Yemen customary adoption).

38. This was true in India prior to 1956, *In re* Purewal, 14 I. & N. Dec. 4 (1972), and is still true in most Moslem countries. *See, e.g., In re* Rehman, 15 I. & N. Dec. 512 (1975).

39. Civil codes in Hong Kong contain provisions for statutory adoptions and recognize customary adoptions as also creating legally binding parent-child relationships. *See, e.g., In re* Ng, 14 I. & N. Dec. 135, 136 (1972); *In re* Yue, 12 I. & N. Dec. 747, 748 (1968).

40. *Kaho,* 765 F.2d at 882.

stance, the Ninth Circuit approach would not alter INS regulations regarding adoptions completed in nations where statute or judicial decree govern all parent-child relationships. In such cases, the INS may continue to require that the law of the country of adoption be fully complied with before granting immigration status. As well, evidence of a genuine family relationship cannot be easily manufactured for fraudulent purposes. A mere factual inquiry by the INS into family circumstances would clear up most concerns about fraudulent parent-child relationships. And, the INS is already organized to conduct this type of inquiry in conjunction with the requirement of 8 U.S.C. § 1101(b)(1)(E) which provides that for immigration purposes, adopted children must have been in the legal custody of their adoptive parents for two years.

Because the *Kaho* analysis better suits the congressional intent of preserving valid family units, while still protecting against abuse of the immigration process, it represents the better rule in these cases.

V. Conclusion

The current immigration law regarding customary adoptions has left applicants confused. Parents are especially uncertain as to what steps they must take to legitimate foreign adoption and finalize the immigration process. The conflict among the circuits is unsettling and the need for uniform decisions in this area cannot be overemphasized.

Thousands of foreign children are adopted into U.S. homes each year. Many of these adoptions take place in countries where no specific legal procedure is required to consummate a valid adoption. Each foreign child must satisfy certain requirements prior to qualifying for immigration status as an immediate relative of a U.S. citizen.

Immigration requirements under 8 U.S.C. § 1101(b)(1)(E) impose certain barriers to customary and traditional adoptions. Although customary adoptions, like all other adoptions, do not create a relationship that is in every way identical to the relationship between natural parents and their natural child, a bona fide parent-child relationship is nevertheless created through such procedures and should be recognized by U.S. immigration laws.

The current INS position requires all adoptions to satisfy a "legally valid" standard. This position imposes undue hardship

upon parents who seek to bring their foreign-born children into the U.S. and is unworkable when applied to situations of customary adoption. The congressional policy of reuniting genuine family units and promoting family relationships is hampered by such unduly restrictive interpretation of 8 U.S.C. § 1001(b)(1)(E).

Future decisions made by the INS should emphasize (1) whether a bona fide family relationship exists, (2) whether the adoption is valid in the nation where the adoption was completed, and (3) whether the policy of uniting and reuniting the family unit is accomplished by recognizing the foreign adoption proceeding. The INS should adopt a policy of substance over form, whereby the substance of the relationship created by the adoption prevails over the form of the adoption proceeding. Judicial analysis should emphasize parent-child relationships rather than documentary evidence. These guidelines are consistent with congressional intent and will provide a uniform approach to assist judges and immigration officials in recognizing those applicants who should be given preferential immigration status due to the valid and binding family relationships which they enjoy.

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