

# ADOPTION ADVOCATE

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## Avoiding the Perils & Pitfalls of Intercountry Adoption from Non-Hague Countries: Considerations for Agencies & Adoptive Parents

### Part I: The Orphan Definition: What You Don't Know Can Hurt You

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#### Introduction

**W**hile adopting a child from another country, you receive word that the in-country court has scheduled the final guardianship or adoption hearing. You make travel plans with your family to be in-country for just a few weeks.

After all, once you appear for the in-country court proceeding, you are sure that this very long process will be almost over. You assume that the last step—procuring a visa from your own government, the United States—will be quick and painless.

Sometimes it is, and you are soon on your flight home, exactly as scheduled, with the newest addition to your family. Other times, your family is not

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so fortunate, and you spend weeks or months, thousands of dollars, and every ounce of patience trying to prove to the U.S. Department of State and ultimately, U.S. Citizenship & Immigration Services (USCIS), that your child is truly an orphan under U.S. law and eligible for a visa to enter the U.S.

In our experience, what agencies and adoptive parents don't know about the orphan definition *can* hurt them and may risk the family's completion of a successful intercountry adoption. This article is Part I of a two-part series that will provide an overview of the most common perils and pitfalls involved in designating a child as an orphan under U.S. law and emphasize best practices for agencies and adoptive families when pursuing adoptions in countries that *are not* signatories to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.<sup>2</sup> A complete and thorough understanding of the perils and pitfalls of the orphan definition—in the beginning, before the case gets off the ground in-country—offers adoptive families and adoptees the best chance of avoiding heartache, disappointment and delay, protects birth families, and offers agencies the best chance of formulating policies to support favorable case completion when inter-country adoption is in the best interest of the child.

## The Orphan Definition: Why It Matters Sooner Rather Than Later

The orphan determination occurs at the end of the international non-Hague adoption process, so why do we suggest that understanding the definition matters most critically in the beginning, before the parental match and during the in-country judicial process?

As with any immigration benefit, the petitioners (the adoptive parents in this case) bear the burden of proving that the child they seek to adopt is an orphan.<sup>3</sup> In this sense, constructing the orphan case is like building a metaphorical sailboat crafted from the timber, tar and bolts provided by the child's life. The only point in building the boat is to prove the child's eligibility for adoption. As in all shipcraft, there are standards which ultimately have the goal of rendering the boat seaworthy. If the builder

<sup>2</sup> Foreign-born children enter the U.S. as children of U.S. Citizens and gain permanent legal residency through three major statutory mechanisms. Adoptive parents who have fully and finally adopted a child and satisfied two years of legal and physical custody may file an application on USCIS Form I-130 (Petition for Alien Family Member) and do not need to prove that the child is an orphan. See INA § 101(b)(1)(E). Alternatively, parents adopting a child from a country that ratified the Hague Convention on the Protection of Children & Cooperation in Respect to Intercountry Adoptions (Article 33) complete USCIS Form I-800 (Petition to Classify Convention Adoptee as an Immediate Relative) among other requirements. See INA § 101(b)(1)(G). The definitions used to determine whether a child from a Hague signatory country qualifies as an adopted child for entry to the U.S. are specific only to Hague adoptions. In this article, we distinguish these two remedies from orphan petitions, in which adoptive parents petition for the child using USCIS Form I-600 (Petition to Classify an Orphan as an Immediate Relative) and satisfy other requirements. See INA § 101(b)(1)(F). While this article addresses only orphan visas under INA § 101(b)(1)(F), USCIS' grant of permanent resident status to the child, through any of the three statutory vehicles outlined above, and the child's admission to the U.S. confers automatic citizenship under the Child Citizenship Act. Accordingly, the three statutory grounds outlined above are important predicates not only to legal status and successful visa entry, but also to the child's final goal of U.S. Citizenship.

<sup>3</sup> *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966); In re: *Casillas*, 22 I&N Dec. 154 (BIA 1998).

begins construction without understanding the basic standards—or worse, gives the standards short shrift or manipulates the standards to find shortcuts—the craft will ultimately fail to achieve its goal. Someone will inevitably get wet or worse, drown.

On the other hand, a careful, well-considered understanding of the orphan definition permits families to test the vessel’s buoyancy at every stage, and ensures that the boat successfully reaches its destination with the child delivered safely to his or her new family. Understanding the orphan definition permits agencies to craft policies that prevent bad results in individual cases or in specific countries.

## History and Scope of the U.S. Orphan Provisions

The legislative history creating the statutory definition of “orphan” as it appears in the Immigration and Nationality Act illustrates that Congress intended the orphan statute to apply not only to children without living parents, but also to “homeless” children—that is, children who are no longer being cared for by a biological parent.<sup>4</sup> The original legislation, drafted after World War II to assist with U.S. immigration of abandoned and deserted children torn from their homes and families, supports this broad legislative purpose.<sup>5</sup>

While later legislation added certain safeguards, including a required home study of prospective adoptive parents, Congress nonetheless continued to refer to the orphan statute as “pertaining to homeless children”—thereby distinguishing it from the provisions of the adopted child statute under section 101(b)(1)(E) of the Immigration and Nationality Act, which requires legal adoption prior to the child’s 16th birthday and two years of legal and physical custody.<sup>6</sup> Moreover, the inclusion of the very grounds for orphan status—abandonment, desertion, disappearance, separation, loss and death—emphasize “the permanent severance of all ties between an orphan and his or her parents.”<sup>7</sup>

## The Orphan Definition in Context

USCIS makes its determination of the child’s status as an orphan during the course of what is called the I-604 investigation, usually during the visa interview process, after the in-country court proceedings are concluded. Either USCIS makes the determination stateside or in its office within the

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<sup>4</sup> 58 Fed. Reg. 59200-01 (1993)(codified at 8 C.F.R. 204 et. seq.)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

U.S. Embassy in the child's home country, based on the location of where the family files the Petition to Classify an Orphan as an Immediate Relative (I-600). Alternatively, where USCIS does not have an office in the child's home country, the agency delegates its adjudicatory responsibility to the U.S. Department of State, which conducts the I-604 investigation as part of the visa issuance process.

## U.S. Legal Grounds for Orphan Status

There are two general categories of orphans under INA § 101(b)(1)(F). First, a child who has no parents because of the death or disappearance of, abandonment or desertion by, separation or loss from his or her parents is an orphan under U.S. law. Alternatively, a child may be an orphan under U.S. law when the child's sole or surviving parent is unable to provide proper care and has, in writing, irrevocably released the child.<sup>8</sup>

These two categories are distinct and separate.<sup>9</sup> Any one of the six enumerated grounds (death, disappearance, abandonment, desertion, separation or loss) will suffice to terminate the parent-child relationship for the purposes of determining orphan status.<sup>10</sup> This means that children with two living parents may nonetheless qualify as orphans, if they fit the requirements of any of the 6 grounds for orphan status. Accordingly, the fact that children have two living parents should not preclude their placement for adoption by an agency if each of the parents meet one of the seven grounds described below. Further, the Adjudicator's Field Manual requires adjudicators "be cognizant of the fact that for a child who has no parents it is not required for the child to have lost each parent in the same way."<sup>11</sup> To further illustrate these principles, we consider each statutory ground of orphan status in the sections below, as well as the most common legal and factual problems encountered by adoptive families.

### 1. Abandonment

**Abandonment Defined:** The definition of "abandonment" is lengthy, complex and nuanced. Cited in full, U.S. Code defines abandonment to mean that the parents have:

...willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, *without intending to transfer, or without transferring, these rights to any specific person(s)*. Abandonment must include not only the intention to surrender all

<sup>8</sup> 9 FAM 42.21 N14.13-6(a) to 22 C.F.R. §42.21; *Adjudicator's Field Manual (AFM)* ch. 21.5(d)(3).

<sup>9</sup> *Id.*

<sup>10</sup> 9 FAM 42.21 N13.2-5 (noting that a child "separated" from parent does not also have to be "abandoned" by that parent).

<sup>11</sup> AFM ch. 21.5(d)(3) ("if one parent abandoned the child, and the other parent deserted the child, the child is an orphan.")

parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a *specific adoption does not constitute abandonment*. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is *authorized under the child welfare laws of the foreign-sending country to act in such a capacity*. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise *exhibit ongoing parental interest in the child*. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.<sup>12</sup>

The sections emphasized above represent USCIS's most commonly cited challenges to the orphan petition based on abandonment: direct placement, authorization of the orphanage, and ongoing parental interest.

**Avoiding Direct Placement:** The single most common issue that arises with abandonment is the issue of direct placement of a child by the biological parents with specific prospective adoptive parents. At worst, facts supporting direct placement in orphan petitions in non-Hague countries defeats orphan status. At best, direct placement presents a serious complication in the case requiring careful advocacy.

**How Direct Placement Arises:** Direct placement arises either from the facts surrounding the actual transfer of custody of the child, or by intimation from those facts, based on the timing of statements made by the biological parents in written relinquishments or during interviews during the visa process. Normally, USCIS' perception of a direct placement arises from language within written relinquishments in which the biological parent specifically names the adoptive family as if the biological parent knew, at the time of the child's physical relinquishment, that a specific adoptive family would care for the child. These kind of inclusions—culturally typical within the in-country court pleadings—are intended to show the judge that the biological family has consented to the adoption of the child. In most cases, the child was released for adoption by the biological parents months or years before a specific adoptive family was known or identified to any biological family member. Moreover, most biological parents are not invested in one particular family's commitment or

<sup>12</sup> 8 CFR § 204.3(b)(emphasis added).

interest, but by the time the court documents are filed, the biological parents usually are aware of the names and countries of origin of the adoptive family. Thus, in-country attorneys make a major error of intimating that the biological family has specifically chosen to release their child to a specific adoptive family. In the majority of cases, the biological and adoptive families have never had any contact with each other prior to preparations for court. They have never met or discussed adoption of the child. Any information the adoptive parents have was provided by orphanage or the attorney handling the adoption or guardianship case. The child is rarely, if ever, placed in the orphanage for a specific family to adopt the child.

Also common and culturally condoned, in-country attorneys intimate a pre-existing relationship between the birth parents and the adoptive family by stating that the adoptive family “supported” or “provided care” for the child and/or family prior to the relinquishment when in fact, no care of any kind was ever provided to the birth family or the child prior to the date of guardianship or adoption. Foreign attorneys include these types of statements in court documents to show the in-country court that the adoptive family is actively invested in the child’s life. These comments make little sense outside of their cultural context, but are commonly plead as a sort of “courtesy.” The peril of these seemingly innocuous statements is that consular officers or USCIS officials misconstrue this language as a “direct placement” without regard for the cultural context, absent proof of prior adoptive family support, or without reference to the actual timing of abandonment. Agencies and families should be careful to be sure that the final orders or rulings avoid such cultural “courtesies.”

**Fixing Direct Placement Issues:** While direct placement is frequently raised by USCIS as an issue with the orphan petition, it is rarely supported by the facts once clarified by evidence and sworn testimony. Accordingly, the first step in fixing a direct placement issue is to carefully craft the history of abandonment by the birth parents, tracking the regulatory language and principles in newly prepared affidavits, and documenting or clarifying any misperceptions by USCIS of a pre-existing relationship between the adoptive and birth families. As a result of the frequency of direct placement as an issue during orphan petition adjudications in non-Hague countries, agencies should work diligently to recommend in-country attorneys who understand this nuance and avoid such statements in court documents. Likewise, adoptive parents should insist on carefully scrutinizing anything filed with the in-country



court prior to filing for damaging, even if well-intentioned, language in the pleadings.

**A Note on Mission Field Adoptions:** *Occasionally, prospective adoptive parents encounter a specific child when they are in the mission field abroad, some who have special needs or require specific care, and inquire whether the child is eligible for adoption. In these sorts of cases, it is important that any such inquiries from the orphanage, school or babies home to the biological family occur without identifying the specific family who is inquiring. The agency, orphanage or other involved entity should take great care to be sure that all legal proceedings transferring rights to the child occur through the intermediary of an orphanage or government agency authorized under the child welfare laws of the sending country as described below. Moreover, the biological parent(s) must clearly state in writing that they are willing to relinquish the child for adoption and have the child adopted by any family, not a specific family.*

**Authorization of the Orphanage:** To qualify as an orphan under the abandonment definition, if the child is relinquished to an orphanage in anticipation of adoption, the orphanage must be “authorized under the child welfare laws of the foreign-sending country.” This issue often arises in countries with informal “babies’ homes,” schools or church-affiliated orphanages that have not yet completed the in-country process for licensure. Licensure requirements vary country to country, and it is critical for the agency working in a particular country to choose affiliations carefully with “authorized” children’s programs within that country. Sometimes children are relinquished to an orphanage, babies home or school, simply because the biological family can no longer care for the child. At time of relinquishment, the biological family may have no future plans for the child to be adopted; they are simply unable to care for the child. As a result, where the parent did not relinquish the child in anticipation of or preparation for adoption, the requirement that the orphanage be “authorized under the child welfare laws of the country” does not apply. Nonetheless, it is highly recommended that adoptions only occur from authorized child welfare facilities.

**Ongoing Parental Interest:** Just as direct placement undermines abandonment as a basis for orphan status, ongoing parental interest by the biological parents may also defeat the child’s approval as an orphan under U.S. law. This issue typically arises because the parent routinely visits the child in the orphanage, or provides support to the child in a school, or frequently receives the child back in the home when the child is on holiday. Occasionally, in an effort to encourage family reunification, an orphanage or boarding school

will encourage or insist that a child return home during certain holiday periods even if not requested or preferred by the family. In such instances, involuntary visits may not defeat the orphan status if it can be shown that the visits were forced on the family by the institution and not sought by the biological family. However, if you find that the parents maintain an ongoing interest in their child through frequent visits or financial support to the institution, consider supporting the family rather than adopting so that the family can stay intact.

## 2. Desertion

**Desertion Defined:** Desertion occurs when a parent has “willfully forsaken their child” and “refused to carry out their parental rights and obligations” resulting in the child becoming a “ward of a competent authority in accordance with the laws of the foreign-sending country.”<sup>13</sup>

**Ward of a competent authority:** Often the most complex portion of the desertion definition is whether an orphan is a “ward of a competent authority.” A “competent authority” is defined as “a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoptions.”<sup>14</sup> The law of the sending country determines what constitutes a “competent authority” and when a child becomes a “ward.”<sup>15</sup> The most compelling inquiry is who exercises authority over the child’s welfare. In many cases, the court exercises authority over the orphan the minute a properly filed guardianship or adoption petition was submitted in the case. At that point, the orphan came under the court’s legal protection. Because the child would have to submit to the Court’s authority in any matter, the child is considered a ward of the Court. However, this legal distinction is often not understood or misapplied by USCIS and Consular Officers reviewing the case.

## 3. Disappearance and Loss

**Disappearance and Loss Defined:** Under U.S. law, disappearance means that “both parents have unaccountably or inexplicably passed out of the child’s life, their whereabouts are unknown, there is no reasonable hope of their reappearance,” and that there has been “a reasonable effort to locate them *as determined by a competent authority* in accordance with the laws of the foreign-sending country.”<sup>16</sup>

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<sup>13</sup> 8 CFR § 204.3.

<sup>14</sup> 9 FAM 42.21.

<sup>15</sup> *Id.*

<sup>16</sup> 8 CFR § 204.3(b)



The definition of loss is similar, and requires “the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, *as verified by a competent authority* in accordance with the laws of the foreign sending country.”<sup>17</sup>

Both definitions turn on the meaning of “competent authority,” which is also defined by regulation as “a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.”<sup>18</sup>

In the same way that abandonment requires knowledge of in-country licensure requirements, disappearance and loss require insight into the country’s child welfare laws, including which agencies, individuals or entities possess the requisite authority or jurisdiction to “make decisions in matters of child welfare.”

Several key issues may arise during the I-604 investigation regarding disappearance and loss. First, these definitions are underutilized in general, and overlooked by the Department of State in making determinations on orphan petitions. When they are utilized, factual insufficiencies can make proving disappearance and loss challenging for the family.

#### **Contemporaneous Informal Investigation and Documentation:**

Best practices require that the agency and/or orphanage should use reasonable efforts to locate parents who are lost or have disappeared immediately or contemporaneously with the child’s arrival at the orphanage, school or babies home. In that way, the “competent authority” necessary to this definition is most likely to assist, and may even be involved in bringing the child to the home in the first place. It is important to document the arrival of the child at the orphanage including how the child came to be in the orphanage. The agency working with the orphanage should insist that either employees of the orphanage or local authorities try to locate the child’s missing parents and investigate the circumstances surrounding the child’s arrival at the home. When this search is conducted contemporaneously with the child’s arrival, it gives the child the best chance at reunification, guards against the appearance of impropriety, and supports the child’s chances of later qualifying as an orphan where the facts uncovered by the informal investigation support orphan status. The individual investigating should document

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

any discovered facts, contacts, or witnesses and those facts should be shared with any future prospective adoptive family.

**Reasonable Efforts to Locate Family:** Disappearance, unlike loss, requires “reasonable efforts to locate” the parent. Reasonable efforts are generally considered to include advertising on the radio and in print media in the dialect most commonly used in the country and in the area where the child was found. Police involvement and investigation, and the involvement of social welfare officers or social welfare investigations, are also considered “reasonable efforts” to locate the family and can prove useful when documenting parental disappearance. Affidavits, reports and documentary proof of these efforts are critical to convincing USCIS that the family, agency or other entity has made “reasonable efforts.” Such documentary evidence may include copies of print advertisements, receipts for radio advertisements, police reports, investigation reports, witness statements from those who found the child or anything else that conclusively demonstrates reasonable and well-intentioned efforts to locate the child’s family.

#### 4. Separation

**Separation Defined:** Like disappearance and loss, separation from both parents means “the *involuntary severance* of the child from his or her parents by action of a *competent authority for good cause* and in accordance with the laws of the foreign-sending country.” The parents must have been “*properly notified and granted the opportunity to contest* such action” and the “termination of all parental rights and obligations must be permanent and unconditional.”

**Common Issues with Separation:** The key issue with separation is the lack of formal parental termination processes in most countries. Accordingly, it is not clear that termination of parental rights has occurred until the adoption or guardianship process is concluded. For this reason, the “competent authority” is often the in-country court. This termination must be complete and permanent. The Court cannot enunciate a parental right to come back and contest the adoption or guardianship. Where it is possible, the agency and in-country attorney must make every effort to have the biological parent(s) present in court. Not doing so creates a problem of notice and opportunity to contest by the biological parent in the eyes of USCIS.

#### 5. Death

<sup>19</sup> AFM ch. 21.5(d)(3)(B).

**Death Defined:** A child is an orphan when a parent is deceased and he or she has not acquired another parent (like a step-parent) as defined under U.S. immigration law.<sup>19</sup>

**Evidence of Death:** Primary evidence to prove that the parents are not living is a death certificate. When a death certificate is available, check the information recorded carefully, including the person named as the “informant” on the death certificate to be sure that it is correct.

Where a death certificate<sup>20</sup> is not available (and sometimes even when it is), prepare the affidavits of extended family members regarding the circumstances and date of death. Peruse the social welfare report and other affidavits prepared for the local, in-country court for any corroboration or discrepancies in the details of the parent’s death. If anything raises your suspicions that the parent may not be deceased, hire an investigator to inquire after the details and firm up any questions.

## 6. Sole Parent

**Sole Parent Defined:** Like abandonment, the sole parent basis for orphan status is similarly misunderstood by adoptive families and agencies and misapplied by USCIS. To fully explore this definition, it’s important to consider the context in which this issue arises in international adoptions in non-Hague countries. A child may be an orphan “whose sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption in accordance with the laws of the foreign-sending country.”<sup>21</sup>

**When the Mother is the Sole Parent:** Sole parent “means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act.”<sup>22</sup> An illegitimate child shall be considered to have a sole parent if his or her father has “severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption.” This definition is not applicable to children born in countries which “make no [legal] distinction between a child born in or out of wedlock, since all such children are considered to be legitimate.”

In countries which do not distinguish between legitimacy and illegitimacy, it may appear at first glance that a mother will not qualify as a “sole parent” under any circumstances. A careful reading of the

<sup>20</sup> *Id.*

<sup>21</sup> AFM ch. 21.5(d)(2).

<sup>22</sup> 8 CFR § 204.3.

Act, however, permits an exception. A mother may be a “sole parent”:

If the child has not been legitimated under the law of the child’s residence or domicile or under the law of the natural father’s residence or domicile (whether legitimation occurs automatically because the law makes all children legitimate at birth or by the father’s taking action to legitimate the child) *while the child was in the legal custody of the legitimating parent or parents; and [t]he child has not acquired a stepparent ... and [t]he natural father of the child: [i]s unknown; or [h]as disappeared or abandoned or deserted the child; or [h]as in writing irrevocably released the child for emigration and adoption.*<sup>23</sup>

This definition in the Adjudicator’s Field Manual is congruent with Congress’ definition of “parent,” “father” and “mother” under INA § 101(b)(2). Those terms mean a parent, father or mother only if:

the relationship exists by reason of any of the circumstances set forth in (1) above, [definition(s) of child] except that, for purposes of paragraph (1)(F) ... in the case of a child born out of wedlock ... *the term ‘parent’ does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.*

Congress intended to exclude fathers who have disappeared or abandoned or deserted the child or fathers who have “irrevocably released the child for emigration and adoption” from the definition of “parent” under INA § 101(b)(2) in order to protect and preserve a father’s rights only where he “is present” in order “to have a say in whether his child can be adopted by an American family.”<sup>24</sup> Accordingly, “[u]nder this language, *the father need not be tracked down if he has disappeared, or if he has abandoned or deserted the child.*”<sup>25</sup> Congress concluded that “the sign off right is limited to a father *whose presence and concern are evident.*”<sup>26</sup>

**Direct Placement by Sole Parent:** This is the only circumstance where a child can qualify as an orphan when the birth parent releases or directly places the child with the adoptive parent(s).<sup>27</sup> Unlike the definition of abandonment and the five other grounds

<sup>23</sup> AFM ch. 21.5(3)(H).

<sup>24</sup> See S. Con. Res. 1260, 101st Cong., 1st Sess., 135 Cong. Rec. S7505-02, S7512 (1989)(emphasis added).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at S7512 (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> INS Cable (file HQ 204.21-P, 204.22-P), reprinted in 73 Interpreter Releases 13 (January 2, 1996).

of orphan status, direct placement is *permitted* in the context of the sole parent definition. In fact, in guidance to its posts, legacy-INS instructed that:

a child who has been determined to have a sole parent will be eligible for orphan classification based on the mother's release of the child *directly to the prospective adoptive parent(s)* only if the birth mother is unable to provide proper care for the child and has in writing irrevocably released the child for emigration and adoption.<sup>28</sup>

In other words, as long as the child's biological parent is (1) the "sole parent" who (2) is unable to provide proper care for the child; (3) and has irrevocably released the child for emigration and adoption, then it doesn't matter whether the child was directly placed with the adoptive parents, with an intermediary orphanage, or with someone with legal custody.

**Incapable of Providing Proper Care:** In all cases, "a sole parent must be incapable of providing proper care." Incapable of providing proper care means that "a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign sending country."

Using affidavits, the probation report or court ruling to prove that the biological parent has no job or makes very little money, has many children and cannot care for them, or cannot care for oneself may satisfy the "incapable of providing proper care" portion of the sole parent definition.

## Conclusion

It is critical to successful orphan processing that the parents, agencies, foreign attorneys, orphanages, and any other parties understand the nuances of the orphan definitions and the common ways that the definitions are subverted by missteps in the preparation of the orphan case or later misapplied or misinterpreted by USCIS. The orphan definition is the substantive legal heart of orphan immigrant petition processing. In Part II of this article, to be published in March 2015 by National Council For Adoption, the authors will review the practical aspects of orphan processing in non-Hague countries and explain common errors or difficulties often encountered from a procedural perspective.



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