Comments on Proposed Intercountry Adoption Regulations

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Re: EO 12866, RIN 1400-AE39

About The Academy of Adoption and Assisted Reproduction Attorneys:

The Academy of Adoption and Assisted Reproduction Attorneys ("AAAA") is a not-for-profit organization of attorneys, judges and law professors throughout the world, who have distinguished themselves in the field of adoption and assisted reproduction law and who are dedicated to the highest standards of practice. AAAA's mission is to support the rights of children to live in safe, permanent homes with loving families; to protect the interests of all parties; and to assist in the orderly and legal process of family formation. AAAA's work includes promoting the reform of adoption and assisted reproduction laws and disseminating information on ethical family formation practices. AAAA monitors developments and trends in state, national, and international adoption and assisted reproduction law, and advocates for legislative reform and ethical practices in this area of family formation law, and for protecting the rights of all parties, particularly the children.

We thank you for the opportunity to meet with you today and express our concerns and suggestions about the proposed regulations concerning intercountry adoption.

The Problem:

On May 6, 2020, the U.S. Department of State (DOS) released its FY 2019 Annual Report on Intercountry Adoptions. The report shows that American families adopted only 2,971 children through intercountry adoption between October 1, 2018 through September 30, 2019. This is a decline of over 26% from the previous year, and over 13% decline from the year before that. Since DOS assumed responsibility for the oversight of intercountry adoption in 2008, the number of abandoned, orphaned, and vulnerable children around the world extends into the tens of millions, yet the number of children adopted by American citizens continues to decrease annually under their oversight, to a new historic low of 2,971.

The report fails to put the disastrous decline in perspective: □ There are millions of children without families worldwide who will benefit from intercountry adoption and tens of thousands of qualified American families who are willing to adopt them. □ The majority of orphans denied intercountry adoption are not finding equal or better solutions in their country of birth; on the contrary, they are living and dying in institutions in ever-growing numbers. Research

conclusively shows that the majority of those who survive the orphanage experience will experience permanent emotional and physical harm and will age out into a world that will exploit them in horrible and degrading ways. □ There are countries that want to partner with the U.S. to find families for orphans, but unfortunately, the United States is unwilling to work with many countries around the world.

In view of this oversight of intercountry adoptions by DOS, AAAA is deeply concerned about the content of regulations proposed by DOS which would further the current decline. Previous regulations which were proposed by DOS but withdrawn would have in fact exacerbated that decline. If the new regulations are similar, even fewer children will be placed with U.S. families.

Regulations should articulate a clear policy in support of intercountry adoption:

The current accrediting entity for adoption agencies, IAAME, appears to hold a bias against intercountry adoption that drives its accrediting actions. Adoption agencies report that they are held to ever changing "standards" not found in the law or any regulation or written policy. Further, these standards are not uniformly enforced against all agencies. It also appears that anonymous complaints are lodged against agencies which are not favored by the Office of Children's Issues in retaliation for whistleblowing. These anonymous complaints then force the agencies to hire lawyers to defend themselves without a clear view of what they have done that violates any clear written law, policy or regulation. Adoption services are shut down during periods of investigation, preventing them from earning revenue while the complaint is evaluated. Agencies report that high cost of defending these often spurious complaints has led to the financial ruin of these mostly nonprofit agencies. Further, IAAME, under the supervision of the Department of State, requires every family to work with an accredited agency as a primary provider, even though the UAA and IAA expressly state that families can act as their own primary provider. With fewer agencies able to financially function, the adoptive families then cannot find another agency willing to serve as a primary provider. IAAME has taken the position that any the new agency will be responsible for all of the actions of the prior agency, which calls the accreditation of the new agency into question. In other words, by creating an environment whereby adoption agencies cannot function, IAAME, under the supervision of the DOS, has directly caused the precipitous decline in intercountry adoption. Disturbingly, families with completed adoptions cannot bring their children home.

The Regulations should make clear that families can serve as their own primary provider:

The regulations should codify what is already contained in the UAA and the IAA, that families can serve as their own primary provider in certain instances.[1] This is particularly important in

[1] The Universal Accreditation Act of 2012 applies Title II of the Intercountry Adoption Act to non-Hague Adoptions. Title II of the Intercountry Adoption Act contains an exception to the accreditation process for individuals acting on their own behalf. Accreditation or Approval is not required if:

cases where the primary provider ceases to function and there are no adoption services left to perform[2]. Complying with the language in the UAA and IAA in this instance would eliminate the transfer issue when an agency closes for families who have completed adoptions.

Second, families must be able to act as their own primary provider if they are adopting a relative and there are no adoption services to perform[3]. In a relative placement, the child has already been identified, there is no real concern that the child is being placed for adoption without the knowledge or consents of the birth parents, the prospective adoptive parents are already aware of the child's medical and social history due to the family relationship, and the foreign government makes the determination of the appropriateness of a relative placement in light of its laws and customs. Further, intercountry adoption relative placements rarely disrupt, which would require that the agency assume custody until another placement can be made. Most intercountry adoptions are completed adoptions and the agency is not required to assume custody in a completed adoption anyway, only in a foster care type placement. Nor would the agency be

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Prospective adoptive parents acting on own behalf—the conduct of a prospective adoptive parent on his or her own behalf in the case, to the extent not prohibited by the law of the State in which the prospect adoptive parent resides. IAA, Section 201 (b)(4).

Similarly the regulations that accompany the Intercountry Adoption Act make clear that prospective adoptive parents may act on their own behalf:
22 CFR 96.13 (d) *Prospective adoptive parent(s) acting on own behalf.* Prospective adoptive parent(s) may act on their own behalf without being accredited, temporarily accredited, or approved unless so acting is prohibited by State law or the law of the Convention country. In the case of a child immigrating to the United States in connection with his or her adoption, such conduct must be permissible under the laws of the State in which the prospective adoptive parent(s) reside and the laws of the Convention country from which the parent(s) seek to adopt. In the case of a child emigrating from the United States in connection with his or her adoption, such conduct must be permissible under the laws of the State where the child resides and the laws of the Convention country in which the parent(s) reside.
The requirement that the family locate a U.S. accredited agency to serve as a primary provider in countries where they are acting on their own behalf violates this law and regulations

[2] The six adoption services are:
1. Identifying a child for adoption and arranging an adoption;
2. Securing the necessary consent to termination of parental rights and to adoption;
3. Performing a background study on a child or a home study on a prospective adoptive parent(s), and reporting on such a study;
4. Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child;
5. Monitoring a case after a child has been placed with prospective adoptive parent(s) until final adoption; or
6. When necessary because of a disruption before final adoption, assuming custody and providing (including facilitating the provision of) child care or any other social service pending an alternative placement. 22 CFR 96.2 Definitions.

[3] The child would still have to meet the rigorous definition of "orphan" or "adoptable child" found in INA 101(b)(1)F) and 101(b)(1)(G). The child must generally have no parents due to their abandonment, disappearance, desertion, separation, death or have a sole or surviving parents who is incapable of providing proper care according to the standards of the country. See those definitions for detailed explanations of those requirements which are quite stringently enforced by USCIS in the approval process.

required to monitor the case until the adoption was finalized because the adoption is finalized in the foreign country. The only adoption service which requires the involvement of an accredited agency to protect the parties is the performance of a home study on the prospective adoptive parents and that could be done by an exempt agency. Alternatively, the family could still be required to identify a home-study agency that is accredited to perform the home-study and to provide post-placement supervision when it is required for finalization or by the placing country. However, they would be able to act as their own primary provider for the remaining adoption services. This proposal would ensure that the home-study and post-placement processes are appropriately completed by accredited agencies while also acknowledging that meaningless "protections" for relative adoptions only create barriers that harm children, birth parents and adoptive families.

Anonymous Complaints:

The process for making complaints against accredited ASPs was established after a long process of working with the wider stakeholder community. We are concerned that the use of anonymous complaints, which is occurring at present and may be codified in the new regulations, violates due process. If an ASP is not told which family has lodged a complaint with the accrediting agency, they cannot effectively address that complaint. The ASP also wastes precious resources in responding to an ill-defined complaint that could have been much more speedily addressed and, possibly resolved, directly with the family. **We urge the Administration not to allow for anonymous complaints.**

Streamlined Regulations for Relative Adoptions:

Section 503 of the Intercounty Adoption Act specifies that alternative regulations could be enacted for Hague Convention adoption relative cases. We have been advocating for streamlined regulations for relative adoptions with Congress for a number of years, without significant progress. **Specifically, we propose that ASPs which act as primary providers in close relative adoptions have minimal yet clearly defined standards for providing services to relatives which would encourage them to take these cases without fear of losing accreditation.** For example, the level of oversight of any foreign supervised providers used to complete the adoption should be less. Substantial participants in the process, such as an attorney engaged to complete a relative adoption, may need to sign a foreign supervised provider agreement. However, less substantial or inconsequential participants, for example, the taxi driver that took the family to the Ministry would be exempt from that detailed oversight. **Additionally, as explained above, families could be permitted to act as their own primary providers in certain circumstances.**

Habitual Residence:

Habitual residence is now governed by policy memoranda, not regulation. In fact, under the 2008 regulations, "habitual residence" was not defined at all. The USCIS website refers to two policy memoranda, one in 2008 See: (https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/Hague_AFM_memo31oct08.pdf) and one in 2017 (See: https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-20-PM-602-0095-Hague-Habitual_Residence.pdf).

However, there is also an Interim Policy Memorandum which governs adoptions of foreign born children which occurred from February 3, 2014 to the issuance of the Final Policy Memorandum in 2017. **There is a strong need for clarity regarding habitual residence with consolidated guidance because the 2017 memo appears to apply new and different requirements to adoptions which occurred between 2014 and 2017 ex post facto.**

Conclusion:

After twelve years of policy and practice, we agree that the 2008 regulations promulgated by USCIS to address Hague adoptions need revision. As stated today, AAAA is in favor of regulations that serve to promote transparent, ethical, and efficient adoption processes and lead to a higher standard of practice within the field of intercountry adoption. However, our deep concern remains that the content of the revised regulations may effectively continue the downward trajectory of intercounty adoption through over burdensome regulation, increased fees and decreased competition. We are also concerned that relative adoptions will continue to plummet as fewer families are able to locate an adoption service provider to serve as the primary provider.