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NEW USCIS POLICIES REGARDING HAITIAN ORPHANS: A STEP IN THE RIGHT DIRECTION, BUT DO THEY GO FAR ENOUGH?

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Following the devastation caused by the recent earthquake in Haiti, the Department of Homeland Security has announced a number of measures to aid both Haitian nationals already in the United States, and certain Haitians who were in the process of coming to the United States as relatives of U.S. citizens. This article does not attempt to summarize all of the relief available to Haitian nationals, such as Temporary Protected Status for many of those already in the U.S. at the time of the earthquake, which was discussed in our February 2010 Immigration Update and on our blog (see http://cyrusmehta.com/perseus/News.aspx and http://cyrusmehta.blogspot.com). Rather, it focuses on policies that USCIS has announced to aid certain Haitian orphans.

To understand current USCIS policy regarding Haitian orphans in particular, it is useful to review the immigration process for orphans more generally. When a child qualifies as an orphan, a U.S. citizen who wishes to adopt that child, or under certain circumstances has already done so, may petition for that child's immigration to the United States without fulfilling the requirement of two years of legal custody and residence with the child that is ordinarily required in adoption cases by section 101(b)(1)(E) of the Immigration and Nationality Act (INA).[1] The orphan-immigration process varies significantly depending upon whether or not the country where the orphan in question habitually resides is a signatory to the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country *Adoption* (generally referred to as the *Hague Adoption Convention*). If the orphan is from such a country, the immigration process proceeds in accordance with INA § 101(b)(1)(G) by means

of Forms I-800A and I-800,[2] and is subject to many complex rules that are outside the scope of this article but should be reviewed with a qualified immigration attorney before the process of adopting an orphan is begun.[3] For countries that are not signatories to the Hague Adoption Convention, the process is governed instead by INA § 101(b)(1)(F) and proceeds by means of Form I-600 and possibly Form I-600A. (The Convention took effect in the United States in April 2008; prior to that time, the separate I-800/I-800A procedure did not exist.) A list of Hague signatory countries is available on the State Department's website at

http://adoption.state.gov/hague/overview/countries.html.[4]

Haiti is not a signatory to the Hague Adoption Convention, so the process of immigration for Haitian orphans proceeds through the traditional Form I-600 process.

The Form I-600, Petition to Classify Orphan as Immediate Relative, is filed to establish that the requirements of INA § 101(b)(1)(F) are met.[5] The child in question must be "an orphan 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."[6] The orphan must be under the age of 16 at the time the petition is filed,[7] except that a petition can be filed for an orphan over 16 but under 18 if one is also being filed for an under-16-year-old sibling.[8] The petition can be filed by a married U.S. citizen and spouse jointly, or by an unmarried United States citizen at least 25 years old, and can be filed either based on an already-finalized adoption abroad where the parent(s) "personally saw and observed the child prior to or during the adoption proceedings" or based on a planned adoption in the United States as to which "the preadoption requirements, if any, of the child's proposed residence" have been complied with.[9] The adoptive parents must establish to the satisfaction of USCIS[10] that they will provide proper care to the orphan. This determination can be expedited by prior filing of a Form I-600A, Application for Advance Processing of Orphan Petition, before the I-600 stage of petitioning for a specific orphan, but a separate Form I-600A is not strictly required; the suitability determination can be done as part of the I-600

adjudication as well.[11]

Under ordinary circumstances, processing of a Form I-600 can take more than a year, depending upon the USCIS Field Office involved: current listed processing times vary from only a couple of months at, for example, the Albany, NY Field Office to more than 13 months at the Miami, FL Field Office.[12] Moreover, the process of adopting an orphan can take even longer than that; potential adoptive parents need to go through a number of steps before they are prepared to file the actual application for a specific child. Thus, at the time of the earthquake in Haiti, there were many U.S. citizen parents who had begun the process of adopting Haitian orphans but were not yet in a position to bring them to the United States on immigrant visas under normal procedures.

As a humanitarian measure, USCIS has agreed to exercise its parole power under INA § 212(d)(5)(A) to allow some of these orphans to enter the United States before final resolution of their I-600 cases.[13] Based on a policy first announced by Secretary of Homeland Security Janet Napolitano on January 18, 2010, and since updated somewhat with respect to certain details, there are two categories of orphans who will be paroled, both having a substantial connection to U.S. prospective adoptive parents who had in some sense begun the process of adopting them before the earthquake.

The first category of orphans to be paroled into the United States, according to the latest USCIS update, is "Children being adopted by U.S. citizens prior to Jan. 12, 2010, who have been legally confirmed as orphans available for inter-country adoption by the Government of Haiti (GOH) through an adoption decree or custody grant to suitable U.S. citizen adoptive parents." For such children, evidence of the child's availability for adoption and of the adoptive parent(s) suitability must be provided as follows:

- Evidence of availability for adoption MUST include at least one of the following:
    - Full and final Haitian adoption decree; or
    - GOH custody grant to prospective adoptive parents for emigration and adoption; or
    - Secondary evidence in place of the above.
- Evidence of suitability MUST include one of the following:
    - Approved Form I-600A, *Application for Advance Processing of an*

Orphan Petition; or
- Current FBI fingerprints and security background check; or
- Physical custody in Haiti plus a security background check.[14]

In some cases, presumably those that were sufficiently close to completion already, this evidence will allow USCIS to issue an immigrant visa for the child, thus allowing the child to enter the United States as a Lawful Permanent Resident, rather than merely entering on parole.[15]

The second category of orphans to be paroled is made up of children who were identified by an "adoption service provider or facilitator as eligible for intercountry adoption" and matched to prospective U.S. adoptive parents before the January 12 earthquake, even though not actually in the process of being legally adopted by that time. For those orphans, the prospective adoptive parents must provide:

•Significant evidence of a relationship between the prospective adoptive parents and the child; AND of the parents' intention to complete the adoption, which could include the following:

- Proof of travel by the prospective adoptive parents to Haiti to visit the child;
- Photos of the child and prospective adoptive parents together;
- An Adoption Service Provider (ASP) "Acceptance of Referral" letter signed by the prospective adoptive parents;
- Documentary evidence that the prospective adoptive parents initiated the adoption process prior to Jan. 12, 2010, with intent to adopt the child (filed Form I-600A, *Application for Advance Processing of an Orphan Petition*, and/or Form I-600, *Petition to Classify an Orphan as an Immediate Relative*, completed a home study, located an ASP to work with in Haiti, etc.).

•Evidence of the child's availability for adoption, which would include the following:

- IBESR (Haitian Adoption Authority) approval;
- Documentation of legal relinquishment or award of custody to the Haitian orphanage;
- Secondary evidence in place of the above.

•Evidence of suitability MUST include one of the following:

- Approved Form I-600A, *Application for Advance Processing of an Orphan Petition*; or
- Current FBI fingerprints and security background check.

USCIS has indicated a willingness to accept secondary evidence where an original document was destroyed in the earthquake, such as correspondence referring to the document or affidavits from persons with knowledge of it.[16]

USCIS has established a special email address for parents who need to set up an appointment at the embassy in Port-au-Prince for screening of an orphan child falling into one of these categories. Parents should email HaitianAdoptions@dhs.gov, with "APPOINTMENT REQUEST", their surname, and the name of the orphanage in the subject line, and be sure to include in the text of the email their child's full name and date of birth; the name, location, and point of contact for the relevant orphanage; and any information regarding illness or special needs of the child. Or, if adoptive parents are in Haiti with the child, the subject line should be "URGENT – ADOPTIVE PARENT IN HAITI", and information included about how to contact the parent. The email address can also be used to contact USCIS about other issues relating to orphans in the process of being adopted by U.S. citizen parents. More detailed instructions are available at http://www.uscis.gov/portal/site/uscis/menuitem.

It is worth noting that USCIS does not have sole control over the speed with which orphans are allowed to leave Haiti. At one point in late January, the government of Haiti halted all departures of orphans due to concerns about child trafficking.[17] Although that bar appears to have been lifted, USCIS remains concerned with ensuring approval by the Haitian government for all departures of orphans from Haiti, and will not issue travel letter for the departure of orphans until it receives approval from the Government of Haiti for each child to depart.[18]

In addition to paroling qualified orphans, USCIS has indicated that it will expedite the process of adjudicating an I-130 petition filed by a U.S. citizen or Lawful Permanent Resident for a relative in Haiti, where a visa number is immediately available.[19] In general, this is only likely to apply to spouses and children (under age 21 at the time of filing of the petition) of U.S. citizens, although it is possible that other relative petitions, such as for a child of a Lawful Permanent Resident, might have remained pending for so long that a

visa number would be available upon adjudication. Parole has not, as a matter of policy, been made available in cases where approval of a petition would not result in an available visa number, such as where a Lawful Permanent Resident has only recently filed for a spouse or child, or a U.S. citizen has only recently filed for a son or daughter over age 21.

As USCIS has explained, moreover, an I-130 petition may not be filed for an orphaned Haitian niece, nephew or grandchild of a U.S. citizen, just as such a petition may not be filed for a niece, nephew or grandchild under ordinary circumstances.[20] And while orphan immigration through the I-600 process does not require a wait for an available visa number (because an orphan immigrating through the I-600 process qualifies as an immediate relative of a U.S. citizen and thus will always have a visa number available), USCIS has not extended its parole policy or its expedited-processing policy to cover cases in which U.S. citizen relatives would wish to pursue the I-600 orphan adoption process for their niece, nephew, or grandchild, but had not begun the process prior to the earthquake because their relative was not orphaned at that time.

USCIS has explained its policy not to streamline immigration of newly orphaned Haitian children by reference to international adoption principles which, it says, forbid speeding up such adoptions out of concern that the children's natural parents may not actually be dead and in the belief that relocating even actual orphans immediately in inadvisable. As USCIS has stated:

> The international standard among adoption professionals in a crisis is to keep children as close to their family members and community as possible. It is often difficult to determine whether children whose parents are missing are truly orphans. In the current situation, many children have become separated from one or both of their parents whose fate is unknown. Even when children are indeed orphaned, they are often taken in by other relatives. Staying with relatives in extended family units is generally a better solution than uprooting the child completely. Also, in the immediate aftermath of such disasters, a country's government may be in disarray and what resources are available may be deployed on recovery projects.
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> USCIS believes that it will take many months before the countries

> affected by the disaster will be able to identify the children who are actual orphans. It is only if and when these countries decide to make these orphans available for international adoption that American citizens will be able to begin adoption proceedings for those children who also qualify as orphans as defined in the Immigration and Nationality Act.

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This explanation does not seem to address why parole or expedited processing of an I-600 would be inappropriate for orphans who were identified as orphans before the earthquake, but were not matched to specific prospective adoptive parents in a way that meets the criteria of either category of the parole policy. Moreover, it ignores the possibility that, given the size of the Haitian-American community in the United States, the extended families of a significant number of newly orphaned Haitian nationals may be located here.

While concerns about mistaken claims of parental death (and perhaps also child trafficking, although USCIS has not explicitly justified its policy by reference to this) are understandable, it seems inhumane for USCIS not to use its parole power in cases where U.S. citizen relatives of newly orphaned Haitian children wish to take them in with a view to eventual adoption, even if no adoption was in process before the earthquake. Given the size of the Haitian-American community and the scale of the devastation in Haiti, there are surely Haitian-Americans with newly orphaned nieces, nephews, grandchildren and so on in Haiti who would wish to adopt these relatives. Such cases will not fall under the announced USCIS parole policy, but where there is proper proof of a relationship and of the death of the child's parents, it is unclear what harm would arise from expediting the process of bringing the orphaned child to the United States to be adopted by an aunt, uncle or grandparent.

Even if there is doubt regarding the presumed death of a child's parents, it would seem appropriate for USCIS to exercise its parole powers in a case where U.S. relatives wish to care for a child at least temporarily with a view to eventual adoption if necessary, no living parents of the child are known to exist and available to care for the child at this time, and the U.S. relatives have obtained appropriate consent from Haitian authorities. Parole for the purpose of adoption if the parents are ultimately confirmed to have died need not lead to adoption if one or both parents turn out to be alive, and is a more humane

solution than stranding children in Haiti who (at least for the moment) have no parents to care for them, when relatives in the safer conditions of the United States are available to do so. USCIS itself has stated that "In the first instance, we believe it is most important to focus on re-uniting separated children with their relatives"[22] and that "taying with relatives in extended family units is generally a better solution than uprooting the child completely."[23] What USCIS does not appear to have recognized is that this logic holds true even if the extended family unit is located in the United States, and the uprooting would be to another location in Haiti where no surviving family members appear to be available at present.

USCIS is to be commended for its willingness to use the parole power to allow certain Haitian orphans into the United States faster than would otherwise be possible. The implementation of this policy, especially in its initial stages, has involved a tremendous expenditure of effort by the agency: one USCIS officer in Haiti, Pius Bannis, was reported to have been working virtually around the clock to identify and process orphans already matched with U.S. parents, sleeping just a few hours per night in his office until reinforcements finally arrived from four other embassies.[24] The policy could now be expanded to cover more children in need, however, and USCIS should give serious consideration to doing so.

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[1] 8 U.S.C. § 1101(b)(1)(E).

[2] Form I-800A is formally designated an Application for Determination of Suitability to Adopt a Child from a Convention Country. Form I-800 is a Petition to Classify Convention Adoptee as an Immediate Relative. Both forms are available on the USCIS website, http://www.uscis.gov.

[3] Under the rules governing Hague cases, an I-800 petition will often be denied if the adoption process, or even the process of contacting the parent or custodian of a potential adoptive child, has proceeded impermissibly far prior to authorization by USCIS. *See* 8 C.F.R. § 204.309(b).

[4] A more comprehensive table listing dates of accession to the Hague Adoption Convention and other relevant information is available on the international administering body's website at http://www.hcch.net.

[5] For additional regulatory explication of the statutory requirements, see 8 C.F.R. § 204.3.

[6] INA § 101(b)(1)(F)(i), 8 U.S.C. § 1101(b)(1)(F)(i).

[7] *Id.*

[8] INA § 101(b)(1)(F)(ii), 8 U.S.C. § 1101(b)(1)(F)(ii).

[9] INA § 101(b)(1)(F)(i).

[10] The text of the statute still refers to the "Attorney General" being "satisfied that proper care will be furnished the child if admitted to the United States", but this authority was transferred to DHS, and specifically USCIS, when the Department of Homeland Security was created.

[11] *See* 8 C.F.R. § 204.3(d)(3) (stating that "nder this concurrent procedure, Form

I–600 serves as both the Forms I–600A and I–600, and the prospective adoptive parents should not file a separate Form I–600A.").

[12] Processing times at individual offices can be found by selecting the appropriate menu option on the USCIS website at https://egov.uscis.gov/cris/Dashboard.do .

[13] Parole allows physical entry of an alien into the United States without completing the admission process. As a legal matter, the individual for many purposes is treated as if still stopped at the border.

[14] "USCIS – Questions & Answers: Information for U.S. Citizens in the process of adopting a child from Haiti," Feb. 4, 2010, http://www.uscis.gov .

[15] *Id.*

[16] *Id.*

[17] Miriam Jordan, "U.S. Official Holds Key to Orphans' Fate," Wall Street Journal, Jan. 29, 2010 http://online.wsj.com/ .

[18] "USCIS – Questions & Answers: Information for U.S. Citizens in the process of adopting a child from Haiti," Feb. 4, 2010, http://www.uscis.gov/ .

[19] "USCIS – Haitian Relief Measures: Questions and Answers," Jan. 18, 2010, http://www.uscis.gov/

[20] *Id.*

[21] *Id.*

[22] "USCIS – Questions & Answers: Information for U.S. Citizens in the process of adopting a child from Haiti," Feb. 4, 2010, http://www.uscis.gov/ .

[23] "USCIS – Haitian Relief Measures: Questions and Answers," Jan. 18, 2010, http://www.uscis.gov/.

[24] Miriam Jordan, "U.S. Official Holds Key to Orphans' Fate," Wall Street Journal, Jan. 29, 2010 http://online.wsj.com/article/.