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Adoption for US Citizens, Immigrants and Nonimmigrants

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[1]

Submitted by Rajiv S. Khanna on Feb 23rd 2010

Quite a few of our community members have asked me about the basic laws governing adoptions. One of my colleagues has prepared brief write up for you.

The procedure to adopt a child from a foreign country varies depending on whether the Prospective Adoptive Parent(s) are U.S. Citizens, Green Card Holders/Permanent Residents, or Non-Immigrant Visa holders. Two alternatives exist for United States Citizens only: adoption through the Hague Convention and orphan adoptions (from non Hague countries). Under these two processes, USCIS determines the eligibility and suitability of the Prospective Adoptive Parent(s) in addition to the eligibility of the foreign born child to immigrate to the United States.

Non-immigrants and Permanent Residents may not adopt foreign born children under the Hague Convention. In order for a Nonimmigrant or Permanent Resident to bring an adopted child into the United States, Prospective Adoptive Parent(s) must prove that they have been in legal and physical custody of the child for at least two years. The statutory provision pertaining to adopted children is found in INA Section 101(b)(1)(E), which provides immigrant classification for "a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years..." This "two-year provision" is for Prospective Adoptive Parent(s) who are able to temporarily reside abroad and adopt a child in accordance with the laws of the foreign state in which they are residing. Note, the two year requirement is counted in the aggregate. Intermittent gaps in time are permitted. Legal custody begins when it is granted to the Prospective Adoptive Parent(s) by a legal process through the courts or other recognized government entity. This legal grant of custody must be evidenced by an official custody document or a final adoption decree.

The two year provision option is complicated and difficult to carry out because it is nearly impossible for Prospective Adoptive Parents (Permanent Residents and/or Non-immigrant visa holders) to return to their home countries/foreign countries and remain with the child abroad for two years before adopting. The two year absence from the United States raises

other concerns with maintenance of one's Permanent Resident status and/or Non-immigrant status. Prospective Adoptive Parents (Permanent Residents) who have completed the two year requirement would complete the immigration process by filing the I-130 and ancillary documentation. A Non-immigrant Prospective Adoptive Parent can attempt to obtain a dependent visa for his or her adoptive child so long as the child meets the definition of a child under INA, as per Section 101(b)(1)(E) noted above. Note, the primary applicant should have fulfilled the two year requirement, not only a/the dependent spouse.

****Please note this is a general summary of the inter-country adoption requirements for Green Card Holders/Non-immigrants. Adoption is a complicated matter and requirements may vary per country. Additional requirements may exist depending on the Prospective Adoptive Parent(s) circumstances. Please consult an attorney to discuss your inter-country adoption inquiries.**

Nonimmigrant Visas:

[General Nonimmigrant Visa](#) [2]

Green Card:

[Adoption](#) [3]

[General Green Card](#) [4]

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Links:

[1] <https://immigration.com/blog/adoption-general-green-card/adoption-us-citizens-immigrants-and-nonimmigrants>

[2] <https://immigration.com/visa/nonimmigrant-visas/general-nonimmigrant-visa>

[3] <https://immigration.com/greencard/green-card/adoption>

[4] <https://immigration.com/greencard/green-card/general-green-card>