

Comments on Proposed ICARE Legislation

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Executive Summary

Introduction

ICARE effectively illustrates the lack of a national comprehensive policy on adoption. The legislation focuses on the need to streamline the processing of adoptions, and the benefits of citizenship. It does not, however, contain policies that seek to ensure the protection of children and families.

Many will claim that ICARE only serves to move functions, and that its goal is not to effect overall policy change. *We strongly believe, however, that the proposed change in function will dramatically alter the landscape of adoption because the very change in functionality could also effect clear policy change.*

The Need for Enforcement

The United States has some of the least stringent requirements on adoption agencies in the world. State licensing regulations do not adequately regulate adoption. The ratification of the Hague Convention will affect only 11 percent of intercountry adoptions to the United States.

The effects of the lack of regulation are seen in the U.S. intercountry adoption statistics.

Over the last 15 years, 40 different countries were in the Top 20 Countries of Origin¹ for U.S. families.

Of these, 13 are currently closed or effectively closed. (By effectively closed, we mean that the number of children being adopted has fallen to 26 or less each year *including* orphan petitions filed by immediate relatives or those living in the foreign country. Former numbers ranged from 79 to 1,122 per country, with an average of 306).

An additional four countries are closed, reportedly temporarily, to investigate concerns or establish new procedures.

Together, these 17 countries account for **43 percent** of the 40 most common countries for U.S. citizens to adopt from. Virtually all of these countries closed due to concerns about corruption, child trafficking or abduction.

¹ As reported by the U.S. Department of State at www.travel.state.gov/adopt/orphan_numbers.html

Immigration Provisions

The proposed W visa could result in an unprotected, deportable status for children whose adoptions are not finalized within two years. Section 203(b).

The proposed change in the orphan definition could remove important safeguards against the unnecessary dissolution of intact families. Section 204(a).

Conclusion

Ethica believes enforcement provisions must be added to the bill as a condition of its passage. If included, Ethica would actively encourage other members of Congress to support the bill and would encourage the Administration to work with Congress to overcome any other obstacles that would prevent its passage.

If such provisions were not added, we would have to actively discourage its passage because of the serious effects it could have on the already tenuous protections to children and families.

As requested, suggested language for changes is indicated on the attached copy and in the accompanying notes.

INTRODUCTION

The stated objectives of ICARE are to improve the intercountry adoption process, foster best practices and ensure that adopted children are treated identically to biological children. All of these goals are worthy, and we support the intent of the legislation.

ICARE, however, also effectively illustrates the *true* problem affecting intercountry adoption—the lack of a comprehensive national policy on adoption. As a signatory to the Hague Convention, the United States recognizes that adoption is a positive option for children in need of families, and that measures should be taken to protect all parties involved and to ensure that adoptions take place in the best interests of children.

We would purport that the U.S. has done an excellent job in fulfilling the first objective—finding families for children. It is our concern, however, that we have failed to enact effective policies that ensure the latter objectives of protecting children and families.

ICARE mirrors this overall lack of a comprehensive policy. The legislation focuses on the need to streamline the processing of cases and to eliminate cooperation and communication difficulties between the Department of State (DOS) and Citizenship and Immigration Services (CIS). The citizenship provisions provide important benefits to children and adoptive families. All of these objectives speak to helping children find families.

Missing, however, are clear policy priorities that serve to ensure that adoptions occur in the best interests of children, and that families, both birth and adoptive, are protected. We support the desire to ensure that children who are fully and finally adopted be treated identically to biological children. However, we must also never lose sight of the fact that there is one monumental difference between the two—that adopted children have another family whose interests must also be considered.

Many will claim that ICARE only serves to move functions, and that its goal is not to effect overall policy change. *We strongly believe, however, that the proposed change in function will dramatically alter the landscape of adoption because the very change in functionality could also effect clear policy change.*

It is imperative, therefore, that Congress carefully consider the impact that legislative changes could have, and ensure that changes will provide the basic framework for a comprehensive national policy. If done well, the Office of Intercountry Adoption (OIA) could be the answer to the lack of a comprehensive national policy. On the other hand, a failure to carefully consider the realities of the current situation could mean that the establishment of the OIA will speed the end of intercountry adoption as an option for children.

The Need for Enforcement

The United States has some of the least stringent requirements on adoption agencies in the world. While some point to the system of state licensing as proof of regulation, adoption consumers experience the shortfalls of that system every day.

Current regulations do not address the realities of intercountry adoption regarding areas as diverse as fee practices, contractual obligations, the receipt of accurate medical and social information, and trafficking or other illegal activity. Many who provide adoption services are not licensed at all. While the ratification of the Hague Convention will provide a good base for federal regulation, it is estimated that the Convention will apply to only 11 percent of intercountry adoptions to the United States.

The Statistical Story

The effects of this lack of regulation are clearly seen in the U.S. intercountry adoption statistics, which show that countries once open to intercountry adoption are now closed or do not allow U.S. agencies to operate. This phenomenon is often lost in the celebration over the continually rising numbers of intercountry adoptions, yet it is real and should be alarming to those who wish to see intercountry adoption remain an option for children and families.

Over the last 15 years, 40 different countries were in the Top 20 Countries of Origin¹ for U.S. families.

Of these, 13 are currently closed or effectively closed. (By effectively closed we mean that the number of children being adopted has fallen to 26 or less each year *including* orphan petitions filed by immediate relatives or those living in the foreign country. Former numbers ranged from 79 to 1,122 per country, with an average of 306.)

An additional four countries are closed, reportedly temporarily, to investigate concerns or establish new procedures.

Together, these 17 countries account for **43 percent** of the 40 most common countries for U.S. citizens to adopt from. Virtually all of these countries closed due to concerns about corruption, child trafficking or abduction.

Some claim these closures are the work of “anti-adoption” forces who wish to limit intercountry adoption. Such a simplistic answer, however, belies the fact that illegal

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and/or unethical activities generally provide the fuel to such critics. Even if only a few adoption service providers engage in such activities, the effects are obvious. Without adequate regulation, the actions of a few can lead to the cessation of adoption activity.

Enforcement Provisions and ICARE

The endangerment of intercountry adoption reinforces the clear need for active enforcement of safeguards and continuing improvement of the system. The recognition of this need is not readily apparent in the ICARE legislation. While some proponents state that ICARE does not prevent investigation and enforcement, it also does not actively address these as a function of the OIA, or as primary responsibility.

Many parents, agencies, and Congressional offices have commented on the difficulties experienced by adoptive parents and children when CIS and/or DOS insist upon full field investigations for cases they consider "not clearly approvable". ICARE focuses on the need to streamline the processing of adoption applications, and seeks to improve coordination and communication problems. It is vital however, that we ensure that we do not remove essential protections while removing processing roadblocks.

In the current system, the real concerns that ICARE seeks to address generally arise during a situation when children and parents are affected by a moratorium or other processing crisis. However, it must be noted that in these situations, *the lack of cooperation between CIS and DOS is often a merely a symptom* of the larger issue—that lack of regulation has contributed yet again to a crisis in a foreign country.

When questions about the origin of children are raised, CIS has an obligation to ensure that children are really orphans. Doing so may require prolonged investigations, placing children and families in awkward situations. However, simply removing CIS from this role does not address the root cause of the problem. If those functions are moved to OIA, then the only thing that will change is the entity responsible for the investigation. If OIA must call in CIS officers to investigate anyway, children and families will still have to endure protracted investigations. Another option, of course, would be for OIA to determine that no investigations, or only perfunctory investigations, are required. And therein lies the danger.

Illegal and unethical practices are often addressed only when CIS launches an investigation. They generally do so because U.S. officers in foreign countries who are directly involved in adjudicating orphan cases raise concerns, and because it is their responsibility to ensure that beneficiaries of citizenship applications are clearly eligible for those benefits.

ICARE proposes to move all functions to the United States, and removes the

responsibility from foreign officers as well. If no U.S. officer in the foreign country considers the adjudication and enforcement of such provisions their responsibility, we must consider when and how serious problems will become apparent to the OIA and how they will be addressed.

Some believe that CIS will object to ICARE because it infringes on their "turf"; because they don't really care about adoption; and because they are trained to look for reasons to keep immigrants out of the U.S. rather than reasons to allow them to enter. Perhaps all of these beliefs are valid.

However, we must also consider if it is at least possible that CIS objects because they know that removing this function will ensure that adequate investigations are not done; because they *do* care that adoptions continue and want to prevent unnecessary moratoriums; and whether they have valid concerns about granting citizenship to children who may have been improperly procured for adoption.

Perhaps they object because of the very real fear that American adoptive parents could face the unimaginable nightmare of discovering that their child was kidnapped or bought only when a birth parent, or a group of birth parents, comes forward to protest and demand the repatriation of their children.

ICARE must clearly indicate that the OIA has the *responsibility* to adequately determine that children are indeed orphans and that it will be held accountable for such determinations before Congress.

Currently, CIS has the responsibility to adjudicate orphan petitions. It may also delegate this responsibility to Consular officers with the DOS. Every case requires an investigation into the circumstances of a case. In the vast majority of cases, such investigations consist only of a review of the relevant documentation. When it is determined that a field investigation is needed, Immigration officers conduct those investigations. DOS does not have the investigative capability to conduct field investigations. In addition, anytime a DOS officer finds reason to question the approval of a case, the case must be sent to CIS for denial. DOS cannot deny a case. Therefore, CIS retains the ultimate responsibility for the adjudication and investigation of the case.

ICARE proposes changing this structure so that the adjudication of the case lies with DOS. However, as noted above, DOS does not have investigative capability. This leads to the following question:

- Who will conduct investigations when conditions warrant?
- If CIS is asked to do an investigation, will they have authority to deny a case?

- If only OIA can deny a case, but CIS has to investigate, could that not lead to coordination problems similar to those that now exist?

To address these concerns, it is suggested that specific language be included in ICARE to clarify that the protection of children and families is a priority, and that the OIA can seek assistance from CIS and Immigration and Customs Enforcement when necessary. We would also suggest that the regulations address a mechanism by which consular officers or investigators abroad can systematically raise awareness of, and request investigations into, improprieties.

OTHER CONCERNS FOR ADOPTIVE FAMILIES

Ethica has noted other provisions that could prove problematical for adoptive families. The proposed timelines are of concern. Six months may be inadequate to transfer functions, train employees, develop appeal mechanisms, etc. This leads to a concern that upon passage of the bill, CIS could determine that it will cease function on a certain date. If the new office is not functional on that date, will there be an overall delay in processing applications until the new office opens?

In addition, **Section 206 (a)(2)** provides for up to 30 days for the processing of applications. In countries where documentation is not available until after the family travels, this could lead to extended travel periods of six weeks or more, causing enormous financial and logistical hardships for adoptive families.

Section 202 (a)(4) removes the medical exam requirement that is currently in place. We understand the desire to remove the exam, which determines whether a child can be excluded from entry if he or she has certain medical conditions. In common practice, however, the existence of the medical exam requirement is often the only protection adoptive parents have in ensuring that an adequate medical exam takes place prior to adoption. When agencies know that the Consulate will test for HIV, for example, they have good reason for doing so ahead of time. Without this provision, many simply won't do tests, increasing the chances that a family could adopt a child with an undiagnosed serious medical condition. This problem could be addressed by stating that an exam will be waived if the family has received full medical disclosure. Even then, many agencies rely on the "can't get that test here" excuse, even when other agencies operating in the same locale manage to do testing. For these reasons, perhaps the best protection for adoptive parents would be the inclusion of a specific medical exam prior to the adjudication of the petition.

Finally, **Section 206(b)** includes appeal provisions for the determination of parent eligibility to adopt, but no appeal provisions for the denial of the child as eligible for adoption.

IMMIGRATION PROVISIONS

As written, it appears that the proposed "W" visa in **Section 203 (b)** would prove extremely problematical to children whose adoptions disrupt, or otherwise are not finalized before the end of the two-year authorized admission period. If an adoption is not finalized, then it appears to result in the child being in an unprotected, deportable status after two years.

The change of the orphan definition as provided for in **Section 204 (a)** could remove important safeguards, especially in the absence of other enforcement provisions.

CONCLUSION

With modifications to the legislation, the resulting OIA could be the vehicle needed to help the United States develop an effective, comprehensive national adoption policy that will serve and protect both children and their parents, both birth and adoptive.

For all the reasons outlined above, we believe that ***enforcement provisions must be added to the ICARE bill as a condition of its passage***. If such provisions were included, we would actively encourage other members of Congress to support it and would encourage the Administration to work with Congress to overcome any other obstacles that would prevent its passage.

If such provisions are not added, we would actively discourage its passage because of the serious effects it could have on the already tenuous protections to children and families.

Please see attached document S1934Rev for specific recommendations on individual sections.