

Equalizing the Treatment of Foreign-Born Adopted Children

By Joseph D'Agostino†*

Introduction

Adoption is a legal means to provide families who have adopted with the same rights as biological families. Under American law, children who have been adopted are expected to have the same rights as biological children, and that goal of equality is also reflected in legal and social standards of international human rights conventions. Yet for thousands of internationally-born children legally adopted as minors by American couples, that promise of equality under the law is violated in one of the most fundamental ways possible, both today and historically.

Many children legally adopted from overseas by American citizens and raised in the United States do not receive automatic American citizenship, and often both the children and their adoptive parents are unaware of this fact. The lack of citizenship becomes an issue when the adoptive parent, or the adopted person as an adult, applies for a passport, tries to vote, attempts to obtain in-state tuition at a college, or otherwise runs into a situation in which citizenship must be proven. Then they are denied the rights and privileges that Americans take for granted. They can even face mandatory deportation to countries they cannot remember for minor, first-time offenses. For example, one woman, adopted at birth by American citizens, was in the process of applying for citizenship and was told she would be deported

back to her country of birth because she had pulled another woman's hair many years before.

The Situation for Some Foreign-Adopted Children: Case Studies

Adopted at the age of eight, Joao Herbert grew up in Wadsworth, Ohio as the legally adopted son of an American couple. An orphan with no family in his native Brazil, he lost the ability to speak Portuguese. When he was convicted of selling marijuana in his early twenties, instead of being treated as an American citizen subject to the penal sanctions of the American criminal justice system, he was deported in 2000 to a country that he barely remembered. His adoptive mother, Nancy Saunders, said this would be "a death sentence."

She was right. In 2004, at the age of 26, Herbert died after being shot by teenage drug dealers, reported Knight Ridder Newspapers. "In Brazil, Herbert settled into a small brick house in Campinas, an industrial town 60 miles north of Sao Paulo. His house is neat and treed, but it's on the edge of Sao Pedro de Viracopos, one of the city's most notorious slums." Herbert taught English to make ends meet, even founding his own school, but never regained fluency in Portuguese. He moved in with and had a daughter by a local woman, Paula Alexandre, but things went downhill in what was, for him, a foreign land.

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“He was a fish out of water,” said friend Dodo Lopes. Michael Miller, a Baptist missionary in Campinas, said, “He never understood the ways of Brazil. Never.” Just a few months after his daughter was born, Herbert “separated from his common-law wife, closed the [English] school.... He also concocted a plan to sneak back into the United States and live under a new identity.”¹

The possibility of deportation does not hang over only those adopted as minors who are now adults. It threatens those who are still children, too. “Allie Mulvihill may seem like your typical American teenager, but she has something weighing on her mind that most fifteen-year-olds do not: deportation,” CNN reported. “Allie may be forced to leave the country because U.S. immigration officials are questioning the legitimacy of the Guatemalan born child’s adoption by her parents, Lori and Scott Mulvihill, in 1994.” The Guatemalan government does not dispute the validity of the adoption, nor did the U.S. embassy at the time. Instead of granting Allie citizenship when the Mulvihills brought their two-year-old daughter home to Allentown, PA, “U.S. immigration officials questioned whether the woman who gave Allie up for adoption in Guatemala was really her biological mother. Allie’s birth certificate was issued 10 months after she was born, which raised suspicions in U.S. officials’ minds that she was made available for adoption due to a baby trafficking scheme.”

Parents must pay for birth certificates in Guatemala, leading some to delay obtaining them, according to the Mulvihills. Thirteen years later, with Allie thoroughly Americanized and without a family in Guatemala that wanted her,

deportation was still a possibility. “Neither Allie or her parents have a way to track down her biological mother and the adoption agency used by the Mulvihills to adopt their daughter has gone out of business.” Despite filling out hundreds of forms, Allie’s immigration status was still not resolved after thirteen years with her family in the United States.²

Current Law

The problem lies in an all too familiar interaction of laws that did not work entirely as intended and a bureaucracy that does not know quite what to do with those laws. The result is children who are legally adopted by American citizens and raised here, but who never become citizens, often without knowing that they are not citizens. Even knowing that they are not citizens sometimes doesn’t help. “We’re told to go in one direction and when we do, we’re told to switch gears and go into another direction,” said Scott Mulvihill. “And when we look for counsel from the government to give us a definite answer, we get stuck with people who are supposed to be working on marriage contracts rather than immigration contracts.”³

McLane Layton has an intimate knowledge of both the law and how it affects families with adopted children. Layton served as Legislative Counsel to Sen. Don Nickles from 1990 to 2005. She and her husband also adopted three children from Eastern Europe in 1995. She was shocked to discover that even though the U.S. government fully recognized the adoptions as legal, and both she and her husband were U.S. citizens, “my children were not going to be automatic U.S. citizens.”⁴ There is a resounding dissonance in the

¹ Hall, K.G. (2004, May 30). After arrest, U.S. sent Ohio man to Brazil and death: Joao Herbert was deported from his adoptive home for a first-offense drug case. *Knight Ridder Newspapers*. Retrieved from http://articles.orlandosentinel.com/2004-05-30/news/0405300027_1_brazil-herbert-notorious

² Speigner, M.S. (2008, July 11). Teen fears disputed adoption could lead to deportation. *CNN “American Morning.”* Retrieved from http://articles.cnn.com/2008-07-11/us/guatemalan.adoption_1_adoption-agency-immigration-officials-immigration-status?_s=PM:US

³ Ibid.

⁴ This and following information about and quotations from Layton are from a phone interview conducted February 10, 2011.



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fact that individuals can be recognized as the children of American citizens without being recognized as American citizens themselves. It is a situation most Americans probably think is legally impossible.

This is a tear in the fabric of the rights adoption is intended to afford: adopted children should be guaranteed rights identical to those of biological children. “I was offended every time I had to sit down to fill out forms to naturalize my children. My husband and I are U.S. citizens and had I given birth to my children overseas they would be citizens. Adopted children are supposed to be treated the same as biological children under U.S. law, but in this instance they are not,” says Layton.

Mrs. Layton shared her concerns with Sen. Nickles, and the eventual result was the Child Citizenship Act (CCA),⁵ passed in 2000. “On February 27, 2001, more than 100,000 foreign-born adopted children across the nation were given the wonderful gift of American citizenship as a result of enactment of the Child Citizenship Act of 2000,” says Layton’s education and advocacy group, Equality for Adopted Children (EACH). “The CCA amended the Immigration and Nationality Act to confer United States citizenship automatically on certain foreign-born children adopted by citizens of the United States.”⁶

Unfortunately, the CCA, originally introduced by Senators Nickles, Inhofe, and Landrieu did not work entirely as intended. The U.S. State Department interpreted the statute to make a distinction between foreign-born children who enter

the United States on IR-3 and IH-3 visas and those who enter on IR-4 and IH-4 visas.⁷ Those who enter on IR-3 and IH-3 visas have been seen and accepted by both adoptive parents, and they automatically receive citizenship upon entering the United States. Those who enter on IR-4 and IH-4 visas, who have a final adoption, but may have met only one or neither adoptive parent, do not receive citizenship automatically.⁸

Why did the Department of State adopt this interpretation? “I’ve not received a good answer on that,” says Layton. It may be, she said, that there was a fear that parents who had not yet met a child would reject him or her, creating a situation in which a foreign-born child that might be rejected by his or her adoptive American family could become an American citizen. Yet, later rejected or not, children who enter the United States on IR-4 or IH-4 visas with final adoption decrees are already legally the children of the adopting Americans. Layton believes the system should be streamlined in the interests of clarity, convenience, and the best interests of the children: those children who enter on IR-4 or IH-4 visas and who are legally adopted by American citizens before coming to the United States should receive citizenship automatically upon arrival here, just like children who are adopted and enter on IR-3 and IH-3 visas. Instead, they become legal permanent residents (LPRs).⁹

Though no precise statistics are available, advocate and author Jean Erichsen estimates that “given that approximately 300,000 children have been adopted internationally by American parents over the past thirty years, the number could well

⁵ Public Law No. 106-395 (2000).

⁶ “Child Citizenship Act of 2000,” Equality for Adopted Children (EACH) website, http://www.equalityforadoptedchildren.org/legislation/child_citizenship_of_2000.html

⁷ See 8 C.F.R. § 320.2.

⁸ “FACE Act,” EACH website, <http://www.equalityforadoptedchildren.org/legislation/face.html>

⁹ Children born outside the United States to American citizens have their citizenship status regulated by statute, specifically 8 U.S.C. § 1401. For example, Section (c) grants citizenship to “a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person,” and Section (e) grants it to “a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person.”



be in the thousands.”¹⁰ Further, the number continues to grow as approximately half of the children adopted internationally enter the United States on IR-4 or IH-4 visas. Not only has the Department of State’s treatment of children entering the United States on IR-4 or IH-4 visas created a continually growing class of adopted children who do not receive automatic citizenship upon entry, the CCA did not apply to anyone age eighteen or over at the time of its enactment. Thus, there are two distinct groups living in this country in citizenship limbo, often without their or their adoptive parents’ knowledge. “People assume that the children they adopt receive citizenship, and adopted children probably don’t even think about the question at all, even when they grow up,” says Layton.

Then something happens to make them think about it, Layton says. “Adult adoptees sometimes find out they are not citizens when they apply for passports, apply to college, enlist in the military, or when they are charged with a minor offense and can be subjected to deportation,” she says. By the time parents of adopted children or adult adoptees figure out that they must apply for citizenship, even though their adoptions were legal, it is often too late. “Documents are lost or cannot be obtained from the developing countries where they originated,” she says. Even the best-informed parents can face challenges. Though the Laytons adopted three siblings in 1995, they still face concerns to this day. “We have only one certified copy of their birth certificates from their birth country and we can’t easily get more,” she said. “Do you know how often people are asked for certified copies of their birth certificates? I can’t get certified copies for my children from my own state unless I re-adopt them in my state, although re-adoption is not required by my state,” Layton says.

The Beginning of the Problem

Though the current anomaly of some legally adopted children not receiving citizenship automatically is long-standing, it rarely created a problem until 1996. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996¹¹ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)¹² of 1996 increased the numbers of LPRs eligible for mandatory deportation. Under these laws, deportation has become far more likely, because the acts that require deportation were expanded and that could be applied both retroactively and for minor crimes that were not subject to deportation at the time of conviction. Under AEDPA, crimes for which a sentence of one year or longer could be imposed often became grounds for the mandatory deportation of those convicted. Formerly a much more restrictive category, “aggravated felony” was used for the purpose of mandatory deportation, however this category was expanded to include such non-violent offenses as document fraud, illegal gambling, prostitution, and other offenses.

IIRIRA further expanded the meaning of “aggravated felony.” A conviction of one year instead of the previous five year requirement now triggers mandatory deportation for crimes of theft or crimes of violence. The money laundering threshold went from \$100,000 to \$10,000. Many new offenses were added that could trigger deportation and the threshold length of possible prison terms reduced greatly. It’s also important to note that the prison terms did not have to be actually imposed upon an individual, they only needed to be within the sentencing limits that a judge could impose.

The number of LPRs subject to deportation increased dramatically and included some of those adopted by American citizens as infants and who had no familial, linguistic, or cultural ties to

¹⁰ Erichsen, J. & Zappala, M. (2008). Thousands of internationally adopted children lack legal citizenship. *Adoption Advocate*, 7. Retrieved from <https://www.adoptioncouncil.org/images/stories/documents/FBANCAAdoptionAdvocate.pdf>

¹¹ Public Law No. 104-132 (1996).

¹² Division C of Public Law No. 104-208 (1996).



the countries of their birth, many for non-violent acts and often without any knowledge that there was a risk of deportation. Even felony DWIs have been found to trigger mandatory deportation.¹³

Mary Anne Gehris, adopted by American citizens from Germany as an infant, applied for citizenship in 1997 and when she received a letter from INS in 1999, she expected it to be a date to be sworn in as a citizen. Instead it was a notice that she was to be deported. The charge that triggered her deportation was an eleven-year-old misdemeanor for pulling the hair of another woman while fighting over a boyfriend. The charge had been suspended with a year's probation, meaning the judge at the time expected nothing of her but a year of good behavior. However, because it was possible to be charged for up to a year of jail time for this offense, it was considered an aggravated felony under IIRIRA. The state of Georgia saved Mary Ann Gehris by pardoning this minimal charge so she would not be deported.^{14,15} Many others are deported for similar minimal acts.

Violation of Human Rights Ideals

The current system of denying American citizenship to some foreign-born children legally adopted by American citizens from overseas seems to violate widely accepted principles embodied in international human rights statements. For example, the 1986 UN Declaration on the Social and Legal Principles Relating to the

Protection and the Welfare of Children, approved by the General Assembly, states, "The child should at all times have a name, a nationality and a legal representative. The child should not, as a result of foster placement, adoption or any alternative regime, be deprived of his or her name, nationality or legal representative unless the child thereby acquires a new name, nationality or legal representative."¹⁶ Arguably, by removing a child from his birth country and causing the resulting loss of cultural and other connections to that country, including a *de facto* loss of the protections of that country's laws, without granting him or her the nationality of the new country of permanent residence, American law is in violation of this article.¹⁷

Further, Article 22 states, "No intercountry adoption should be considered before it has been established that the child is legally free for adoption and that any pertinent documents necessary to complete the adoption, such as the consent of competent authorities, will become available. It must also be established that the child will be able to migrate and to join the prospective adoptive parents and may obtain their nationality."¹⁸ Though it is true that children adopted from overseas can obtain American citizenship if their adoptive parents are aware of the need for further bureaucratic measures after legal adoption and then pursue those measures with the vigor and money needed, the reality is that this ideal is not being followed. For the average American adop-

¹³ *In re Carlos Istalin Magallanes-Garcia*, Board of Immigration Appeals (1998).

¹⁴ Morawetz, N. (2000). Symposium: Understanding the impact of the 1996 deportation laws and the limited scope of proposed reforms. *Harvard Law Review*, 113, 1936, 1943.

¹⁵ Lewis, A. (2001, February 10). Abroad at home; Rays of hope. *The New York Times*. Retrieved from <http://query.nytimes.com/gst/fullpage.html?res=9807E5DC1331F933A25751C0A9679C8B63&sec=&spon=&pagewanted=all>

¹⁶ UN General Assembly. (1986). *Declaration on social and legal principles relating to the protection and welfare of children, with special reference to foster placement and adoption nationally and internationally*, Article 8.

¹⁷ Though "nationality" and "citizenship" have somewhat different technical meanings, there is no meaningful space between them in this context. 8 U.S.C. § 1101 says, "The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1408 defines United States nationals, such as those born in outlying territories of the United States, and the definitions do not include foreign-adopted children. It would remain a violation of equal treatment if foreign-adopted children could obtain their adoptive parents' American nationality but not their citizenship.

¹⁸ UN General Assembly. (1986). *Declaration on social and legal principles relating to the protection and welfare of children, with special reference to foster placement and adoption nationally and internationally*, Article 22.



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tive parent, managing all the details of the many forms of identification is burdensome because of the time and money it takes to do this for the varied forms of identification, from passports to Social Security cards.

The UN Convention on the Rights of the Child says, “Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption...”¹⁹ This passage does not address nationality directly, but children adopted within the United States keep their nationality and enjoy the safeguards of being nationals of the country in which they permanently reside. Some internationally adopted children receive different, lesser treatment.

Proposed Solution

Chuck Johnson, President and CEO of the National Council For Adoption, is cautiously optimistic that a piece of legislation that would clarify the CCA to grant automatic citizenship to all foreign-born children adopted by American citizens will go forward this session with broad bipartisan support as the CCA did in 2000. It will bear similarities to a section of previously proposed legislation on this issue, the Foreign Adopted Children Equality Act (FACE). Advocates hope that the new legislation will accomplish what the CCA was intended to, providing automatic U.S. citizenship to all foreign-adopted children of American citizens upon their arrival in the U.S.

A statutory fix is necessary, Layton says. “I think that deporting the legally adopted child of an American citizen to a foreign country is unconscionable and unconstitutional. Until legislation makes it undeniably clear that foreign-adopted children of American citizens are American citizens, just like biological children born abroad to American citizens, inequities will continue to exist.”

Equal citizenship rights would have kept Joao Herbert of Ohio in America, the place he knew as home, likely preventing his death and saving his mother, Nancy Saunders, from suffering the loss of her son. These rights would have spared Allie Mulvihill years of fear of being sent away from the only home she remembered and separation from her family. Her parents could have lived without the fear of losing their daughter. This is not an issue of granting special treatment, but correcting an inequality and affording foreign-born children who are adopted the same rights and responsibilities enjoyed by biological children of American citizens born abroad. Adopted individuals should not have to live in fear. Families should not fear losing the adopted children they chose to give a home to. Advocates for adopted individuals and their families, such as Johnson and Layton, hope that Congress will come together on this issue, just as it did with the CCA, to right the inequality that prevents automatic citizenship for children who are adopted by American citizens.

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¹⁹ UN General Assembly. (1989). *Convention on the rights of the child, Article 21(c)*.

