

IAA (Pub. L. 106-279, 204(d), 42 U.S.C. 14924(d)).

§ 96.109 Effect of the withdrawal of temporary accreditation by the accrediting entity or the Secretary.

(a) If an agency's temporary accreditation is withdrawn, it must cease to provide adoption services in all Convention cases and must, under the oversight of the accrediting entity, transfer its Convention adoption cases and adoption records to other accredited agencies, approved persons, or a State archive, as appropriate.

(b) Where the agency is unable to transfer such Convention cases or adoption records, the accrediting entity must, after consultation with the Secretary, take appropriate action to assist the agency in transferring its Convention cases and adoption records.

(c) When an agency's temporary accreditation is withdrawn, the Secretary will, where appropriate, take steps to inform the Permanent Bureau of the Hague Conference on Private International Law.

(d) An agency whose temporary accreditation has been withdrawn may continue to seek full accreditation or may withdraw its pending application and apply for full accreditation at a later time. Its application for full accreditation must be made to the same accrediting entity that granted its application for temporary accreditation. If that entity is no longer providing accreditation services, it may apply to any accrediting entity with jurisdiction over its application.

(e) If an agency continues to pursue its application for full accreditation or subsequently applies for full accreditation, the accrediting entity may take the circumstances of the withdrawal of its temporary accreditation into account when evaluating the agency for full accreditation.

§ 96.110 Dissemination and reporting of information about temporarily accredited agencies.

The accrediting entity must disseminate and report information about agencies it has temporarily accredited as if they were fully accredited agencies, in accordance with subpart M of this part.

§ 96.111 Fees charged for temporary accreditation.

(a) Any fees charged by an accrediting entity for temporary accreditation will include a non-refundable fee for temporary accreditation set forth in a schedule of fees approved by the Secretary as provided in § 96.8(a). Such fees may not exceed the costs of

temporary accreditation and must include all the costs of all activities associated with the temporary accreditation cycle (including, but not limited to, costs for completing the temporary accreditation process, complaint review and investigation, routine oversight and enforcement, and other data collection and reporting activities). The temporary accreditation fee may not include the costs of site visit(s). The schedule of fees may provide, however, that, in the event that a site visit is required to determine whether to approve an application for temporary accreditation, to investigate a complaint or other information, or otherwise to monitor the agency, the accrediting entity may assess additional fees for actual costs incurred for travel and maintenance of evaluators and for any additional administrative costs to the accrediting entity.

(b) An accrediting entity must make its schedule of fees available to the public, including prospective applicants for temporary accreditation, upon request. At the time of application, the accrediting entity must specify the fees to be charged in a contract between the parties and must provide notice to the applicant that no portion of the fee will be refunded if the applicant fails to become temporarily accredited.

Dated: August 27, 2003.

Richard Armitage,

Deputy Secretary of State, Department of State.

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DEPARTMENT OF STATE

22 CFR Part 98

RIN 1400-AB-69

[Public Notice 4467]

Intercountry Adoption—Preservation of Convention Records

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State (the Department) is proposing new regulations to implement the records preservation requirements of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention) and the Intercountry Adoption Act of 2000 (the IAA). The IAA requires that the Department issue rules to govern the preservation of Convention records held by the Department and the Department of Homeland Security (DHS). These proposed rules require the Department

and DHS to maintain Convention records for 75 years.

DATES: Written or electronic comments must reach the Department on or before November 14, 2003.

ADDRESSES: Commenters may send hard copy submissions or comments in electronic format. Commenters sending only hard copies must send an original and two copies referencing docket number State/AR-01/98 to: U.S. Department of State, CA/OCS/PRI, Adoption Regulations Docket Room, SA-29, 2201 C Street NW., Washington, DC 20520. Hard copy comments may also be sent by overnight courier services to: U.S. Department of State, CA/OCS/PRI, Adoption Regulations Docket Room, 2201 C Street NW., Washington DC 20520. Do not personally hand deliver comments to the Department of State.

Comments referencing the docket number State/AR-01/98 may be submitted electronically to adoptionregs@state.gov. Two hard copies of the comments submitted electronically must be mailed under separate cover as well. The electronic comments or the hard copy comments must be received by the date noted above in the date section of this proposed rule. Comments must be made in the text of the message or submitted as a Word file avoiding the use of any form of encryption or use of special characters. If you submit comments by hard copy rather than electronically, include a disk with the submission if possible. Hard copy submissions without an accompanying disk file, however, will be accepted.

FOR FURTHER INFORMATION CONTACT: For further information on submitting comments on the regulations, contact Anna Mary Coburn or Edward Betancourt at 202-647-2826. Hearing- or speech-impaired persons may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: As noted, comments may be submitted electronically to: adoptionregs@state.gov. Public comments and supporting materials are available for viewing at the Adoption Regulations Docket Room. To review docket materials, members of the public must make an appointment by calling Delilia Gibson-Martin at 202-647-2826. The public may copy a maximum of 100 pages at no charge. Additional copies cost \$0.25 a page. The Department of State will keep the official record for this action in paper form. Accordingly, the official administrative file is the

paper file maintained at the Adoption Regulations Docket Room, United States Department of State. The Department of State's responses to public comments, whether the comments are received in written or electronic format, will be published in the **Federal Register**, and no immediate responses will be provided. General information about intercountry adoptions is available on the Department of State's Web site at <http://travel.state.gov/adopt.html>. Background information about the development of these regulations is provided at <http://www.hagueregs.org>.

I. Legal Authority

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. 105-51 (1998); 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)), 32 I.L.M. 1134 (1993); Intercountry Adoption Act of 2000, 42 U.S.C. 14901-14954.

II. Preservation of Convention Records

The Convention governs intercountry adoptions between countries that are parties to the Convention. The IAA provides for U.S. implementation of the Convention. The Convention's main purpose is to establish safeguards to ensure that an intercountry adoption takes place in the best interests of the child. The IAA's purpose is primarily to ensure that adoptions between the United States and other countries party to the Convention take place in accordance with the Convention. Together, the Convention and the IAA seek to protect the rights of children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) covered by the Convention. Another purpose of the IAA is to improve the ability of the Federal government to assist United States citizens seeking to adopt children from Convention countries and residents of Convention countries seeking to adopt children from the United States. More detailed information about the Convention and the IAA may be found in the Supplementary Information published in the proposed rules for part 96 of title 22 of the Code of Federal Regulations (CFR), which are published today as well in the **Federal Register**.

Both the Convention and the IAA contain specific provisions requiring that competent authorities preserve records concerning a child's intercountry adoption. The purpose of this proposed regulation is to enable the Department and DHS (the successor agency to the Immigration and Naturalization Service (INS)) to comply with the Convention and the IAA

requirements for the preservation of Convention records. (The Secretary of DHS will assume certain functions vested in the Attorney General and the INS by the IAA relating to the Immigration and Naturalization Service's responsibilities, pursuant to the Homeland Security Act of 2002, Public Law 107-296, Nov. 25, 2002, as amended by section 105 of the Homeland Security Act Amendments of 2003. (See Consolidated Appropriations Resolution, Public Law 108-7, Feb. 20, 2003)). This Preamble uses terms, such as the Secretary, the Department of Homeland Security, Case Registry, Convention, Convention country, adoption record, agency, person, and public body that are defined in § 96.2 of the proposed regulations for part 96 of title 22 of the CFR, which as noted are also being published on the same day as this proposed rule in the **Federal Register**. This proposed rule defines Convention records, and carries forward for the convenience of the public the same definition of Convention contained in the proposed regulations for part 96.

Article 30 of the Convention generally requires that each Convention country ensure that information concerning any child whose adoption is subject to the Convention be preserved. The IAA mandates that the Department issue regulations to comply with the Convention's requirement that a child's records be preserved. Specifically, section 401(a) of the IAA requires that the Department, in consultation with INS (now part of DHS), issue regulations that establish procedures and requirements for the preservation of Convention records. As required by the IAA, the Department has consulted with DHS to prepare this regulation.

The term Convention record is defined in these proposed regulations as including only records pertaining to adoptions under the Convention that are generated or received by two Federal agencies—the Department or DHS. The term Convention record does not include records generated or received by adoption service providers or State public bodies. The definition for Convention record in part 98 thus mirrors the IAA definition for the same term.

The Convention also imposes an obligation for the preservation of adoption records. The term adoption record, rather than the term Convention record, is used to cover records generated or received by agencies or persons or State public bodies. The term adoption record is defined in § 96.2 of the proposed regulations for part 96 of title 22 of the CFR. The proposed

regulations on the preservation of adoption records—that is, records held by non-Federal entities, including agencies, persons, and State public bodies—are contained in the proposed regulations for part 96 of title 22 of the CFR. The retention of such records is not addressed by this proposed new rule for part 98. Nor does this proposed regulation address access to adoption records. State law will continue, entirely unaffected by part 98, to govern access to adoption records held by agencies, persons, or public bodies including State courts as provided for by section 401(c) of the IAA.¹

As required by section 401(a) of the IAA, the proposed regulations in part 98 address the preservation of Convention records generated or received by the Department and DHS. The proposed regulations are not required to, and do not, address access by birth parents, adoptive parents, or adoptees to Convention records. Access to Convention records retained by the Department or DHS will be controlled by Federal law governing access to records held by Federal agencies, particularly by the Freedom of Information of Act (5 U.S.C. 552 (1966)) and the Privacy Act (5 U.S.C. 552(a) (1974)).

Because the Convention is not yet in force for the United States, no records currently held by the Federal government pertain to a Convention adoption. Once the Convention has entered into force for the United States, there will be Convention records. A Convention record will include DHS's "A" files and may include other records held by the Department and DHS, including entries in the planned Case Registry.

¹ The report of the Senate Committee on Foreign Relations, S. Rep. No. 106-276 (2000) at page 11 contains a statement with regard to section 401(c) of the IAA that includes the following:

[T]he Committee does not intend this legislation to affect the scope of access to adoption records under existing Federal or State law. Under current law, Federal records that contain information regarding intercountry adoptions are subject to Federal laws regarding disclosure and access to information maintained by the Federal Government (primarily the Privacy Act and the Freedom of Information Act). Records regarding intercountry adoptions held by States or in the files of adoption agencies are governed by any State law that may apply to such records. * * * Under section 401, Federal records will continue to be governed by applicable Federal law, while non-Federal records, including records of adoption proceedings conducted in the United States, will continue to be governed by applicable State law. No State is required by this provision to change its laws regarding access to, and disclosure of, adoption records.

The report of the House Committee on International Relations, H.R. Rep. No. 106-691(2000) at page 30, contains almost identical language relating to section 401(c).

The proposed rule adopts a minimum period of 75 years for the preservation of Convention records. Promulgation of this rule will further compliance with Article 30(1) of the Convention, which requires that provision be made for the preservation of information about a child's origin, including the identity of the child's parents and about the child's medical history. While such information will primarily be in the child's adoption record, some may also be in a child's Convention record. The 75-year period is consistent with the current record preservation period for records held by the Department and DHS that are similar to Convention records. The preservation requirement will extend to Convention records regarding three kinds of adoptions covered by the Convention:

- (1) Adoptions involving a child immigrating to the United States;
- (2) Adoptions involving a child emigrating from the United States; and
- (3) Adoptions involving two other countries party to the Convention.

A minimum period of 75 years was considered adequate to ensure the availability of Convention records during the lifetime of the adopted person, when matters for which the records may be needed are likely to arise. At the same time, the 75-year period should ensure that the costs and paperwork burden of retaining records are not incurred unnecessarily by retaining them beyond their likely usefulness.

The 75-year period will begin to run (for all three kinds of adoptions covered by the Convention) on the date that the first document or entry specifically related to the adoption is included in the Convention record. Additional subsequent entries to the record will thus be subject to a slightly shorter retention period than the first entry, but the difference is not likely to be significant in a typical adoption case in which most of the records would be entered within the first one or two years of the adoption.

This proposed rule will also create and reserve a new part 97 of title 22 of the CFR. The Department anticipates using part 97 to establish regulations governing adoptions under the Convention.

III. Regulatory Review

A. Regulatory Flexibility Act/Executive Order 13272: Small Business

The Department of State has reviewed this regulation, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, and, pursuant to 5 U.S.C. 605(b), certifies that it will not have a

significant economic impact on a substantial number of small entities. Executive Order 13272 therefore is inapplicable.

B. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by 5 U.S.C. 804 for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. The rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

C. The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Public Law 104–4; 109 Stat. 48; 2 U.S.C. 1532, generally requires agencies to prepare a statement, including cost-benefit and other analyses, before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal governments, or by the private sector. Section 4 of UFMA, 2 U.S.C. 1503, excludes legislation necessary for implementation of treaty obligations. The IAA falls within this exclusion because it is the implementing legislation for the Convention. In any event, this rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year. Moreover, because this rule will not significantly or uniquely affect small governments, section 203 of the UFMA, 2 U.S.C. 1533, does not require preparation of a small government agency plan in connection with it.

D. Executive Order 13132: Federalism

A rule has federalism implications under Executive Order 13132 if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This regulation will not have such effects, and therefore does not have sufficient federalism implications to require consultations or to warrant the preparation of a federalism summary impact statement under section 6 of Executive Order 13132.

E. Executive Order 12866: Regulatory Review

Under section 3(f) of Executive Order 12866, proposed regulations that meet the definition of “significant regulatory action” generally must be submitted to OMB for review. Section 3 of Executive Order 12866 exempts from this requirement “rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services.” This rule, through which the Department provides for the implementation of the Convention, directly pertains to foreign affairs functions of the United States. Although the Department does not consider this rule to be a “significant regulatory action” within the meaning of the Executive Order 12866, the Department has consulted with the INS (now part of DHS) during the formulation of the rule. The rule was sent for review to OMB.

F. Executive Order 12988: Civil Justice Reform

The Department has reviewed these proposed regulations in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden. The Department has made every reasonable effort to ensure compliance with the requirements in Executive Order 12988.

G. The Paperwork Reduction Act (PRA) of 1995

Under the PRA, 42 U.S.C. 3501 *et seq.*, agencies are generally required to submit to OMB for review and approval collection of information requirements imposed on “persons” as defined in the PRA. These regulations impose retention requirements only on the Department of State and DHS, and do not impose any information collection requirements on “persons.” Therefore, the requirements of the PRA do not apply.

List of Subjects in 22 CFR Part 98

Adoption and foster care; International agreements; reporting and record-keeping requirements.

Accordingly, the Department proposes to add a new part 98 of title 22 of the CFR, chapter 1, subchapter J, to read as follows:

PART 98—INTERCOUNTRY ADOPTION/CONVENTION RECORD PRESERVATION

Sec.
98.1 Definitions

98.2 Preservation of Convention Records

Authority: Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague, May 29, 1993), S. Treaty Doc. 105-51 (1998); 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); Intercountry Adoption Act of 2000, 42 U.S.C. 14901-14954.

§ 98.1 Definitions.

As used in this part:

(a) *Convention* means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993.

(b) *Convention record* means any item, collection, or grouping of information contained in an electronic or physical document, an electronic collection of data (including the information contained in the Case Registry), a photograph, an audio or video tape, or any other information storage medium of any type whatever that contains information about a specific past, current, or prospective

adoption covered by the Convention (regardless of whether the adoption was made final) that has been generated or received by the Secretary or DHS. Convention record includes a record, generated or received by the Secretary or DHS, about a specific adoption case involving two Convention countries other than the United States in connection with which the Secretary or DHS performs a Central Authority function.

(c) Such other terms as are defined in 22 CFR 96.2 shall have the meaning given to them therein.

§ 98.2 Preservation of Convention records.

Once the Convention has entered into force for the United States, the Secretary and DHS will preserve, or require the preservation of, Convention records generated or received by the Secretary or DHS in connection with adoptions and placements for adoption covered by the Convention for a period of not less than 75 years. For Convention records

involving a child who is immigrating to the United States and Convention records involving a child who is emigrating from the United States, the 75-year period shall start on the date that the Secretary or DHS generates the first document or entry or receives the first document in any Convention record related to the adoption of the child. For an intercountry adoption or placement for adoption involving two Convention countries other than the United States, the 75-year period shall start on the date that the Secretary or DHS generates the first document or entry or receives the first document for a Convention record in connection with the performance of a Central Authority function.

Dated: August 27, 2003.

Richard Armitage,

Deputy Secretary of State, Department of State.

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