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### Intercountry Adoption: A Need for Mandatory Medical Screening

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# INTERCOUNTRY ADOPTION: A NEED FOR MANDATORY MEDICAL SCREENING

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## I. INTRODUCTION

Infertility has caused many couples to turn to other methods in order to create a family. Various options are available for families who have difficulties with conception.<sup>1</sup> The primary non-medical, non-invasive method is that of adoption. Adoption, although at times very expensive, can be less costly than fertility treatments.<sup>2</sup> Those seeking to adopt may still face substantial hurdles. Even if a couple is the 'right' age, 'right' race, earns a sufficient income, and is of the 'right' sexual orientation, they may still have difficulties with adopting their preferred child, and at the very least they face sometimes unnecessarily long waits before a child becomes available.<sup>3</sup> Couples often turn to intercountry adoption because of the "less restrictive eligibility requirements" and the short

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<sup>1</sup>LOIS GILMAN, THE ADOPTION RESOURCE BOOK 6-13 (1984). Some options available to couples who have had problems with conception include fertility treatments, in vitro fertilization, artificial insemination, and adoption. *Id.*

<sup>2</sup>*Id.*

<sup>3</sup>Age, race, and marital status of the prospective parents are legitimate factors to be considered in adoptions. 2 AM. JUR. 2d *Marital Status of Petitioner* § 143 (1995); *id.* at *Age of Petitioner* § 144; see also GILMAN, *supra* note 1, at 22-26.

time period before the actual adoption.<sup>4</sup> This Note addresses some of the hurdles associated with domestic adoption, and further examines the choice to adopt internationally.

Despite the numerous benefits of intercountry adoption, most families do not consider the possible health ramifications. Since adoptive parents are unsuspecting of ailments associated with foreign countries, a complete pediatric examination is a must after receiving the foreign adoptee. Such a pediatric examination will be effective when it is uniform and thorough, but without such an examination both parents and physicians remain in the dark about the child's health.<sup>5</sup>

Congress ought to amend the Immigration and Nationality Act (INA) to require a standard pediatric examination for all foreign adoptees, regardless of the country of origin, as a condition to approval of granting immediate relative status to the adoptee. This Note proposes that Congress can effectuate mandatory screening of internationally adopted children through its power to regulate immigration and therefore, should use this power to ensure that all international adoptees receive all necessary screening and treatment.

## II. PRINCIPLE TYPES OF ADOPTION

Numerous avenues exist through which a couple may adopt a child. Couples can adopt through an adoption agency or through an independent adoption.<sup>6</sup> An adoption agency can be either public or private.<sup>7</sup> When couples choose to adopt through an agency, they rarely deal with the natural mother.<sup>8</sup> Typically the agency, and not the birth mother, conducts the investigation to locate suitable adoptive parents.<sup>9</sup> Couples generally prefer private agencies because public agencies involve long waits<sup>10</sup> and a lack of knowledge of the birth mother.<sup>11</sup>

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<sup>4</sup>Rosanne L. Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 552 (1994).

<sup>5</sup>See discussion *infra* part VII.

<sup>6</sup>EDMUND B. BOLLES, *THE PENGUIN ADOPTION HANDBOOK* 48-49 (1984); GILMAN, *supra* note 1, at 18-19; WILLIAM MEEZAN ET AL., *ADOPTIONS WITHOUT AGENCIES* 9-11 (1978).

<sup>7</sup>BOLLES, *supra* note 6, at 48-49; GILMAN, *supra* note 1, at 18-19; MEEZAN, *supra* note 6, at 9-11.

<sup>8</sup>GILMAN, *supra* note 1, at 121; 2 AM. JUR. 2d *Distinctions Between Agency and Private Adoptions* § 6 (1995).

<sup>9</sup>2 AM. JUR. 2d § 6. Although prospective parents file an application with an agency and then wait for a child to be assigned to them, the agency will select the adoptive parents for a specific child. At this point, the birth mother has no involvement with the selection of adoptive parents because she has surrendered her child to the agency. *Id.*

<sup>10</sup>GILMAN, *supra* note 1, at 20; MEEZAN, *supra* note 6, at 36.

<sup>11</sup>Paula K. Bebensee, Note, *In the Best Interests of Children and Adoptive Parents: The Need for Disclosure*, 78 IOWA L. REV. 397 (1993); GILMAN, *supra* note 1, at 179-80; MEEZAN,

To shorten the adoption process, numerous couples elect to adopt through a private agency. Although adoption through a private agency may slightly shorten the adoption process, the couple must still satisfy the other desirable qualities of adoptive parents.<sup>12</sup> Aside from the shorter duration of the pre-adoption process, private agencies accomplish the same ends as the public agencies; however, private agencies are more costly to the prospective parents.<sup>13</sup>

Frustrated with the long waits and lack of available infants, some couples have chosen to pursue independent adoptions domestically. Independent adoptions are more attractive than agency adoptions for numerous reasons, the most substantial being the shorter waiting period.<sup>14</sup> Another important aspect of independent adoptions which attracts prospective parents is fewer procedural requirements, which consequently allow for more privacy.<sup>15</sup> Because of the desirability of independent adoptions, the availability of infants through agency adoptions has decreased severely.<sup>16</sup>

The newest trend in adopting children is to seek adoption in foreign countries, through foreign agencies. The process of intercountry adoption is much shorter than that of other available options, but also more costly.<sup>17</sup> The cost of intercountry adoption is often high, sometimes exceeding \$20,000.<sup>18</sup> Similar to the domestic independent adoption, intercountry adoptions allow for more privacy and a much shorter waiting period.<sup>19</sup>

The benefits of adopting a foreign child are numerous to the adoptive parents. The desired qualities, sought by adoption agencies in the United States, are not the same in the foreign countries, therefore making it easier for an older couple to adopt.<sup>20</sup> In fact, many foreign adoption agencies prefer older couples when placing a child with a family.<sup>21</sup> Accompanying the older couple is the image of a more established and secure family for the adoptee.<sup>22</sup>

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*supra* note 6, at 56-60. Thirty-three percent of adoptive parents expressed dissatisfaction with the amount of information made available to them. *Id.* at 59.

<sup>12</sup>GILMAN, *supra* note 1, at 23.

<sup>13</sup>*Id.* at 26.

<sup>14</sup>MEEZAN, *supra* note 6, at 143.

<sup>15</sup>*Id.* at 143-44.

<sup>16</sup>BOLLES, *supra* note 6. Agencies often turned away single, working-class, or divorced applicants, thus prejudicing the adoption process. *Id.* at 37-40.

<sup>17</sup>Romano, *supra* note 4, at 554.

<sup>18</sup>ADOPTION: INTERNATIONAL PERSPECTIVES 140 (Euthymia D. Hibbs ed., 1991); Marilyn H. Karfeld, *Made in China*, CLEVE. JEWISH NEWS, Jan. 5, 1996, at 14.

<sup>19</sup>MEEZAN, *supra* note 6, at 143.

<sup>20</sup>Romano, *supra* note 4, at 552.

<sup>21</sup>Karfeld, *supra* note 18, at 12-13.

Intercountry adoption also facilitates the adoption process for single adoptive parents, interracial adoptive parents, and others who may not meet the eligibility requirements of domestic adoptions.<sup>23</sup> Many of the problems associated with interracial domestic adoptions do not exist in intercountry adoption.<sup>24</sup> Although foreign agencies encourage adoptive parents to consider the effects of adopting a child of another race, they do not prohibit or discourage interracial adoption.<sup>25</sup>

A humanitarian aspect is often associated with intercountry adoption. Many children are adopted from poverty stricken countries.<sup>26</sup> Foreign orphanage conditions in many of the countries, particularly China<sup>27</sup> and Romania,<sup>28</sup> would shock the conscience of most Americans. As a result, some couples feel they are saving the foreign born child from the poor conditions of her native country by bringing her to the United States.<sup>29</sup>

The large number of Romanian adoptions exemplifies this humanitarian attitude. After the decline of Ceausescu in 1989, Americans learned of the horrors of the Romanian orphanages.<sup>30</sup> Americans were eager to adopt Romanian children in order to rescue the children from the dreadful orphanages, despite the fact that most of these children were unhealthy.<sup>31</sup> Humanitarian actions of this magnitude were also prevalent with Korean<sup>32</sup> and Chinese<sup>33</sup> adoptions. The last thirty years have seen an increase in Americans

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<sup>22</sup>*Id.* at 11.

<sup>23</sup>Romano, *supra* note 4, at 559.

<sup>24</sup>*Id.* at 560.

<sup>25</sup>BOLLES, *supra* note 6, at 115; Karfeld, *supra* note 18, at 15; GILMAN, *supra* note 1, at 61-62.

<sup>26</sup>BOLLES, *supra* note 6, at 123-26. Large numbers of foreign-born adoptees are adopted from countries such as East Asia, Latin America, and India. *Id.*

<sup>27</sup>Mark P. Altieri, *Letter to the Editor*, PLAIN DEALER, Jan. 28, 1996, at 4-C; Karfeld, *supra* note 18, at 13-14.

<sup>28</sup>Dana E. Johnson et al., *The Health of Children Adopted from Romania*, 268 JAMA 3446 (1992).

<sup>29</sup>BOLLES, *supra* note 6, at 136; Karfeld, *supra* note 18, at 14.

<sup>30</sup>Johnson et al., *supra* note 28, at 3446.

<sup>31</sup>*Id.* at 3447. Following the Ceausescu reign, Americans learned of over 100,000 children living without proper care and in substandard orphanages. This tragedy prompted many Americans to attempt to adopt Romanian children. Howard E. Bogard, Comment, *Who Are the Orphans? Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 EMORY INT'L L. REV. 571, 605 (1991).

<sup>32</sup>Wun Jung Kim, *International Adoption: A Case Review of Korean Children*, 25 CHILD PSYCHIATRY HUM. DEV. 141, 142 (Spring 1995). Following the Korean War, many Americans adopted Korean children in an attempt to rescue them from the aftermath of the war. *Id.*

<sup>33</sup>Altieri, *supra* note 27, at 4-C.

seeking intercountry adoption as the information regarding of poor living conditions became available to them.

Another benefit to the adoptive parents is the wide availability of infants in foreign countries. The number of infants available for adoption through intercountry adoption exceeds the number available for domestic adoptions, particularly in India and South East Asia, due to high poverty levels and birth rates.<sup>34</sup> Infant availability decreases the waiting period for the complete adoption is short.<sup>35</sup> The most significant benefit to the adoptive parents is the security of knowing that the birth mother of their newly adopted child is not likely to suddenly appear on their doorstep and seek to annul the adoption.<sup>36</sup> When all these factors are considered, the extra money spent by a family on the intercountry adoption may seem insignificant.

### III. ADOPTING IN A FOREIGN COUNTRY—RECOGNITION

Adoptive parents will find that it is not difficult to accomplish the actual adoption in a foreign country and subsequent recognition in the United States. Recognition can be accomplished in accordance with the laws of the foreign country, or through what is known as "customary adoption."<sup>37</sup> By showing the adoption to be legal in the foreign country, the adoptive parents can be certain that the United States will recognize the adoption.<sup>38</sup>

When intercountry adoption occurs in a foreign country which has adoption laws, the party seeking recognition need only show that the adoption in question satisfied those laws.<sup>39</sup> If the party successfully shows compliance with the foreign country's adoption laws, the Immigration and Naturalization Service (INS) will recognize the adoption.<sup>40</sup> This burden is not difficult to satisfy. The United States has also recognized adoptions which were technically not valid in the foreign country.

When intercountry adoption occurs in a foreign country which does not have formal laws for adoption, the party seeking recognition must show the custom

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<sup>34</sup> Alfred J. Nicholson et al., *Health Screening of International Adoptees*, 156 MED. J. AUST. 377 (Mar. 16, 1992).

<sup>35</sup> Romano, *supra* note 4, at 554. The waiting period for an intercountry adoption, from the time of application, may be as little as six months. *Id.*

<sup>36</sup> Karfeld, *supra* note 18, at 13. Forty-five percent of couples fear that the birth mother will change her mind about the adoption after the child has been placed, however, this percentage decreases after the adoption has been finalized. MEEZAN, *supra* note 6, at 63.

<sup>37</sup> 3A AM. JUR. 2d *Adoption in Foreign Country* § 215 (1995); *id.* at *Customary Adoption* § 216.

<sup>38</sup> Immigration and Nationality Act (INA) § 101(b)(1)(F), 8 U.S.C. § 1101 (b)(1)(F) (1995).

<sup>39</sup> Matter of Mendoza, 18 I. & N. Dec. 66 (B.I.A. 1981). If an adoption is in accordance with the laws of the country where it occurred and satisfies INA § 101(b)(1)(E) it will be recognized for immigration purposes. *Id.* at 67.

<sup>40</sup> *Id.*

which effectuates the legal adoption.<sup>41</sup> In addition to showing the existence of the custom creating adoption, the party must also show the adoption in question observed the customary procedures.<sup>42</sup> This burden is also not difficult to satisfy.

#### IV. INTERCOUNTRY ADOPTION OCCURRING IN THE UNITED STATES

Adoptions involving foreign-born children may occur in any of the fifty states so long as the state enacts a policy that validates the adoption decree.<sup>43</sup> Before a court can approve the adoption, certain extra steps, above and beyond those required for domestic adoption, must be taken for INS purposes.<sup>44</sup> For example, in Ohio, the adoptive parents must meet with the probate judge prior to receiving the child.<sup>45</sup> Once the judge determines that the adoption is legitimate, the adoptive parents must submit to a home study, the results of which will be sent to the INS.<sup>46</sup> The home study is the means by which an agency may evaluate the adoptive parents.<sup>47</sup> This process confirms that the adoptive parents have all resources necessary to provide for and nurture the adoptee.<sup>48</sup> Assuming the child satisfies the requirements of the INA, the adoptive parents will bring the child to the United States.<sup>49</sup> After one year, the new family must have a follow-up interview.<sup>50</sup> If the adoption decree is valid, the INS will recognize the adoption.

The federal regulations involved include the filing of the I-600A and I-600 forms.<sup>51</sup> Initial application to the INS should be made upon completion of the home study by filing the I-600A.<sup>52</sup> Filing of the I-600A ("Application for

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<sup>41</sup>Kaho v. Ilchert, 765 F.2d 877 (9th Cir. 1985).

<sup>42</sup>*Id.* at 885.

<sup>43</sup>Pascual v. O'Shea, 421 F. Supp. 80 (D.C. Haw. 1976). Where an adoption satisfies the applicable state law and the requirements of INA § 101(b)(1)(E), it will be recognized for immigration purposes. *Id.* at 83.

<sup>44</sup>BOLLES, *supra* note 6, at 131.

<sup>45</sup>Telephone Interview with Gregory W. Klucher, Esq., Probate Court Administrator Lake County, OH (Feb. 2, 1996) [hereinafter Klucher].

<sup>46</sup>*Id.*

<sup>47</sup>GILMAN, *supra* note 1, at 45.

<sup>48</sup>*Id.* This study should enable both judges and state authorities to determine whether the adoption is in compliance with all applicable child care laws. MEEZAN, *supra* note 6, at 173.

<sup>49</sup>Klucher, *supra* note 45.

<sup>50</sup>*Id.*

<sup>51</sup>18 C.F.R. § 204.3 (1996); see Margaret Hostetter & Dana E. Johnson, *International Adoption. An Introduction for Physicians*, 143 AM. J. DISABLED CHILD. 325, 326 (1989) [hereinafter Hostetter, *International Adoption*].

<sup>52</sup>Hostetter, *International Adoption*, *supra* note 51, at 326.

Advance Processing of Orphan Petition") is not required of the adoptive parents. However, any information submitted with the I-600A need not be resubmitted when the adoptive parents file the I-600.<sup>53</sup> With this application, the federal government will perform a fingerprint check and decide if the parents are qualified and suitable to bring a foreign child into the country.<sup>54</sup>

After accepting the referral of a specific child, the adoptive parents must file the I-600 ("Petition to Classify Orphan as an Immediate Relative").<sup>55</sup> The I-600 form must be filed by the adoptive parents, for without approval of an I-600 form, the adopted child will not be eligible for entry as an immediate relative.<sup>56</sup> Prior to approving the I-600, the adoptive parents must provide evidence that they have satisfied the preadoptive requirements of the state.<sup>57</sup> Included in the filing of the I-600, the adoptive parents must also submit all necessary information about the adoptee.<sup>58</sup>

Once the INS is satisfied that all requirements have been met, the consular officer will arrange for the adoptee to receive a medical examination.<sup>59</sup> This examination often acts merely as a guarantee that the adoptee is alive, although the purpose of the exam is to ensure that the child is free from communicable diseases.<sup>60</sup>

Although formal adoption in the United States is not required by the INA, it is often recommended as an added security measure.<sup>61</sup> Some states may prohibit families to submit to a second adoption upon the child's arrival to the United States; however, where no formal adoption occurred in the foreign country, the domestic adoption is required upon the child's arrival to the United States.<sup>62</sup> A formal adoption within the United States does not automatically confer to the child a valid American birth certificate.<sup>63</sup> Although most states statutorily provide for a change of birthplace on the domestic adoptee's birth certificate, this benefit is not conferred upon foreign-born adoptees.<sup>64</sup>

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<sup>53</sup>GILMAN, *supra* note 1, at 102.

<sup>54</sup>*Id.*; see also Hostetter, *International Adoption*, *supra* note 51, at 326.

<sup>55</sup>Hostetter, *International Adoption*, *supra* note 51, at 328.

<sup>56</sup>Bogard, *supra* note 31, at 597.

<sup>57</sup>Hostetter, *International Adoption*, *supra* note 51, at 328.

<sup>58</sup>GILMAN, *supra* note 1, at 103.

<sup>59</sup>Hostetter, *International Adoption*, *supra* note 51, at 328.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>GILMAN, *supra* note 1, at 115.

<sup>63</sup>*Id.* at 117.

<sup>64</sup>In re Adoption of a Child By L.C., 425 A.2d 686 (N.J. 1981). If a state were to issue a valid birth certificate to an internationally adopted child, this would interfere with the



## V. DIFFERENT PARTIES TO THE INTERCOUNTRY ADOPTION

Fraud and duress are significant problems recognized with the intercountry adoption, especially with those handled independently.<sup>65</sup> This situation often occurs because of the eagerness and desperation associated with the adoptive parents.

Many prospective parents resort to the intercountry adoption procedure because they have suffered through the private and public agencies in the United States.<sup>66</sup> Frequently, the hopeful parents have been on unsuccessful adoption waiting lists for years because there just are not enough infants available.<sup>67</sup> Perhaps, they have been rejected by agency after agency because they failed to meet the agency standards.<sup>68</sup> They may have been a party to an independent adoption in which the birth mother changed her mind,<sup>69</sup> or they may have learned of unpleasant experiences of other couples trying to adopt in the United States.<sup>70</sup> The problems often associated with domestic adoption make parents eager to adopt through intercountry adoption.

Unfortunately, the intercountry adoption is often imperfect. Similar to domestic adoption, intercountry adoption can occur either independently or through an agency.<sup>71</sup> In some countries, nonagency adoptions are not legal, however, in many countries the use of an independent intermediary is allowed.<sup>72</sup> Because of the large sums of money which change hands in these types of adoptions, the adoption may seem facially illegal and somewhat 'black market'.<sup>73</sup> Where the costs to the adoptive parents are not necessary and reasonable, they should be avoided, as excessive costs may make the adoption appear as 'black market'.<sup>74</sup> Adoptive parents should scrutinize unidentifiable costs, for such characteristics are commonly associated with a baby trade.<sup>75</sup>

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naturalization procedures of the federal government. *Id.* at 694.

<sup>65</sup>GILMAN, *supra* note 1, at 70; *see also* BOLLES, *supra* note 6, at 123-24.

<sup>66</sup>GILMAN, *supra* note 1, at 72; Mary C. Hester, Comment, *Intercountry Adoption from a Louisiana Perspective*, 53 LA. L. REV. 1271, 1273 (1993).

<sup>67</sup>BOLLES, *supra* note 6, at 124.

<sup>68</sup>Romano, *supra* note 4, at 550.

<sup>69</sup>*See supra* note 36 and accompanying text.

<sup>70</sup>Karfeld, *supra* note 18, at 11.

<sup>71</sup>MORTON L. LEAVEY & ROY D. WEINBERG, LAW OF ADOPTION 60 (Irving J. Sloan ed., 1979).

<sup>72</sup>GILMAN, *supra* note 1, at 68.

<sup>73</sup>*Id.* at 123. The "black market" adoption typically employs methods which are legal; however, the fee charged far exceeds what is customary. ADOPTION: INTERNATIONAL PERSPECTIVES, *supra* note 18, at 140. In some foreign countries, the use of an intermediary in an international adoption has been prohibited by law. Romano, *supra* note 4, at 547.

<sup>74</sup>GILMAN, *supra* note 1, at 70. Because couples involved with an independent adoption may know very little about the process, they will often overlook discrepancies;

When considering intercountry adoption, the prospective parents may choose to have an agency handle the adoption. The prospective parents can apply through a local agency in the United States or a non-local agency in the foreign country.<sup>76</sup> Local and non-local agencies often work in conjunction to locate a child.<sup>77</sup> In this situation, a fee is usually paid to both the agency in the United States and the agency in the foreign country.<sup>78</sup>

Despite the higher costs associated with agency-to-agency adoptions, when prospective parents may feel more secure with the process. When the adoptions are handled independently, absent agency involvement, the adoptive parents may feel they are being "held up" by the birth mother or intermediary and dealing without an avenue for redress.<sup>79</sup> Dealing with an agency ensures that the parents will have more leverage in receiving a refund should something go wrong with the process. This leverage is not typically available with the use of an intermediary.

There are a number of benefits to the adoptive parents in an agency adoption of this kind. When a family works with an agency in the United States, the adoptive parents have the benefit of working with qualified individuals.<sup>80</sup> An agency specializing in intercountry adoption is aware of the problems commonly associated with such an adoption, i.e., unknown health care issues.<sup>81</sup> Moreover, the agency can serve as a type of educator for the adoptive parents. Since the medical guidelines for bringing a foreign infant into the United States for adoption are minimal at best, the agency may inform the parents about possible medical problems associated with specific foreign nations.<sup>82</sup> The agency may also encourage the family to learn more about issues in third world countries, so as to better address the child's psychological needs.

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an independent intermediary might take advantage of this. BOLLES, *supra* note 6, at 133.

<sup>75</sup>GILMAN, *supra* note 1, at 70.

<sup>76</sup>*Id.* at 67.

<sup>77</sup>*Id.* at 64-65.

<sup>78</sup>Karfeld, *supra* note 18, at 14.

<sup>79</sup>GILMAN, *supra* note 1, at 68. Adoptive parents working with an intermediary may be without leverage. Should complications arise, they may lose money or even the promised child without any legal claim to damages. *Id.*

<sup>80</sup>Telephone Interview with Beth Brindo, Licensed Social Worker with the Adoption Center of Bellfaire, Cleveland, OH (Feb. 2, 1996) [hereinafter Brindo].

<sup>81</sup>*Id.* An agency affiliated with the intercountry adoption process can best prepare adoptive parents for their arriving child by encouraging the parents to familiarize themselves with issues common to the child's country of origin. *Id.* By learning about daily practices in the child's native country and incorporating them into the new household, the adoptive parents may facilitate any transition for the child. GILMAN, *supra* note 1, at 185.

<sup>82</sup>Brindo, *supra* note 80.

The INS requires the foreign infant to undergo a physical examination in her native country, but merely for INA screening purposes.<sup>83</sup> The infant need not be tested for those diseases prevalent in her native country. The examination must test only for diseases which would cause the child to be excludable under the INA, and therefore is limited in its application.<sup>84</sup> A qualified agency working with the adoptive parents can encourage the parents to have an elective second examination.<sup>85</sup> If ailments are uncovered in an examination, the agency can also help the adoptive families get treatment for the child in the United States.<sup>86</sup>

The local agency may not be associated with an agency in the foreign country. In this case, instead of working with a foreign agency, the local agency may work with a foreign attorney or another intermediary.<sup>87</sup> Under these circumstances, the agency still provides the adoptive parents with the benefit of working with qualified individuals. In cases where an agency is not involved, adoptive families will not receive these benefits.

Prospective parents may also choose to directly apply to an agency located in a foreign country.<sup>88</sup> Although this route may eliminate the initial local-agency procedures, the adoptive parents may be required to contact a local agency to complete the intercountry adoption procedures.<sup>89</sup> In this situation, if the individuals working in the agency are qualified and knowledgeable about intercountry adoption, the adoptive parents may receive the same benefits as those associated with the agency-to-agency adoptions.

The prospective parents may choose to adopt independently through a foreign intermediary. This method involves several risks since there may not be a means of redress or refund.<sup>90</sup> In some cases, the prices merely continued to increase, or the infants were ill upon arrival, and in the more unfortunate cases, the adoptive parents paid large sums of money only to never hear from the intermediary again.<sup>91</sup> Although adopting through an intermediary may appear to have positive results for the adoptive parents, the intermediary may know very little about possible health care issues. Without uniform guidelines

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<sup>83</sup>*Id.*; see also *supra* notes 60-61 and accompanying text.

<sup>84</sup>Brindo, *supra* note 80. Although the medical examination may vary according to the foreign country, it typically consists of only a baseline screening for HIV and immunizations. This allows for many diseases to remain undetected. *Id.*

<sup>85</sup>*Id.*; see discussion *infra* part VII, discussing the need for a required second examination.

<sup>86</sup>Brindo, *supra* note 80.

<sup>87</sup>GILMAN, *supra* note 1, at 68.

<sup>88</sup>BOLLES, *supra* note 6, at 131-37.

<sup>89</sup>*Id.*

<sup>90</sup>GILMAN, *supra* note 1, at 70.

<sup>91</sup>*Id.* at 67-70.

for intercountry adoption, adoptive parents will remain in the dark when facing health care issues.

#### VI. HEALTH PROBLEMS ASSOCIATED WITH INTERCOUNTRY ADOPTION

Most intercountry adoptees suffer from some type of medical condition.<sup>92</sup> The public health standards in other countries, particularly in third world nations, differ from the standards in the United States. As a result of these differences, the foreign-born child has a higher risk of medical problems. Agency experts qualified in intercountry adoptions encourage medical examinations.<sup>93</sup> However, the use of agency experts is not mandatory, and since there are no uniform standards for intercountry adoptions, these medical examinations are not required.<sup>94</sup>

One problem facing adoptive parents is the unavailability of extensive medical history to the adoptive parents or the agencies.<sup>95</sup> Since the standards vary among agencies, no uniform health standard applies to the importation of foreign children for adoption purposes.<sup>96</sup> Because of the "unique medical needs"<sup>97</sup> of the foreign-born child and the lack of proper screening, undetected medical problems are prevalent among internationally adopted children.<sup>98</sup> Without a uniform standard, children with diseases and ailments, for which screening is not required, may enter the intercountry adoption process undetected.<sup>99</sup>

In many cases, the conditions are not serious or life threatening.<sup>100</sup> Numerous episodes of scabies and other skin disorders, head lice, chronic ear

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<sup>92</sup>Laurie C. Miller et al., *Developmental and Nutritional Status of Internationally Adopted Children*, 149 ARCHIVES PEDIATRIC ADOLESCENT MED. 40 (1995).

<sup>93</sup>Brindo, *supra* note 80.

<sup>94</sup>Although consular officers will arrange for medical examinations prior to issuing the child a visa, this medical examination does not sufficiently deal with the ailments typically associated with intercountry adoption. No such required medical examination exists in the United States.

<sup>95</sup>GILMAN, *supra* note 1, at 80; Hostetter, *International Adoption*, *supra* note 51, at 327.

<sup>96</sup>Margaret K. Hostetter et al., *Unsuspected Infectious Diseases and other Medical Diagnosis in the Evaluation of Internationally Adopted Children*, 83 PEDIATRICS 559 (1989) [hereinafter Hostetter, *Unsuspected Infectious Diseases*]; Margaret K. Hostetter et al., *Medical Evaluation of Internationally Adopted Children*, 325 N. ENG. MED. J. 479 (1991) [hereinafter Hostetter, *Medical Evaluation*].

<sup>97</sup>Romano, *supra* note 4, at 558.

<sup>98</sup>Hostetter, *Medical Evaluation*, *supra* note 96, at 483.

<sup>99</sup>With the current situation, many internationally adopted children enter the United States with some type of medical problem. The only way to effectively control these problems is to implement detailed medical evaluations to be administered to all foreign adoptees. Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96.

<sup>100</sup>Romano, *supra* note 4, at 556.

discharge, and dental abnormalities appeared in a study performed at the Outpatient Inter-Country Adoption Clinic in Melbourne, Australia.<sup>101</sup>

In some cases, however, these ailments may be permanent and costly to the newly adoptive parents.<sup>102</sup> The study at Melbourne detected abnormal results in screenings for parasitic diseases, tuberculosis, hepatitis B, and anemia.<sup>103</sup> Children screened at Melbourne received detailed physical examinations, the results of which identified one or more abnormalities in many of the children.<sup>104</sup> These results support the physicians' conclusion that a thorough medical examination must be administered to all intercountry adoptees.<sup>105</sup> The conclusions emphasize the need for thorough examinations. The physicians concluded that reliance on preliminary tests is insufficient for lack of completeness and that detailed examinations must be administered even when contrary to the preliminary results.<sup>106</sup>

To enter the United States, Congress established certain qualitative restrictions which may prohibit a person from entering if she has been diagnosed with a disease which has been named in grounds for exclusion.<sup>107</sup> Illnesses which are not grounds for exclusion remain undetected during this phase of the adoption process.<sup>108</sup> Since these qualitative restrictions generally address diseases associated with an adult population, illnesses typically associated with infants and small children are often not considered or tested.

Congress must mandate broad medical screening for internationally adopted children.<sup>109</sup> With mandated screening, fewer illnesses would remain undetected. Although many medical disorders exist in international adoptees, anemia, intestinal parasites, hepatitis B, and tuberculosis are the most common.<sup>110</sup> Through a mandatory medical evaluation, the adoptive parents of

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<sup>101</sup>Nicholson et al., *supra* note 34, at 378. Ten percent of children screened had various skin disorders and four percent had chronic ear discharge. *Id.*

<sup>102</sup>Of the children tested at Melbourne, 25% required specialist consultation and follow-up visits. *Id.* at 379.

<sup>103</sup>*Id.* at 378; see also Miller et al., *supra* note 92, at 41-42.

<sup>104</sup>Nicholson et al., *supra* note 34, at 378.

<sup>105</sup>*Id.* at 377.

<sup>106</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 559.

<sup>107</sup>INA § 212(a)(1), 8 U.S.C. § 1182(a)(1)(1995). The health related grounds for exclusion, set forth in INA § 212(a)(1), apply to all aliens seeking entry into the United States. *Id.*

<sup>108</sup>Hostetter, *International Adoption*, *supra* note 51, at 328.

<sup>109</sup>Without mandatory screening, internationally adopted children and their families will continue to receive inadequate medical evaluations and treatments. See discussion *infra* part VII.

<sup>110</sup>Nicholson et al., *supra* note 34, at 378.

a child diagnosed with one of these illnesses would learn of the illness and all necessary treatments.<sup>111</sup>

Personal medical history may be the only link to preventative medicine for adopted children. The growing need for disclosure in domestic adoption<sup>112</sup> is comparable to the need for medical examinations in intercountry adoptions.<sup>113</sup> Without personal medical history, treatment for physical and psychological diseases is less attainable. Since disclosure of previous medical history is often not possible in intercountry adoption,<sup>114</sup> the need for a thorough medical evaluation increases. Without a full medical evaluation, adoptive parents have no knowledge of their newly adopted foreign infant's medical history. As a result, immediate treatment is unlikely.<sup>115</sup> It is in the child's best interest<sup>116</sup> for Congress to adopt a national standard to require medical evaluations of all internationally adopted children.<sup>117</sup>

Where potential medical bills may be extensive or an illness very serious, the adoptive parents may choose to avoid the adoption.<sup>118</sup> Although this proposition may seem uncaring, it is a reality. Consider the availability of abrogation in domestic adoptions. Undetected medical problems are common, and in extreme circumstances have lead to abrogation.<sup>119</sup> Adoptive parents of foreign infants often have no redress in the law. To combat this problem, thorough uniform examinations and proper treatment must be mandated.

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<sup>111</sup>Currently, there exists no mandatory evaluation for internationally adopted children.

<sup>112</sup>Laura Methvin, Comment, *Improving Access to Nonidentifying Medical Information in Florida Adoptions: A Call for Legislation*, 22 FLA. ST. U.L. REV. 565 (1994); Bebensee, *supra* note 11, at 398.

<sup>113</sup>The absence of medical history leaves physicians guessing when it comes to the medical analysis of an internationally adopted child. Hostetter, *International Adoption*, *supra* note 51, at 327.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 329.

<sup>116</sup>"The best interests of the child" is a standard often used in child custody cases as a compelling factor considered by courts. *R.L.P. v. R.M.W.*, 775 S.W.2d 167, 171 (Mo. Ct. App. E.D. 1989); Methvin, *supra* note 112, at 572.

<sup>117</sup>The "best interests of the child" standard is also applied to adoption law in the United States. Methvin, *supra* note 112, at 572. This standard is clearly applicable to any medical evaluation, which an intercountry adoptee would receive, since identification and treatment of any medical abnormality are in "the best interests of the child."

<sup>118</sup>*In re H.J.B.*, 359 A.2d 285, 288 (D.C. Ct. App. 1976).

<sup>119</sup>Bebensee, *supra* note 11, at 398. Between 1983 and 1987, California courts annulled sixty-seven adoptions due to misrepresentation of the physical or mental health of the child. *Id.*

Abrogation of an adoption is often not allowed absent fraud or misrepresentation on the part of the adoption agency. See *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532 (Wis. 1989).

With proper and early identification of any medical disorders, physicians and parents can provide the most effective treatments.<sup>120</sup> Early detection and treatment will not only minimize costs to the parents, but will also reduce the risk of incubation of any infectious diseases in other family members.<sup>121</sup>

Since the United States has not mandated any routine medical procedures on intercountry adoption, a child could very likely enter the country carrying an infectious ailment. Subsequently, her illness could remain undetected for a substantial period of time.<sup>122</sup> Although a child's illness may not be contagious, the period during which her illness remained undetected could have severe repercussions on her health and well being.

If the adoptive parents are fortunate enough to have an agency's support or information regarding intercountry adoption, they may realize the severity of possible illnesses necessitating a full medical evaluation.<sup>123</sup> If the family deals with a local agency, that agency will advise the adoptive parents of the need for medical testing.<sup>124</sup> An examination prior to, or even upon entry could drastically reduce any prolonged illnesses which the child may have acquired in her native country. Examinations will also uncover diseases which, although not symptomatic in the child, could be transmitted to the newly adoptive family.<sup>125</sup>

Mental health risks could also be minimized through a full evaluation after the child has entered the United States.<sup>126</sup> Many foreign-born children who are brought to this country through intercountry adoption may suffer from illnesses or trauma associated with living conditions in their native countries.<sup>127</sup> Neglect and substandard living conditions are very common to children adopted from third world countries.<sup>128</sup> These conditions may result in noticeable ailments or abnormalities which can be treated upon identification.<sup>129</sup> Other mental health issues, related to poor living conditions, which remain unnoticeable, should also be immediately addressed to prevent long-term effects.<sup>130</sup>

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<sup>120</sup>See *infra* notes 204-206 and accompanying text.

<sup>121</sup>W. Robert Lange & Ellen Warnock-Eckhart, *Selected Infectious Disease Risks in International Adoptees*, 6 *PEDIATRIC INFECTIOUS DISEASE J.* 447, 449-50 (May 1987).

<sup>122</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 559.

<sup>123</sup>Brindo, *supra* note 80.

<sup>124</sup>*Id.*; GILMAN, *supra* note 1, at 78-81.

<sup>125</sup>Hostetter, *International Adoption*, *supra* note 51, at 330.

<sup>126</sup>*Id.* at 331-32.

<sup>127</sup>GILMAN, *supra* note 1, at 79-81.

<sup>128</sup>Karfeld, *supra* note 18, at 13.

<sup>129</sup>Miller et al., *supra* note 92, at 40.

<sup>130</sup>Hostetter, *International Adoption*, *supra* note 51, at 328.

*A. Parasitosis, Hepatitis B, and Other Infectious Diseases*

The increase in intercountry adoption, has alerted physicians to the presence of parasitosis in children.<sup>131</sup> To better combat the spread of parasitosis, a greater understanding of the disease is necessary for physicians, so that they may properly screen and provide treatment for those children who are symptomatic as well as asymptomatic.<sup>132</sup> The transmission of parasitosis in urban and rural areas has created public health concerns.<sup>133</sup> Some medical centers have required that all Latin American born patients under twenty years of age undergo testing for the parasitic diseases.<sup>134</sup>

Since the presence of parasites among children in Latin American nations can be overwhelming, prior to joining the American community through intercountry adoption, these children should be tested and treated if necessary. Intestinal parasites are also common to children from India, who must be tested and treated.<sup>135</sup> Although parasitic diseases are prevalent in India and Latin American nations, screening should not be limited to foreign adoptees from these geographic locations.<sup>136</sup> Physicians have detected the presence of parasitic diseases, although unexpected, in foreign adoptees from Korea, Romania, and China.<sup>137</sup>

Effective treatment for intestinal parasites cannot be maintained if only a selective population is screened.<sup>138</sup> Clearly, treatment can only be effective if screening is uniform. The presence of parasitosis in children, either symptomatic or asymptomatic, can and ought to be treated, during the adoption process.<sup>139</sup> Early identification of parasitic diseases is necessary for the health and well being of the foreign adoptee and all those with whom she has contact.<sup>140</sup> Effectively screening and treating all foreign-born children for parasitosis as a condition of entry in intercountry adoption would prevent possible transmission to others and alleviate the burden of screening within an entire community.

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<sup>131</sup>Joel L. Bass et al., *Parasitology Screening of Latin American Children in a Primary Care Clinic*, 89 PEDIATRICS 279 (Feb. 1992); Hostetter, *Medical Evaluation*, *supra* note 96, at 482.

<sup>132</sup>Bass et al., *supra* note 131, at 281.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

<sup>135</sup>Hostetter, *International Adoption*, *supra* note 51, at 329.

<sup>136</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 563.

<sup>137</sup>Johnson et al., *supra* note 28, at 3448; Hostetter, *Medical Evaluation*, *supra* note 96, at 482.

<sup>138</sup>Hostetter, *Medical Evaluation*, *supra* note 96, at 484.

<sup>139</sup>Bass et al., *supra* note 131, at 281.

<sup>140</sup>*Id.*; see also Hostetter, *Unsuspected Medical Diseases*, *supra* note 96, at 563.



Another infectious disease common among international adoptees is hepatitis B. If untreated, hepatitis B can create long-term effects such as acute or chronic liver disease.<sup>141</sup> The high risk of acquiring the disease increases for those living with the infected child.<sup>142</sup>

Early studies did not screen for hepatitis B surface antigens in all foreign adoptees, but commonly limited the screening to particular cultures.<sup>143</sup> Since physicians often limited the testing to that for hepatitis B surface antigens, cases of chronic hepatitis B infection may have remained undetected. More recent studies have applied a broader screening of a hepatitis B profile to all foreign adoptees regardless of country of origin, and discovered an unexpectedly high frequency of hepatitis associated with those cultures not typically tested.<sup>144</sup> As with all screening tests, the hepatitis B profile screening must be applied to all international adoptees regardless of country of origin to be effective.<sup>145</sup>

Tuberculosis and cytomegalovirus (CMV)<sup>146</sup> should also be included in the screening of all international adoptees. Both diseases pose a threat to family members and often remain undetected during examinations in the country of origin.<sup>147</sup> The fact that diseases associated with tuberculosis are often misdiagnosed in the foreign country strongly suggests that even when the foreign adoptee has been previously screened for tuberculosis, screening should be readministered by a physician upon arrival in the United States.<sup>148</sup>

Although common to India and parts of Asia, CMV may be present in other nations.<sup>149</sup> Children carrying CMV may suffer from neurological problems and hearing loss if untreated.<sup>150</sup> Identifying CMV prevents the spread of the virus

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<sup>141</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 560.

<sup>142</sup>Johnson et al., *supra* note 28, at 3449.

<sup>143</sup>Lange & Warnock-Eckhart, *supra* note 121, at 449.

<sup>144</sup>Hostetter, *Medical Evaluation*, *supra* note 96, at 484; *see* Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 562.

<sup>145</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 562.

<sup>146</sup>Cytomegalovirus (CMV) is one of the most highly host-specific herpes viruses that infect humans with the production of unique large cells bearing intranuclear inclusions. CMV can cause a variety of clinical syndromes, collectively known as cytomegalic inclusion disease. The classic disease is congenital, being acquired in utero from the mother. Most infected infants are asymptomatic, but some may suffer from jaundice, purpura, cerebral calcifications, and severe central nervous system sequelae (resulting in blindness, deafness, quadriplegia and mental retardation). DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 428 (W.B. Saunders Co. ed., 27th ed. 1988).

<sup>147</sup>*See* Hostetter, *Medical Evaluation*, *supra* note 96, at 484; Hostetter, *International Adoption*, *supra* note 51, at 329-30.

<sup>148</sup>*See* W. Robert Lange et al., *Mycobacterium Tuberculosis Infection in Foreign-born Adoptees*, 8 PEDIATRIC INFECTIOUS DISEASE J. 625 (Sep. 1989).

<sup>149</sup>Hostetter, *International Adoption*, *supra* note 51, at 330.

<sup>150</sup>*Id.*

among the family members or the day care environment.<sup>151</sup> If an adoptive mother or other female of child bearing age acquires CMV, the results could be extremely detrimental to an unborn infant or future attempts at conception.<sup>152</sup>

### *B. Problems Specific to China*

In China, there are thousands of babies available for adoption by American families.<sup>153</sup> Because of this abundance of Chinese babies, couples who are eager to adopt find that China is eager to provide. For couples in their late thirties or who already have biological children, China appears to be the answer.<sup>154</sup> Domestic adoptions, unlike Chinese adoptions, may take several years to come to fruition, and in many instances the adoption may fail. Couples deciding to adopt from China may have to wait as little as four months.<sup>155</sup> Furthermore, many American couples choose to adopt from China because they do not have to meet the birth mother.<sup>156</sup> The adoptive parents feel more secure as new parents since it is highly unlikely that the Chinese birth mother will attempt to regain custody of her child.<sup>157</sup>

The circumstances, from which the Chinese-born infants come, are far from sanitary.<sup>158</sup> The Chinese orphanages fall far below any American standards and act as an incubator for infection and disease. Urine and flies surround Chinese children daily in the dirt-poor conditions of their orphanages.<sup>159</sup> Chinese orphans often suffer from ringworm and other fungal infections.<sup>160</sup>

These infections will accompany the newly adopted infant in her journey to the United States. Many of the adopted Chinese infants act as carriers for the hepatitis B virus, presenting yet another health concern associated with intercountry adoption.<sup>161</sup>

Uniform medical screening could eliminate the spread of such infections and diseases.

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<sup>151</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 563.

<sup>152</sup>*Id.*

<sup>153</sup>See Karfeld, *supra* note 18, at 11.

<sup>154</sup>*Id.* at 12.

<sup>155</sup>*Id.* at 11.

<sup>156</sup>*Id.* at 13.

<sup>157</sup>See *supra* note 36 and accompanying text.

<sup>158</sup>Karfeld, *supra* note 18, at 13.

<sup>159</sup>*Id.*

<sup>160</sup>*Id.* at 14.

<sup>161</sup>*Id.* The screening of Chinese children prior to the intercountry adoption is inadequate with respect to hepatitis B. Karfeld, *supra* note 18, at 13.

*C. Problems Specific to Romania*

After the end of Ceausescu's regime, Americans learned of the inhumane conditions of the orphanages in Romania.<sup>162</sup> In 1991, Americans adopted 7,328 Romanian infants.<sup>163</sup> These children came from state-run orphanages which provided insufficient food and inadequate shelter.<sup>164</sup> Many children were far from healthy.<sup>165</sup> Children who lived in the orphanage system for more than four months would likely contract serious medical problems.<sup>166</sup>

Foreign health care facilities available to adoptees were deficient or nonexistent, which caused serious illnesses in most of the children who came to the United States.<sup>167</sup> When a team of international adoption clinics joined together to screen Romanian adoptees, it determined that Romanian adoptees were a "high-risk pediatric group."<sup>168</sup> Screening detected a high rate of intestinal parasites, with many children having multiple parasites.<sup>169</sup> Unsuspected diagnoses of hepatitis B and other infectious diseases were also detected.<sup>170</sup>

Once again, complete pediatric examinations were necessary to determine the health conditions of all adoptees. Physicians should not adhere to prior incomplete examinations which do not fully detect or properly diagnose serious medical conditions.<sup>171</sup> With requisite pediatric screening of internationally adopted children, both parents and physicians will be aware of possible ailments and capable of ensuring detection and treatment.

## VII. MANDATORY SCREENING

Congress requires that all aliens seeking entry to the United States must submit to a medical examination.<sup>172</sup> This medical examination serves to uncover the presence of the HIV virus in aliens prior to their admission to the

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<sup>162</sup>Johnson et al., *supra* note 28, at 3446.

<sup>163</sup>*Id.* at 3447.

<sup>164</sup>*Id.* at 3446.

<sup>165</sup>During the winter of 1989, at least fifty percent of the children in Romanian orphanages died due to a lack of heat, hot water, and sewage facilities. Hester, *supra* note 66, at 1273.

<sup>166</sup>See Johnson et al., *supra* note 28, at 3447.

<sup>167</sup>*Id.* Eighty-five percent of Romanian children tested at the University of Minnesota from October 1990 through September 1991, exhibited clinical findings of serious medical disorders. *Id.*

<sup>168</sup>*Id.* at 3450.

<sup>169</sup>Johnson et al., *supra* note 28, at 3448.

<sup>170</sup>*Id.* at 3447.

<sup>171</sup>*Id.* at 3450.

<sup>172</sup>See INA § 212 (a)(1), 8 U.S.C. § 1182(a)(1)(1995).

United States.<sup>173</sup> Since the INA identifies the HIV virus as a health-related ground for exclusion, the INS will prevent aliens, identified as carrying the virus, from entering the United States. The INA provides that,

Any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome . . . is excludable.<sup>174</sup>

Thus, Congress has created absolute exclusion<sup>175</sup> for those aliens with HIV, but it has not identified any other communicable disease by name. Because of this, the medical screening which occurs prior to admission for immigration to the United States may be limited to the screening for HIV and other known communicable diseases.

The same health-related grounds for exclusion applies to foreign-born children adopted by families within the United States. Because of the established grounds for exclusion, the pre-adoptive screening process is insufficient to detect illnesses when performed in the foreign nation. Parents adopting a foreign-born child are not likely to know of any existing health problems other than those for which screening was required. The undetected diseases may be contagious and may necessitate immediate medical treatment, however, the families may not even know of the existence of health problems.<sup>176</sup> This Note does not suggest that the INA should identify more health-related grounds for exclusion, rather that the INA ought to identify a complete medical examination as a condition for entry.<sup>177</sup>

Physicians throughout the United States and other countries have performed studies on the internationally adopted population. These studies aim to help physicians recognize many illnesses that often remain undetected.<sup>178</sup> Researchers hope that better informed physicians will be able to implement thorough medical examinations as a standard procedure of

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<sup>173</sup>Faith G. Pendleton, Note, *The United States Exclusion of HIV-Positive Aliens: Realities and Illusions*, 18 SUFFOLK TRANSNAT'L L. REV. 269, 279 (1995).

<sup>174</sup>INA § 212(a)(1)(A)(I).

<sup>175</sup>Although the Act calls for exclusion of all aliens infected with the AIDS virus, the Attorney General may waive this exclusion. INA § 212(a)(1)(B). This waiver power specifically includes unmarried adopted children of United States citizens. INA § 212(g)(1)(A).

<sup>176</sup>See Hostetter, *Medical Evaluation*, *supra* note 96, at 479.

<sup>177</sup>By requiring a standard medical evaluation for all intercountry adoptees, adoptive parents can be more informed about the health needs of their child. The present system provides no reliable means of detecting unsuspected diseases or abnormalities in foreign adoptees. Telephone Interview with Susan Glatki, Esq., Cleveland, OH (Mar. 8, 1996) [hereinafter Glatki].

<sup>178</sup>See generally Nicholson et al., *supra* note 34; Hostetter, *International Adoption*, *supra* note 51.

intercountry adoptions. Absent standard procedures for examinations of the internationally adopted child, family physicians remain in the dark about the child's medical condition.<sup>179</sup> If physicians are not accustomed to examining foreign-born children, they will be unfamiliar with the attributes of the foreign-born child.<sup>180</sup> Although one might think such information would be readily available to physicians, illnesses endemic to other cultures may be unknown to many family physicians and may remain undetected even during a preliminary examination.<sup>181</sup>

Physicians also face the problem of insubstantial medical histories.<sup>182</sup> Many of the children adopted from a foreign country have no known medical history which the physician could consult.<sup>183</sup> Lacking available medical history and familiarity with the foreign culture and custom, physicians might compare diagnosing the foreign-born child with looking for a needle in a haystack.<sup>184</sup>

If the adoptive parents have worked with a foreign adoption agency, they may obtain a limited medical history.<sup>185</sup> The quantity and quality of the medical history available to the adoptive families varies from agency to agency.<sup>186</sup> Some agencies may release substantial information regarding the birth parents, whereas other agencies may have no such information.<sup>187</sup> While one agency may provide information from physical examinations, another agency may merely verify that the child is alive.<sup>188</sup> Parents and physicians must be aware that most foreign adoptees have not received immunizations, and these should be administered upon arrival.<sup>189</sup>

The family physician must closely scrutinize any medical information received by the adoptive parents, and many physicians recommend that the information not be relied upon when performing a thorough medical examination.<sup>190</sup> Because the foreign orphanages do not meet the health

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<sup>179</sup>See Romano, *supra* note 4, at 556; Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 559. Sixty-seven percent of the foreign adoptees previously seen by physicians in the United States had an unsuspected medical diagnosis. *Id.* at 561.

<sup>180</sup>See GILMAN, *supra* note 1, at 176-77.

<sup>181</sup>See Hostetter, *Medical Evaluation*, *supra* note 96, at 479.

<sup>182</sup>Hostetter, *International Adoption*, *supra* note 51, at 327.

<sup>183</sup>See GILMAN, *supra* note 1, at 80.

<sup>184</sup>See Romano, *supra* note 4, at 556.

<sup>185</sup>Hostetter, *International Adoption*, *supra* note 51, at 327.

<sup>186</sup>*Id.*

<sup>187</sup>*Id.*

<sup>188</sup>*Id.*

<sup>189</sup>Hostetter, *International Adoption*, *supra* note 51, at 330.

<sup>190</sup>See Hostetter, *Medical Evaluation*, *supra* note 96, at 480. The results of screening foreign adoptees uncovered at least one medical condition in eighty-one percent of the

standards of those in the United States, effective evaluations are often hindered.<sup>191</sup> At times, the medical evaluations performed in the adoptee's country are simply inaccurate.<sup>192</sup> Malnutrition may have a serious affect on the health of the adoptee, however, the agency may not report the status.<sup>193</sup> Physicians also need to consider the living conditions within the orphanage. In China, the children spend their days in high-chairs and are not free to roam, similar to the children in Korea who are also not free to explore their environment.<sup>194</sup> The inability of these children to roam may severely hinder their development both physically and psychologically.<sup>195</sup> Since these factors are commonplace in the foreign agency, the effects may be commonplace as well, and therefore, any resulting medical illnesses may not be reported.

Adoptive parents receive insufficient information regarding the health of the adoptee.<sup>196</sup> Physicians should not rely on this information when deciding whether to forego an evaluation.<sup>197</sup> If a physician were to rely on a prior negative screening performed and to forego further screening of the child, the child could continue to suffer from an undetected malady.<sup>198</sup> Certainly, if the medical information provides insight into the health needs of the child, the physician should take note, but the physician should at no time rely upon the information in place of completing a pediatric evaluation.<sup>199</sup>

Also, adoptive parents and physicians should not rely heavily on the required visa medical evaluations.<sup>200</sup> The purpose of these evaluations is merely to test the adoptee for communicable diseases which make her excludable under the INA. The visa medical evaluation should be relied upon only to confirm that the child is alive.<sup>201</sup> Physicians must administer a thorough medical examination to screen the adoptee for infectious diseases, even for those diseases supposedly tested during the visa medical examination.

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children. This condition was not evident from the children's history or physical examinations. *Id.*

<sup>191</sup> Brindo, *supra* note 80.

<sup>192</sup> Johnson et al., *supra* note 28, at 3450.

<sup>193</sup> See Hostetter, *International Adoption*, *supra* note 51, at 327. Insufficient brain growth may be linked to malnutrition occurring in the orphanage. Johnson et. al., *supra* note 28, at 3450.

<sup>194</sup> Hostetter, *International Adoption*, *supra* note 51, at 331; Karfeld, *supra* note 18, at 13.

<sup>195</sup> The lack of physical and mental stimulation within the orphanage may cause developmental delays. Johnson, *supra* note 28, at 3450.

<sup>196</sup> See *supra* notes 182-89 and accompanying text.

<sup>197</sup> See Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 561.

<sup>198</sup> *Id.*

<sup>199</sup> Johnson et al., *supra* note 28, at 3450.

<sup>200</sup> Glatki, *supra* note 177; Hostetter, *International Adoption*, *supra* note 51, at 328.

<sup>201</sup> Hostetter, *International Adoption*, *supra* note 51, at 328.

Adoptive parents and physicians should devote themselves to a proper screening of the adoptee so that they may detect medical problems. The physicians will also need to ensure that any previously identified medical problems have been properly identified. With proper screening, the parents and physicians can work together to treat and prevent the spread of many diseases and illnesses.<sup>202</sup>

No standard exists for physicians to follow when evaluating intercountry adoptees. However, physicians cannot continue to screen foreign-born adoptees as they would American children.<sup>203</sup> Foreign children need a more specialized pediatric evaluation which will investigate a broader range of illnesses.<sup>204</sup> In a study at the University of Minnesota, physicians suggested that the intercountry adoptee should receive a more specialized pediatric evaluation than refugee children.<sup>205</sup>

The American Academy of Pediatrics recommends that physicians perform three basic screening tests for refugees.<sup>206</sup> These tests include a test for hepatitis, one for tuberculosis, and a third for parasites.<sup>207</sup> The University of Minnesota study expanded the screening to include four additional tests.<sup>208</sup> Having expanded the screening, the physicians were able to correctly diagnose medical ailments that they would have been unable to diagnose under the refugee standards.<sup>209</sup>

The screening of these children resulted in an unsuspected medical diagnosis in sixty-three percent of the children.<sup>210</sup> Not only did this study reinforce the need for a standard complete evaluation of foreign-born children, but it also identified many inadequacies existing in the prior examinations procedures. By applying all of the screening agents to each child, the study was able to provide information previously unknown to physicians. The process uncovered an unsuspected high rate of hepatitis B involved with non-Korean children.<sup>211</sup> Since hepatitis B has been generally associated only with Korean infants, other nationalities are not often tested.

Of the children screened, sixty-three percent had already received an evaluation by a physician within the United States and had been deemed

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<sup>202</sup>Nicholson et al., *supra* note 34, at 379.

<sup>203</sup>Romano, *supra* note 4, at 556.

<sup>204</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 563.

<sup>205</sup>*Id.* at 559.

<sup>206</sup>*Id.*

<sup>207</sup>*Id.*

<sup>208</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 559.

<sup>209</sup>*Id.* at 559.

<sup>210</sup>*Id.* at 563.

<sup>211</sup>*Id.* at 562.

healthy.<sup>212</sup> After the physicians in the Minnesota study implemented the expanded screening for seven tests, they discovered unexpected medical conditions in sixty-seven percent of those children already diagnosed as healthy.<sup>213</sup> The original misdiagnoses can only be explained by inadequate and inconsistent screening methods. The original physicians may have examined the foreign adoptees as they would American infants, however, foreign adoptees and American infants do not share the same health needs. Internationally adopted children come from nations which differ from the United States in many aspects, including climate, technology, or medical standards. Therefore, foreign adoptees must be examined as a "special pediatric population" unlike a child born in the United States.<sup>214</sup>

The Minnesota study is one of several which implemented seven screening tests. Another study at the International Adoption Clinic at the University of Minnesota evaluated international adoptees from fifteen different countries by applying the same seven screening tests.<sup>215</sup> Fifty-seven percent of these children had serious medical conditions, and a large percentage of these were "silent diseases," which would not have been detected had the screening tests not been applied.<sup>216</sup> The seven screening tests employed by the International Adoption Clinic at Minnesota pick up where the prior examinations have failed. These screening agents are not rare or specific to the International Adoption Clinic; rather, they are readily available to all primary care physicians and specialists.<sup>217</sup>

It is important to note that the children were not a party to the studies at Minnesota because they were symptomatic.<sup>218</sup> This is significant because doctors were able to treat diseases that otherwise would have gone undetected. Physicians and adoptive parents alike desire to identify proper screening tests for the new intercountry adoptees. Without sufficient standards for the screening of this "special pediatric population," infectious diseases will remain undetected.<sup>219</sup>

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<sup>212</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 560.

<sup>213</sup>*Id.* at 561.

<sup>214</sup>*Id.* at 563.

<sup>215</sup>Hostetter, *Medical Evaluation*, *supra* note 96, at 479.

<sup>216</sup>*Id.* at 483.

<sup>217</sup>*Id.*

<sup>218</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 560.

<sup>219</sup>*Id.* at 563.



## VIII. INA &amp; ADOPTION HISTORY

Prior to 1957, Congress did not afford adopted foreign children the status of "child" for immigration purposes.<sup>220</sup> Fearing that "sham" adoptions would multiply in order to avoid the quota restrictions of the INA, Congress initially conferred "child" status only to a select group of adopted children.<sup>221</sup> Similar to the idea behind the "sham" marriages, citizens would adopt an alien who had been unable to qualify for a family preference or an employment preference and bring that alien into the United States as a "child."<sup>222</sup> If the "sham" was successful, the alien could obtain citizenship and subsequently petition for other family members under a family preference.<sup>223</sup>

Gradually, intercountry adoptions became more acceptable in the INA, and the fear of "sham" adoptions decreased with the requirement that the adoptee be an "orphan" and thus unable to petition for other family members. However, a few qualifications remain before an adopted child can obtain "child" status as an immediate relative.<sup>224</sup> These qualifications address age limitations and the purpose of the adoption so that the INS can better prevent "sham" adoptions.<sup>225</sup> INA restrictions on adoptions do not address any procedural requirements outside of the petitions for adoption which are covered on the I-600A and I-600 forms.<sup>226</sup> Aside from the screening required to satisfy the qualitative restrictions, the INA does not address any means of influence over the health concerns surrounding the intercountry adoption.

To qualify for status as an immediate relative through adoption, the foreign-born child must be under the age of sixteen at the time of adoption.<sup>227</sup> Furthermore, the foreign-born child must be an "orphan" as defined by the INA. A child is considered to be an orphan either, "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

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<sup>220</sup>STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 179 (David L. Shapiro et al. eds., 1992).

<sup>221</sup>*Id.*

<sup>222</sup>*Id.* The Immigration Marriage Fraud Amendments were enacted in 1986 to confer conditional permanent residence status to the alien spouse of an American citizen, to better control the problem with "sham" marriages. INA § 216, 8 U.S.C. § 1186 (1995).

<sup>223</sup>International adoptions which were entered into for the purposes of aiding an alien in obtaining immediate relative status, are considered "sham" adoptions and are not permissible. *Zanzonico v. Neeld*, 111 A.2d 772, 775 (N.J. 1955).

<sup>224</sup>INA § 101(b)(1)(F).

<sup>225</sup>*Id.*

<sup>226</sup>8 C.F.R. § 204.3 (1996).

<sup>227</sup>INA § 101(b)(1)(F).

and adoption. . . ."<sup>228</sup> Certain exceptions to the "orphan" requirement exist, however, they are typically not at issue in the intercountry adoption situation.<sup>229</sup>

The adoption may occur in either the foreign country where the child resides or the child may be brought to the United States to undergo domestic adoption proceedings. Regardless of where the adoption occurs, no right or privilege will be afforded to any prior parentage, whether by birth or adoption.<sup>230</sup>

Provided that the INS does not consider the foreign-born child to be an alien ineligible for entry and the child meets the requirements of either subsection (E) or (F) of section 101(b)(1) of the INA, than the child shall be admitted as a permanent resident alien. The adoptive parents may apply for their child to be naturalized as a citizen immediately.<sup>231</sup> However, to be recognized, the adoptive family must first show that the adoption conformed with either the laws or customs validating an adoption in the foreign country.<sup>232</sup>

Congress has essentially unrestrained power to regulate the admission of aliens into the United States. Although Congress' power to regulate the immigration of foreigners to the United States does not appear as an express provision of the United States Constitution, it is an implied power derived from the Commerce Clause, Naturalization Clause, Migration and Importation Clause, and the War Powers Clause.<sup>233</sup> In the *Head Money Cases* of 1884, the Supreme Court held a federal statute regulating immigration to be a valid exercise of congressional power as a regulation of commerce with other nations.<sup>234</sup> The Supreme Court has continuously recognized the plenary power of Congress to regulate immigration. With the constitutional power to regulate immigration, Congress may effectively legislate to preempt state regulations.<sup>235</sup>

Since the late 1800's, the federal government has successfully controlled immigration through congressional legislation. However, this power, although seemingly unrestricted, has been consistently reviewed by the Supreme Court.<sup>236</sup> Although portions of the INA have been challenged as

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<sup>228</sup>*Id.*

<sup>229</sup> A child under the age of sixteen who has lived with and been in the legal custody of the adoptive parents for not less than two years, shall be granted immediate relative status, provided no natural parent retains a claim of parentage for immigration purposes. INA § 101(b)(1)(E).

<sup>230</sup>*Id.*

<sup>231</sup> INA § 322. An earlier requirement of two-year residence has been discontinued. GILMAN, *supra* note 1, at 115.

<sup>232</sup> See *supra* notes 37-42 and accompanying text.

<sup>233</sup> LEGOMSKY, *supra* note 220, at 8-11.

<sup>234</sup> 112 U.S. 580 (1884).

<sup>235</sup> See LEGOMSKY, *supra* note 220, at 23.

<sup>236</sup> See Chinese Exclusion Case, 142 U.S. 651 (1892) (Court upheld congressional act

unconstitutional, the Supreme Court has repeatedly held that Congress' power to regulate immigration is plenary.<sup>237</sup>

[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.<sup>238</sup>

An alien wishing to enter the United States, either as a permanent resident or a nonimmigrant, has no constitutional right to enter.<sup>239</sup> Today, an alien seeking entry is afforded statutory due process, however, she is not considered to be a person "within the United States" and therefore has no due process right.<sup>240</sup> The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." <sup>241</sup> Since exclusion from the United States does not deprive an alien seeking entry of life, liberty, or property, there is no Fifth Amendment due process violation.<sup>242</sup>

The Supreme Court has held "that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."<sup>243</sup> Although an alien within the United States has been afforded many of the rights afforded to citizens, Congress retains practically plenary power over admission, exclusion, and deportation of all aliens.

Only those persons with citizenship have rights to enter and remain in the United States permanently.<sup>244</sup> Children born in foreign nations to foreign parents are aliens, and therefore subject to the laws of immigration. An alien child adopted by an American family will be afforded citizenship through naturalization, provided the adoption satisfies the requirements set forth in the

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over constitutional challenge, holding the power to exclude aliens inherent in sovereignty).

<sup>237</sup>See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (Court adds strength to inherent power by extending congressional power to deport aliens); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (Court holds no constitutional due process right afforded to alien seeking entry).

<sup>238</sup>*Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)).

<sup>239</sup>See *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

<sup>240</sup>*Id.*

<sup>241</sup>U.S. CONST. amend. V.

<sup>242</sup>See generally *Fong Yue Ting*, 149 U.S. at 730.

<sup>243</sup>*Nishimura Ekiu*, 142 U.S. at 659.

<sup>244</sup>LEGOMSKY, *supra* note 220, at 2.

INA.<sup>245</sup> Until such rights are conferred to the child, her entry into the United States is governed by the laws of immigration.

An important role of the INA is to establish a set of qualitative restrictions which effectively define the type of alien which will be allowed into the United States.<sup>246</sup> These restrictions apply to both immigrants and nonimmigrants.<sup>247</sup>

Another important function of the INA is to establish programs designed to assist certain classes of aliens.<sup>248</sup> Section 412 of the INA provides assistance to refugees for domestic resettlement.<sup>249</sup> Section 412 (b) (5) of the INA provides that:

[t]he Director [of the Office of Refugee Resettlement within the Department of Health and Human Services] is authorized to make grants to, and enter into contracts with, State and local health agencies for payments to meet their costs of providing medical screening . . . to refugees.<sup>250</sup>

The medical situations associated with refugees are comparable to those of intercountry adoptees. In fact, many physicians urge that the level of medical attention required by internationally adopted children is much higher than that required by refugees.<sup>251</sup> Intercountry adoptees are a "special pediatric population" faced with severe health care issues. These adoptees and their adoptive parents are entitled to thorough medical examinations and the additional support provided for refugees. With the ability to regulate the immigration of aliens to the United States and the ability to provide assistance for certain classes of aliens, Congress should recognize the need for the uniform screening of internationally adopted children and mandate its enforcement.

#### IX. CONCLUSION

The Minnesota studies illustrate the need for uniform screening tests.<sup>252</sup> These tests should be applied to all prospective adoptees regardless of nation of origin. Worldwide, physicians who are familiar with the specific needs of

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<sup>245</sup>INA § 322.

<sup>246</sup>INA § 212.

<sup>247</sup>Nonimmigrants are aliens who seek entry into the United States, however, this entry is not for permanent residency. INA § 101(a)(15).

<sup>248</sup>INA § 412.

<sup>249</sup>*Id.*

<sup>250</sup>INA § 412(b)(5).

<sup>251</sup>Hostetter, *Unsuspected Infectious Diseases*, *supra* note 96, at 559.

<sup>252</sup>*Id.* at 562-63.

intercountry adoptees have recognized these children as a "special pediatric population" and emphasize the importance of detailed pediatric screening.<sup>253</sup> These physicians also stress the need for the immediacy of these evaluations.<sup>254</sup> Requiring uniform screening for all intercountry adoptees will enable physicians to detect unsuspected medical problems and provide immediate treatment as needed.

By mandating screening of all foreign adoptees, Congress can ensure that they receive all necessary screening and treatment. This can only be accomplished through an established uniform examination. Only through this uniform examination can physicians and adoptive parents be more informed of possible ailments and infectious diseases which may arise in the foreign adoptees.

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<sup>253</sup>See generally Nicholson et al., *supra* note 34.

<sup>254</sup>Hostetter, *Medical Evaluation*, *supra* note 96, at 479.