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RAY RUSHTON DISTINGUISHED LECTURER SERIES: CHILD TRAFFICKING AND INTERCOUNTRY
ADOPTION: THE CAMBODIAN EXPERIENCE

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BIO:

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SUMMARY:

... On December 21, 2001, James W. Ziglar, Commissioner of the Immigration and Naturalization Service, suspended the processing of adoption petitions filed by United States citizens for children from Cambodia, declaring, "INS' responsibility to determine that a child is truly an orphan must never be tainted by any action that results in the exploitation of innocent children by separating them from their biological families as a result of fraud, trafficking in human beings or other criminal activity. ... Although one might conclude or infer that the birth mother was induced by the payment to give up her son for adoption, there is no evidence that the money was paid by the adoptive parent, or a person or entity working on his behalf. ... Second, the OIC should supplement the record with evidence that the money received by the birth mother was a payment for the child or an inducement to the birth mother to give up the child. ... The OIC is also reminded that any investigation of child-buying should focus on concrete evidence of the alleged child-buying or an admission of guilt. ... The end result of the Cambodian adoption situation is that hundreds of United States families had their cases subjected to investigation and approved, while criminal investigations revealed substantial abuses that lead one to believe that many of the children may have been separated from their birth families through fraud, coercion, or purchase. ...

TEXT:

On December 21, 2001, James W. Ziglar, Commissioner of the Immigration and Naturalization Service, ¹ suspended the processing of adoption petitions filed by United States citizens for children from Cambodia, declaring, "INS' responsibility to determine that a child is truly an orphan must never be tainted by any action that results in the exploitation of innocent children by separating them from their biological families as a result of fraud, trafficking in human beings or other criminal activity." ² The decision to suspend processing followed months of serious allegations about children being trafficked for adoption. It was the only time that the United States had ever stopped adoptions from abroad.

Background

American citizens who wish to adopt a child from abroad are required to obtain two clearances from the Immigration Service. The first of these is the approval of the person as an adoptive parent. The evidence that a person is approved as an adoptive parent is generally included in the documentation provided to the foreign government. Occasionally, the foreign government asks that the clearance be submitted directly by the United States Embassy. The Cambodian government required such a clearance, asking the United States Embassy to issue a letter -- known as a "release letter" -- to verify that the adoptive parents were approved. This letter had to be received by the Cambodian government in order for an adoption to be

approved.

The second clearance certifies that the child is an orphan, as defined by United States immigration law. The child must be approved before an immigrant visa can be issued, and the process generally occurs after the American parents have traveled to the foreign country and formally adopted the child. Classification as an orphan requires documentary proof that the child is an "orphan 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 and adoption."⁴³ The criteria are strict, making it difficult for children with two parents to be approved. The Immigration Service is required to perform an investigation into the orphan status of each child, although in the vast majority of cases, this investigation consists solely of a review of the submitted documents. If the officer adjudicating the petition believes further investigation is necessary, a field investigation is conducted to determine the eligibility of the child.⁴⁴

While ultimate responsibility for approving adoption cases falls to the Immigration Service, certain responsibilities can be delegated to Consular officers within the Department of State. In countries where there is no permanent immigration officer, the Consular officer adjudicates the child's orphan status. Consular officers, however, cannot deny a child whom they believe does not qualify. Instead, the Consular officer must report his or her findings to the Immigration Service for review and subsequent approval or denial.

United States citizens generally hire an adoption agency to assist them in locating a child to adopt and in obtaining the required clearances from the Immigration Service. In many cases, adoption agencies in the United States contract with persons, known as "facilitators," in the foreign country to perform services.

Cambodian Adoptions -- 2001

Cambodian adoption had long been the subject of controversy. Concerns about child trafficking and other illegal activity forced Cambodia's government to halt adoptions several times. Adoption processing reopened in the spring of 2001 under new regulations meant to protect children and families. Even with the new regulations, Cambodian adoptions were substantially faster and less expensive than adoptions from other countries. Large numbers of United States Citizens applied to adopt children, resulting in intense competition between facilitators and agencies.

In September 2001, police raided a clinic used by at least one orphanage placing children with American families. The police found twelve children alleged to have been trafficked, and four workers were charged with trafficking offenses. The details of the case remained murky throughout the fall with the Cambodian courts first granting custody of the children to the orphanage, then to the human rights group LICADHO, and then back to the orphanage. There were rampant allegations that the raid had been a "set up" by competing facilitators; however, solid evidence was difficult for anyone to obtain.

At the time, there was no immigration officer assigned to Phnom Penh, and Consular officers were adjudicating adoption petitions. Investigations were called for in early October after Embassy personnel refused to issue visas to twelve American families who had traveled to adopt children. Over the next twelve weeks, a string of unfortunate events created a crisis environment. In the wake of the terrorist attacks of September 11, security concerns were paramount and Embassy personnel determined that it was too dangerous to conduct the field investigations themselves. They requested immigration officers from Bangkok, who arrived in early November to conduct the investigations. By then, the American families who had arrived in Cambodia expecting a stay of less than a week had been there almost a month, prompting Congressional inquiries into the delays.

The twelve families were issued Notices of Intent to Deny ("NOIDs") their applications on November 30, 2001, because of significant paperwork irregularities that made the origin of the children questionable. Almost immediately, the validity of the decision to deny the cases was questioned. The NOIDs contained errors in names, gender, and birthdates of the children and often mixed cases up entirely. Most troubling was the fact that the INS had not interviewed key players in the adoptions and that the NOIDs were filled with accusations not supported by fact. One contained a section describing an interview "with a man who drove up on a motorcycle" who claimed to have facts about the lack of abandoned children in the area. However, the NOID not only was devoid of any evidence of the man's stated position in the village, it failed to even provide his name. Congressional advocates became involved, the plight of the families waiting in Phnom Penh received national media attention, and demands for the clearance of the cases increased.

Meanwhile, the Embassy halted all adoptions being handled by certain facilitators, leading to considerable outcry from the adoption community. According to established procedure, the adjudicating officer is supposed to review the petition and supporting evidence and make a determination of whether the case is "clearly approvable."⁴⁵ After the original twelve families were delayed, the State Department announced that the Embassy had stopped processing all adoption petitions

temporarily. Adoption agencies, facilitators, and adoptive parents were aware, however, that visas for some cases were still being quietly processed. Many facilitators -- mostly Cambodian nationals -- reported that the Embassy would not even allow them to submit cases for review, while cases being submitted by two American facilitators continued to be processed. It was then announced that no new release letters would be issued, effectively halting any new adoptions from occurring. However, it quickly became apparent that this rule, too, was not being applied to all cases, even though the State Department continued to assert that it was.⁶⁶

In December, Congressional advocates held briefings and demanded answers. In a meeting on December 14, 2001, with adoption agency advocates, the State Department asserted that the only cases being processed were those that were "clearly approvable" and that no release letters were being issued. When presented with evidence that letters were indeed being issued, the State Department agreed to inquire of the Embassy. Several days later, release letters for dozens of families who had been denied processing were issued, paving the way for the adoptions to proceed. However, some seventy-two hours later, the Immigration Service granted the original twelve families humanitarian visas to bring their adopted children into the United States and then declared a moratorium on all Cambodian adoptions. While Commissioner Ziglar no doubt felt that closing Cambodian adoptions was the prudent thing to do in the midst of the considerable concern about child trafficking, the uneven processing by the Embassy in the months leading up to the moratorium made the decision problematic.

In the weeks that followed, it was determined that several hundred United States families had been in the process of adopting Cambodian children when the moratorium was declared. Of those, approximately 150 cases had already progressed through the Cambodian government, and the United States citizens had been declared the parents of the adopted children. Most of these cases would have completed visa processing prior to the December 21st suspension had the Embassy continued to process the petitions according to established procedure. A second small group of less than a dozen cases was halted in the middle of the Cambodian process. A third group totaling approximately 100 families included those whose adoptions would have progressed to completion if the Embassy had continued to issue release letters to all approved families. A fourth group consisted of those who had filed applications to adopt but who had not yet been matched with a child.⁶⁷

Under considerable pressure to address the situation, a task force was formed comprised of members of the Immigration Service, the Department of State, and the Royal Government of Cambodia to address the adoptions already in progress. Due to the considerable concern about child trafficking, it was determined that each case would be subjected to a field investigation by the task force prior to approval. This "special initiative" to clear pending cases began in March 2002. At the same time, special agents with the investigative branch of the INS, now called Immigration and Customs Enforcement ("ICE"), were dispatched to Cambodia. After uncovering evidence of illegal activity, a criminal investigation was launched into the actions of several adoption facilitators, most notably an American facilitator whose cases had earlier been deemed clearly approvable by the Embassy. The two processes -- the investigation and processing of pending adoptions and the criminal investigation -- occurred simultaneously throughout the next eighteen months. The conclusions of the two, however, were vastly different.

The investigations into the pending cases were completed by the end of 2003, with the vast majority clearing by January of that year. Of the hundreds of cases, it is reported that only one was originally denied a visa. That case, too, was approved after the petitioner appealed the decision.

In October 2002, search warrants were executed based upon the criminal investigators' findings. In 2003, several co-conspirators were indicted on charges of visa fraud, conspiracy to launder money, and structuring of financial transactions related to Cambodian adoption cases.

It is unclear why the information uncovered by the criminal investigators did not directly impact the processing of the adoption cases. Some speculate that the intense political pressure to clear the pending cases was a factor. Others believe the evidence uncovered at the time did not clearly show that the children were not, indeed, orphans. Without denials, public records on the findings of the investigations are not available. There was, however, discussion during the investigation addressing the fact that finding sufficient evidence to deny the cases due to child trafficking would be difficult. A review of the problems encountered in other countries starkly illustrates why it was difficult to achieve the Commissioner's goal of ensuring that "INS' responsibility to determine that a child is truly an orphan must never be tainted by any action that results in the exploitation of innocent children by separating them from their biological families as a result of fraud, trafficking in human beings or other criminal activity."

Federal Regulations on "Child Buying"

Regulations under the Immigration and Nationality Act, 8 C.F.R. § S 204.3(i), provide:

Child-buying as a ground for denial. An orphan petition must be denied under this section if the prospective adoptive

parent(s) or adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.⁸⁸

This administrative provision seems straightforward: if the adoptive parent, or someone working on the adoptive parent's behalf, gives money or other consideration to the child's parents, except for the payment of the necessary reasonable expenses outlined in the regulation, then the petition must be denied on the grounds of child buying. Furthermore, the burden of proof in immigration cases lies with the petitioner (the adoptive parent). If the Service determines that money has been paid, it is the responsibility of the petitioner to prove that the child is eligible for a visa and that the child was not bought. At first glance it would seem that with proper investigation and documentation, the Service could easily verify allegations of child trafficking in those instances where trafficking has occurred.

Occasionally, the Service obtains confessions from either the child's parent or the petitioner regarding payment that is not intended as reimbursement for expenses. With such a confession, INS can easily deny the case and uphold its decision on appeal, as illustrated by a case in which an adopted Vietnamese child was denied a visa because the adoptive parent gave the birth parent a small amount of cash as a "gift."⁸⁹

In the absence of a confession, however, the Service must demonstrate that evidence exists proving the child was bought. According to the Foreign Affairs Manual, officers must take into account the fact that some payment of expenses is allowed under the law. Officers are advised, "Investigations of child buying, therefore, should focus on concrete evidence or an admission of guilt."⁹⁰

Does the requirement that INS obtain either an "admission of guilt" or "concrete evidence" protect the children? A review of just one case raises serious concerns about this standard of evidence. According to the publicly available appeal decision⁹¹ in this case, the Officer in Charge ("OIC") denied the petition based upon a finding that the child's mother sold the beneficiary (child) to an adoption facilitator. In support of the denial, the OIC relied in part on a signed statement of the birth mother that said she was unable to take care of her son and had given him to a woman who had come to her house to contact her about relinquishing her son for adoption.

She indicated that the woman, Ms. Y,⁹² helped her fill out forms, picked up her son, and paid her eight million Vietnamese Dong (around \$ 500 in United States currency). She also stated that Ms. Y promised her that she would be paid more money after her son was on board a plane to the United States. The investigative report by the INS stated that the mother initially said her purpose for relinquishing the child was so that he could have a brighter future, and that she had initially told INS that she had "received no money from the facilitator who she did not remember the name or address."⁹³ The report then stated that the mother persisted in providing erroneous information until a police officer advised her that she should tell the truth about the facilitator and provide a written statement if she had received money.⁹⁴ The report then recited the details of the birth mother's statement and related that "the birth mother cried and said that if her child did not go to the United States with the adoptive father, she would have to return the money to [Ms. Y]."⁹⁵ Additionally, the investigation allegedly uncovered information that the chief agent of the facilitating agency admitted to Vietnamese authorities that he and his siblings were engaged in the business of buying babies for international adoptions and that many of the biological mothers who worked with the facilitator had confirmed to Vietnamese authorities that they willingly sold their babies. However, the NOID contained no evidence of these alleged confessions.⁹⁶

When the NOID was issued to the petitioner (the adoptive parent), it did not contain either the investigative report or the above-referenced statement by the mother. Two days later, the petitioner submitted a letter to the INS asking for copies of the evidence. On the same day, the mother gave a contradictory statement to the Vietnamese law firm representing the petitioner. "When asked if she had received any money from the petitioner, the birth mother claimed that 'neither individual nor organisation sic gave me any money.'" ⁹⁷ She also denied ever being "interviewed by the police or by any other organization, domestic or foreign."⁹⁸

Some six weeks later, the mother made yet another statement regarding the adoption to the Vietnamese law firm. In this statement, the mother "explained her family's dire economic situation and her father's rejection of her son."⁹⁹ She stated that during her pregnancy she decided to place the child for adoption and through a series of contacts was introduced to a Ms. X, who told her "the people who adopted would also give me some financial assistance for the delivery of the baby."¹⁰⁰ She stated that Ms. X introduced her to Ms. Y, who lent the mother money to recover her "residence registration booklet" from a pawn shop so she could obtain the baby's birth certificate.¹⁰¹ She further outlined her need for money for the birth expenses

and foster care, stating that whenever she needed money she called "Ms. X and asked her to seek Ms. Y." ⁿ²² She also stated that she had received money several times from Ms. Y after the birth of her baby and that the total she had received was about three million in VND. ⁿ²³ She then stated that after the adoption ceremony at the Department of Justice, Ms. Y gave her 3.9 million in VND. ⁿ²⁴ The mother explained that during her interview with the Vietnamese authorities she was frightened and told them that she had received money. ⁿ²⁵ She explained that when the attorneys later asked her whether she had received money she thought that her earlier admission was the reason she was being investigated, so she then told the lawyers she had not received any money. ⁿ²⁶ The mother "concluded her statement by maintaining that 'if Ms. Y did not give me money I would still give my child for adoption. Because I do not want to and cannot feed my child sic.'" ⁿ²⁷

The petitioner submitted a response to the NOID asserting that it was "vague and filled with errors, and that the OIC's conclusion is 'misleading and bootstrapping and replete with indefinite references.'" ⁿ²⁸ The petitioner stated that, "contrary to [United States] law, the NOID did not indicate the grounds for the intent to deny or the evidence that the Service relied on in reaching its conclusions." ⁿ²⁹ The response also included the two subsequent statements of the mother, affidavits, and other documents. ⁿ³⁰ Three weeks later, the OIC denied the petition, repeating his earlier allegations and dismissing the affidavits and additional evidence submitted by the petitioner as untrustworthy. ⁿ³¹

The Appeal Decision

In its appeal decision, ⁿ³² the Administrative Appeals Unit ("AAU") determined that the OIC had failed to include the evidence used to deny the petition. The denial did not contain the alleged confessions of the "chief agent" of the facilitating agency or of the birth mothers who supposedly stated they had sold their children to the facilitator. ⁿ³³

The appeal pointedly states that "denial of this petition cannot be based upon the serious allegations of the OIC without evidence offered in support of those conclusions." ⁿ³⁴ The appeal decision makes a convincing argument that the Service failed to properly investigate or document its sweeping allegations against the agency in question.

On the other hand, the appeal notes that the "credibility of the birth mother is seriously injured by her inconsistencies and constantly evolving statements." ⁿ³⁵ Additionally, it is noted:

The petitioner has submitted evidence on appeal which raises serious concerns regarding the practices of agency and its role in the procurement of children for foreign adoption. In his affidavit, [Mr. Z], an employee or "assistant" of Mr. [agency representative] and agency, stated that "upon completion of the adoption process, the adoptive parent(s) or agency, in consideration of the economic conditions of the child's birth mother, might offer some money and/or gift as financial assistance." Considering the impoverished conditions of the birth mothers, such payments can only create the appearance of impropriety, at best. With birth mothers living in extreme poverty, such payments or gifts might induce a parent to abandon a child for foreign adoption if the parent had expectations of a gift or prior knowledge of the potential for a monetary gift. This type of payment or "gift" cannot be condoned and the OIC would be justified in investigating such a practice. However, in the present case, there is no direct evidence in the record to establish that the birth mother received such a gift from the adoptive parent, or a person or entity working on his behalf.

In accordance with 8 CFR 204.3(i), an orphan petition must be denied for "child buying" if the following elements are established:

1. the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf
2. have given or will give money or other consideration
3. either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity
4. as payment for the child or as an inducement to release the child. ⁿ³⁶

The appeal then notes the exception for expenses as outlined in the law and defines "inducement" as 'the act or process of enticing or persuading another person to take a certain course of action.'" ⁿ³⁷

In reference to the crucial piece of evidence, the statement by the birth mother, the appeal decides:

While this statement raises serious concerns regarding the adoption, this statement, by itself, does not establish that the

petitioner was engaged in "child buying" as defined in the regulation. Although the birth mother indicated that she received money directly from [Ms. Y], there is no evidence to establish the identity of [Ms. Y] or to demonstrate that [Ms. Y] was working on behalf of the petitioner or [the agency] The birth mother's claim that the money was loaned to her to cover the expense of childbirth and foster care might be a plausible explanation for the money, considering her impoverished condition, except for the established unreliability of her testimony. ^{a38}

Previously the appeal had noted that neither the OIC nor the petitioner had submitted any evidence on the identity of Ms. Y or her involvement in the adoption. The appeal states that "the record is disturbingly silent as to the identity of [Ms. Y] or her connection to [the agency]." ^{a39}

The appeal continues:

Furthermore, the birth mother's statement does not specifically indicate that she accepted the money as payment for the child or as an inducement to release the child. The birth mother began her statement by unequivocally expressing her inability to care for the child due to her economic hardship. Although one might conclude or infer that the birth mother was induced by the payment to give up her son for adoption, there is no evidence that the money was paid by the adoptive parent, or a person or entity working on his behalf. Without this critical element, there is no basis to find that the birth mother was induced to give up her child. This petition may not be denied based on inferences or conclusions that are not supported by the record. ^{a40}

In subsequent sections, the appeal states:

The matter will be remanded to the OIC so that the record may be supplemented to address the unresolved issues. First, the OIC should provide evidence to establish whether [Ms. Y] was

an agent of agency and ultimately of the petitioner. Second, the OIC should supplement the record with evidence that the money received by the birth mother was a payment for the child or an inducement to the birth mother to give up the child. . . . The OIC is also reminded that any investigation of child-buying should focus on concrete evidence of the alleged child-buying or an admission of guilt. ^{a41}

Was the decision of the appeal unit correct? It is undoubtedly true that the record did not meet the standard of "direct evidence" and that the OIC seriously damaged his own case. The decision states that the OIC must provide concrete or direct evidence that Ms. Y was working for the agency, and thus the petitioner, and that the payment the mother received was a payment for the child or an inducement to relinquish the child. This requirement raises serious questions: What evidence would suffice to support the allegation? What would prove that Ms. Y worked for the adoption facilitator? Short of a confession that they did indeed work together or, in its absence, an employment contract or record of financial transactions -- both very unlikely to be available in this situation -- is there anything that would provide concrete evidence of a link between the two entities?

What would prove that the money received by the child's mother was a payment for the child or an inducement to relinquish the child? In the absence of a confession by the mother that she had never intended to place her child for adoption before she was offered payment or that the money was not meant to cover expenses, is there any other type of evidence that could be used to prove this?

The record contains the fact that the facilitator openly stated that they often offered birth mothers money after an adoption, and the birth mother stated that she received approximately \$ 500 in United States currency from Ms. Y. While the statute provides for the "reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings," there is nothing in the record that indicates that the money received by the mother was for such expenses. It should be noted that adoptive parents generally pay fees that cover administrative, court, legal and translation expenses, and the only medical service generally related to the adoption proceedings is the medical exam required by the United States Embassy.

In addition, the World Bank reported that in 2001 the annual per capita income in Vietnam was \$ 410, which means that the mother received approximately 125% of the annual per capita income. By contrast, in the United States, the per capita income for 2001 was \$ 34,870, which means that a United States birth mother receiving an equivalent payment for expenses would be allotted \$ 43,587. Yet this type of evidence was not deemed sufficient to prove that the mother was paid for the child or received an inducement to relinquish her child.

Short of a confession, it is hard to fathom what kind of direct evidence the OIC could possibly unearth to support the charge of child buying. Indeed, under this interpretation of the regulation, it would seem that anyone could traffic in children

with impunity provided that: (1) they hired a "runner" or other non-employee to deliver the cash or contact the birth mothers; and (2) the birth mother stated that she intended to place the child irrespective of the payment she received -- a statement that a mother can easily be coached to make.

This troubling case highlights the extreme difficulty in producing direct evidence to prove child buying. In the Cambodia cases, it was verbally stated that the task force was instructed to deny only those cases that could be sustained on appeal. Given the record in previous cases, officers are therefore forced to use an interpretation of inducement that concludes that if a parent offers the child to an orphanage prior to receiving money, the consent was not induced. This interpretation, however, fails to take into consideration the reality that if a specific orphanage or facilitator is known by all to give money after a child is placed, that in itself can serve as an inducement. The results of the criminal investigation in Cambodia prove that this concern is a valid one.

The Criminal Investigation

In March 2002, two special agents with the Immigration and Naturalization Service traveled to Cambodia to investigate allegations of baby trafficking. In a search warrant executed on October 16, 2002, Special Agent Richard Cross details allegations against adoption facilitator Lauryn Galindo and her sister Lynn Devin, the owner of a United States adoption agency, and their associates. The search warrant details several incidents in which adoptive families were directed by Ms. Galindo and her associates to give cash to the birth parents of the newly adopted child. One such incident was captured on videotape. In documents later filed with the United States Embassy under penalty of perjury, the children were declared abandoned with no known parents. The warrant also documents bribes paid to officials to process cases or to falsify paperwork. In November 2003, Ms. Galindo and Ms. Devin were charged with conspiracy to commit visa fraud, conspiracy to launder money, and structuring. Both Ms. Galindo and Ms. Devin pled guilty. Ms. Galindo was sentenced in November 2004, and Ms. Devin was sentenced in January 2005.

Information released by United States Immigration and Customs Enforcement in November 2004 detailed findings of the investigation. ⁴² The information reads, in part:

Operation Broken Hearts was a landmark investigation into allegations of child trafficking by a criminal enterprise. The conspiracy involved alien smuggling, visa fraud, wire fraud, mail fraud, tax fraud, money laundering and violations of the Foreign Corrupt Practices Act. From January 1997 to December 2001, the conspirators operated a scheme to defraud U.S. Citizens who adopted some 700 children from Cambodia. They received approximately \$ 8 million dollars from adoptive parents in the United States, and then used the profits to live lavish lifestyles in Seattle, Hawaii and Cambodia.

....

How Did This Child Trafficking Enterprise Operate?

The enterprise operated through a series of deceptive and fraudulent schemes, among them:

Baby Recruiters -- A baby recruiter would approach a birth family in their local village concerning their willingness to sell their child. Once the recruiter located a potential child, they would notify a baby buyer in Phnom Penh. The "buyer" would pay the "recruiter" a \$ 50 commission for each child he or she located in a village. The recruiters were also known as "freelance locators" and "helpers."

Baby Buyers -- The baby buyers in this enterprise were orphanage directors and taxicab drivers. The "buyers" used several means to obtain children from their birth families. Some birth families were told they could have their child back at any time.

- . A reputable nongovernmental organization will provide food and medical care to your child in Cambodia.
- . Your child will be able to attend a school in Cambodia.
- . You can regularly visit your child at the orphanage in Cambodia.
- . You can have your child back at any time.

OR

- . A rich family will raise your child in the United States. They will send you money and photos of the child for the rest

of your life.

. When your child becomes an adult, he can petition for you to immigrate to the United States.

. I will give you money and rice for your child now. [Note -- The payments ranged from \$ 20 to \$ 200 and a fifty-kilogram bag of rice. These payments were also known as "nurse care."]

....

False Documents -- After the children were purchased and stored, the next step in the conspiracy was to create a false paper trail. The children's true identities were erased. They were given new names and histories. This information was placed on birth certificates and adoption related documents. These documents were then used to obtain legitimate Cambodian passports.⁴³

Even though this United States Immigration and Customs Enforcement document clearly indicates that this was a "child trafficking enterprise," no charges of child trafficking were brought against the involved parties. Under United States law, child trafficking for the purpose of adoption is not illegal. The Victims of Trafficking and Violence Protection Act of 2000 makes it a crime to traffic in children for sexual exploitation and labor only.⁴⁴

It is further noted that even in the cases where adoptive parents admittedly gave money to birth parents, these actions were done after the children had been placed in the orphanage,⁴⁵ which makes it very possible that the cases could not have been denied under the current regulation on child buying. Even if they could have been denied, the only ramification is that the victim (the child) is punished by not being issued a visa. The perpetrator could not be charged with trafficking.

In the Immigration and Customs Enforcement investigation, charges were brought for visa fraud and money laundering, with some noting that these crimes are easier to prosecute. The absence of a law on child trafficking and adoption, however, provides the avenue for some to argue that the only crimes committed were minor paperwork irregularities. These arguments do nothing to further the dialogue on preventing children trafficking.

The documentation fraud in the Cambodia cases served to erase the identities of the adopted children. Investigators found that children had complete birth families, making their approval as "orphans" impossible.⁴⁶ Thus, while some may argue that documentation fraud is endemic in countries such as Cambodia, the evidence shows that even when identifying information was available on the children it was erased to procure visas for the children. The erasure of identity also served to make it nearly impossible to trace the origins of the child and to investigate trafficking concerns. Investigators noted that of the hundreds of adoptions processed, only a small number were traceable. In light of these actions, the "minor paperwork irregularities" take on a more sinister implication.

The end result of the Cambodian adoption situation is that hundreds of United States families had their cases subjected to investigation and approved, while criminal investigations revealed substantial abuses that lead one to believe that many of the children may have been separated from their birth families through fraud, coercion, or purchase. Ultimately, the effect of the fraudulent adoptions on these families and children will be lifelong.

Increased Protection Needed

In order for adopted children and their families, both birth and adoptive, to be protected the United States needs to implement appropriate child protection laws regarding adoption.

The United States is party to two international treaties dealing with intercountry adoption: The Optional Protocol ("Optional Protocol") to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;⁴⁷ and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).⁴⁸

The Optional Protocol states, "Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."⁴⁹ Article 3 specifically requires states to have laws on the sale of children. The Article provides:

Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal

or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

- (a) In the context of sale of children as defined in article 2:
 - (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:
 - a. Sexual exploitation of the child;
 - b. Transfer of organs of the child for profit;
 - c. Engagement of the child in forced labour;
 - (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;
- (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;
- (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.⁵⁰

Although some individual states in the United States have laws on the purchase or sale of children, these are by no means uniform. They are also difficult to use when prosecuting crimes that happen outside the United States. The lack of a federal law on the sale or purchase of children creates a dangerous gap in child protection and arguably places the United States in a position of non-compliance with the requirements of the Optional Protocol. The Hague Convention requires that state parties "shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention."⁵¹ One of the main objectives of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of children and with respect for his or her fundamental rights as recognized in international law" and "to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children."⁵²

The United States has not yet ratified the Hague Convention, although it was signed in 1994 and received Senate ratification in 2000. Since the Senate's ratification, the Department of State has been drafting regulations to implement the Convention. A proposed set of regulations was released for public comment on September 15, 2003. The proposed regulations contained this section on child buying:

§ 96.36 Prohibition on child buying.

- (a) The agency or person prohibits its employees and agents from giving money or other consideration, directly or indirectly, to a child's parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child. If permitted or required by the child's country of origin, an agency or person may remit reasonable payments for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally. Permitted or required contributions shall not be remitted as payment for the child or as an inducement to release the child.
- (b) The agency or person has written policies and procedures in place reflecting the prohibitions in paragraph (a) of this section and reinforces them in its employee training programs.⁵³

The language from the proposed regulations closely mirrors the current administrative clause that has proven so ineffective in trying to prove that child-buying has occurred. The proposed regulations did not contain any additional regulatory language that would broaden the definition of "inducement" or that would lower the standard of evidence from needing "concrete evidence or an admission of guilt."

On the other hand, the categories of allowable expenses have been substantially broadened from those currently contained in Immigration regulations. The proposed language would allow for the payment of pre-birth expenses for the birth parents, for example, and yet the proposed regulations do not delineate any method of review that would ensure that such expenses were not used to induce the mother to place her child.

Many have argued that the payment of prenatal and adoption expenses for birth parents overseas should be allowed because such expenses are allowed in United States adoptions. However, there are serious concerns about some practices regarding the payments of expenses in the United States, too, which some believe serve as a subtle form of coercion that persuades parents to follow through with an adoption plan when they may not otherwise do so. Given the difficulties in enforcing safeguards in other countries, protections may need to differ from those in the United States if they are to provide the same level of protection that is given to United States birth parents. Section § S 96.36 contains none of the safeguards or requirements normally used in domestic adoption to regulate the payment of expenses. Without such safeguards, the proposed Hague regulations may actually lead to an increase in child trafficking activity.

It is imperative that the United States implement a law that makes child trafficking for the purpose of adoption illegal, and modify the current regulations to allow petitions to be denied if probable cause is found to suspect child buying. Without such changes, there is nothing to prevent the tragedy that occurred in Cambodia from happening again.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionInvalid AdoptionsFamily LawAdoptionProceduresForeign AdoptionFamily LawAdoptionExpenses

FOOTNOTES:

n1 On March 1, 2003, the Immigration and Naturalization Service was incorporated into the Department of Homeland Security. For the sake of simplicity, the former INS, now USCIS, will be referred to simply as "INS," the "Service," or the "Immigration Service."

n2 See Press Release, U.S. Dep't of Justice, Immigrations and Naturalization Services, INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases (Dec. 21, 2001) available at <http://uscis.gov/graphics/publicaffairs/newsrels/cambadopt.htm>.

n3 8 U.S.C. § 1101(b)(1)(F) (2004). See also 8 C.F.R. § 203.3(a)(2) (2005).

n4 Foreign Affairs Manual, 9 FAM 42.21 N13.4-3 Orphan Investigation Procedures (TL-VISA-372; 03-18-2002), provides:

a. Orphan investigation procedures vary from post to post, since the best means of collecting necessary information regarding the child's status and history often depend on local conditions. Most Form I-604, Request For and Report On Overseas Adoption Investigations are conducted at the time of the visa interview and are based on document review. An investigation can also include interviews with the child (if of sufficient age), social workers, orphanage representatives, the prospective adopting parents, or biological parent(s), if available. When fraud is detected or indicated, a full field investigation may be warranted. A fraud investigation should be conducted as expeditiously as possible.

Id.

n5 9 FAM 42.21 N13.4-4 (TL-VISA-562; 08-01-2003) provides:

When the Form I-600, Petition to Classify Orphan as an Immediate Relative, is filed at an abroad post, the Form I-604, Request For and Report On Overseas Adoption Orphan Investigation, must be completed before the petition can be adjudicated. In this situation, the Form I-604 investigation plays an essential role in determining if the child qualifies under INA 101(b)(1)(F) and thus if the petition is "clearly approvable." Documents required for completion of the Form I-604 investigation will vary because local conditions differ. [See guidelines in 9 FAM 42.21 N13.3-6 and 9 FAM 42.21 N13.3-10.] If the Form I-604 investigation either is inconclusive or indicates the child does not qualify for status, the

Form I-600 petition should be referred along with the completed report to the appropriate DHS office abroad for adjudication.

9 FAM 42.21 N13.4-4 (TL:VISA-562; 08-01-2003).

n6 A Congressional Hearing entitled "International Adoptions: Problems and Solutions" was held in the House International Relations Committee on May 22, 2002. The situation in Cambodia was discussed at length. Follow-up questions regarding accusations of preferential treatment at the Embassy were answered by Ambassador Mary Ryan and entered into the record. The answers reveal that visas continued to be approved and release letters were issued throughout the October-December 2001 period.

n7 Information and statistics on the Cambodian adoption crisis and the "special initiative" to clear pending cases can be accessed on the USCIS website at: <http://uscis.gov/graphics/services/retadopcam.htm>.

n8 8 C.F.R. § 204.3 (2005).

n9 U.S. Citizenship and Immigration Services Website, Decisions Issued in 2001, Ho Chi Min City Vietnam, November 30, 2001 at <http://www.immigration.gov/graphics/lawsregs/admindec3/f1/2001/NOV300101F1101.pdf>.

n10 IMMLS PSD FAM III 42.21 NT (2003). See U.S. Citizenship and Immigration Services Website, Foreign Affairs Manual, Regulations, Foreign Affairs Manual & Foreign Affairs Handbooks, Table of Contents, 42.21 Notes at <http://foia.state.gov/masterdocs/09FAM/0942021N.pdf>.

n11 See Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101 (b)(1)(F) of the Immigration and Nationality Act, I.N.S. Off. Admin. App., File No. 01F1101 (Sept. 18, 2001), available at <http://uscis.gov/graphics/lawsregs/admindec3/f1/2001/sep180101f1101.pdf>.

n12 *Id.* Names were removed to protect the identity of the child.

n13 *Id.* at 4.

n14 *Id.*

n15 Id.

n16 Id. at 12.

n17 See id. at 5.

n18 Id.

n19 Id.

n20 Id.

n21 Id.

n22 Id.

n23 Id. at 6.

n24 Id.

n25 Id.

n26 *Id.*

n27 *Id.*

n28 *Id.*

n29 *Id.*

n30 *Id.*

n31 *Id.* at 7.

n32 Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101 (b)(1)(F) of the Immigration and Nationality Act, I.N.S. Off. Admin. App., File No. 01F1101 (Sept. 18, 2001), available at <http://uscis.gov/graphics/lawsregs/admindec3/f1/2001/sep180101f1101.pdf>.

n33 *Id.* at 9.

n34 *Id.* at 10.

n35 *Id.*

n36 *Id.* at 10-11 (*emphasis added*).

n37 *Id.* at 11 (quoting BLACK'S LAW DICTIONARY 779 (7th ed. 1999)).

n38 *Id.*

n39 *Id.*

n40 *Id.*

n41 *Id.*

n42 See U.S. Immigration & Customs Enforcement, Backgrounder: Operation Broken Hearts (Nov. 19, 2004), at <http://www.ethicanet.org/galindobackgr.pdf>.

n43 *Id.* (emphasis in original).

n44 See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

n45 See U.S. Immigration & Customs Enforcement, Backgrounder: Operation Broken Hearts (Nov. 19, 2004), at <http://www.ethicanet.org/galindobackgr.pdf>.

n46 See *id.*

n47 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 832, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (2002), available at <http://www.ohchr.org/english/law/crc-sale.htm>. The United States has not ratified the Convention on the Rights of the Child, but it has become party to the Optional Protocol on the Sale of Children.

n48 See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, available at <http://www.hcch.net>.

n49 See G.A. Res. 832, U.N. GAOR, 54th Sess., Supp. No. 49, art. 2, U.N. Doc. A/54/49 (2002).

n50 Optional Protocol, *supra* note 47, at Art. 3 (emphasis added).

n51 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 48, at Art. 8.

n52 See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, available at <http://www.hcch.net>.

n53 Prohibition on Child Buying, 68 Fed. Reg. 54,064, 54,101 (Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

<http://w3.nexis.com/new/delivery/PrintDoc.do?fileSize=69263&jobHandle=1841%3A12...> 09/25/2006

MR. WHITFIELD. This hearing is adjourned and thank you all again.
[Whereupon, at 5:15 p.m., the subcommittee was adjourned.]

