

Proposed Revenue Procedure Regarding Finality of Adoptions

Notice 2003-15

This notice provides a proposed revenue procedure that would establish certain safe harbors for determining the finality of the adoption of a foreign-born child for purposes of the adoption credit and the exclusion for employer-provided assistance for qualified adoption expenses.

The proposed revenue procedure applies to qualified adoption expenses paid or incurred in connection with the adoption of a foreign-born child who has received an “immediate relative” (IR) visa from the Department of State. The Department of State issues an IR visa only to a foreign-born child who enters the United States pursuant to a decree of adoption or guardianship granted by a court or other governmental agency (“competent authority”) with jurisdiction over child welfare matters in a foreign-sending country. Thus, the proposed revenue procedure does not apply to the adoption of a child who is a citizen or resident of the United States at the time the adoption proceedings commence.

The proposed revenue procedure provides that a taxpayer may treat an adoption of a foreign-born child who receives an IR-3 visa as final for federal income tax purposes in the taxable year in which the competent authority enters a decree of adoption. The adoption of a foreign-born child who receives an IR-4 visa and enters the United States under a guardianship or legal custody arrangement may be treated as final for federal income tax purposes in the taxable year in which a court of the home state enters a decree of adoption. A taxpayer who adopts a foreign-born child who receives an IR-2 visa, or who receives an IR-4 visa and enters the United States under a decree of simple adoption, may treat the adoption as final for federal income tax purposes in the taxable year in which a home state court enters a decree of re-adoption or the home state otherwise recognizes the adoption decree of the foreign-sending country.

The Service requests general comments on the proposed revenue procedure. The

Service also requests specific comments on the following matters:

(1) Whether other specified events (such as the date on which a foreign-born child obtains United States citizenship) should be treated as safe harbors, either in addition to or in lieu of events provided in the proposed revenue procedure;

(2) Whether the term “enters a decree of adoption” is sufficiently precise (in light of variations in the laws of foreign countries and of states within the United States, and of the possibility that a decree of adoption might be appealed or otherwise contested) to establish a reliable date for determining the finality of an adoption, and if not, what term is more precise; and

(3) Whether the phrase “the taxable year in which a home state court enters a decree of re-adoption or the home state otherwise recognizes the adoption decree of the foreign-sending country” is sufficiently broad to encompass the manner in which various states acknowledge the existence of a parent-child relationship and, if not, what phrase is more encompassing.

Comments should be submitted by June 2, 2003, either to:

Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
Attn: CC:PA:T:CRU (ITA)
Room 5529

or electronically at: *Notice.Comments@irs.counsel.treas.gov* (the Service’s comments e-mail address). All comments are available for public inspection and copying.

Although the revenue procedure is in proposed form, the Internal Revenue Service will not challenge the finality of adoptions by taxpayers who apply the proposed revenue procedure in any taxable years for which the period of limitation under § 6511 of the Internal Revenue Code has not expired on February 11, 2003.

Rev. Proc. 2003—

SECTION 1. PURPOSE

This revenue procedure provides certain safe harbors for establishing the finality of the adoption of a foreign-born child for federal income tax purposes.

SECTION 2. BACKGROUND

.01 Section 23 of the Internal Revenue Code allows a credit for qualified adoption expenses paid or incurred by an individual in connection with the adoption of an eligible child. Section 137 allows an exclusion from an employee’s gross income for qualified adoption expenses paid or incurred by the employer under an adoption assistance program. See Notice 97-9, 1997-1 C.B. 365, for general guidance concerning the credit under § 23 and the exclusion under § 137.

.02 Section 23(d)(2) provides that an eligible child includes any individual who has not attained age 18, or who is physically or mentally incapable of caring for himself. However, under § 23(d)(1)(C), no credit or exclusion is allowed for the adoption of a stepchild.

.03 Section 23(a)(2) provides the general rule that, for qualified adoption expenses paid or incurred in a taxable year before the adoption is final, the credit is allowed in the next taxable year after the taxable year in which the qualified adoption expenses are paid or incurred. For qualified adoption expenses paid or incurred during or after the taxable year in which the adoption is final, the credit is allowed in the taxable year in which the qualified adoption expenses are paid or incurred.

.04 Section 23(e) provides, in the case of an adoption of an otherwise eligible child who is not a citizen or resident of the United States at the time the adoption commences (“foreign adoption”), that: (1) the credit is allowed only if the adoption becomes final, and (2) qualified adoption expenses paid or incurred in any taxable year before the taxable year in which the adoption becomes final are treated as paid or incurred in the taxable year in which the adoption becomes final. Similar rules apply for purposes of the exclusion under § 137 for employer-provided adoption assistance.

.05 Therefore, for a foreign adoption, qualified adoption expenses paid or incurred before the taxable year in which the adoption becomes final, or during the taxable year in which the adoption becomes final, are allowed as a credit under § 23 in the taxable year in which the adoption becomes final. Similarly, the exclusion under § 137 for amounts furnished by an emp-

loyer before or during the taxable year in which a foreign adoption becomes final is allowed for the taxable year in which the adoption becomes final.

SECTION 3. SCOPE

This revenue procedure applies to taxpayers who claim the adoption credit or exclusion for qualified adoption expenses related to a foreign-born child. This revenue procedure does not apply to taxpayers who adopt or attempt to adopt an eligible child who is a United States citizen or resident at the time the adoption procedure commences.

SECTION 4. DEFINITIONS

.01 *Foreign-born child.* An individual who is not a citizen or resident of the United States at the time the adoption commences but who is otherwise an eligible child within the meaning of § 23(d)(2).

.02 *Orphan.* A foreign-born child under the age of 16 at the time an immigration petition is filed on the child's behalf who has suffered 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 foreign-born child for emigration and adoption.

.03 *Foreign-sending country.* The country of citizenship of a foreign-born child, or if the foreign-born child is not permanently residing in the country of citizenship, the country of the child's habitual residence before adoption.

.04 *Competent authority.* A court or governmental agency of the foreign-sending country with jurisdiction and authority to make decisions in matters of child welfare, including adoption (as provided in 8 C.F.R. § 204.3 (2001)).

.05 *Home state.* The state (including the District of Columbia and possessions) in which the adopted child and adoptive parents make their habitual residence in the United States.

.06 *Full and final adoption.* An adoption of an orphan in which the competent

authority of the foreign-sending country enters a decree of adoption establishing a parent-child relationship and both adoptive parents (in adoptions by two parents) or the sole adoptive parent (in adoptions by one parent) see the orphan before or during the adoption proceeding.

.07 *Simple adoption.* An adoption of a foreign-born child in which the competent authority of the foreign-sending country enters a decree of adoption establishing a parent-child relationship under the laws of that foreign-sending country, but in which either (1) one or both of the adoptive parents do not see the foreign-born child before or during the adoption proceeding (in the case of an orphan receiving an IR-4 visa), or (2) the foreign-born child receives an IR-2 visa.

.08 *Re-adoption.* An adoption or other recognition proceeding under home state law occurring subsequent to the entry of a foreign-born child into the United States on an IR-4 or IR-2 visa.

.09 *IR-2 visa.* A visa issued to a foreign-born child adopted while under the age of 16 years who has been in the legal custody of, and has resided with, the adoptive parent or parents for at least 2 years.

.10 *IR-3 visa.* A visa issued to an orphan after a full and final adoption of the orphan has occurred in the foreign-sending country. An IR-3 visa is issued if: (1) the competent authority of the foreign-sending country severs the parental rights of the biological or any previous adoptive parents and establishes a parent-child relationship between the orphan and the adoptive parent or parents, and (2) both adoptive parents (in adoptions by two parents) or the sole adoptive parent (in adoptions by one parent) see the orphan before or during the adoption proceeding.

.11 *IR-4 visa.* An IR-4 visa issued to an orphan if: (1) the competent authority of the foreign-sending country grants legal guardianship or custody either to the prospective adoptive parent or parents or to an individual or agency acting on behalf of the prospective adoptive parent or parents, or (2) a simple adoption occurs in the foreign-sending country.

SECTION 5. APPLICATION

.01 *IR-3 visa.* If a taxpayer adopts an orphan in a full and final adoption and the orphan receives an IR-3 visa, the taxpayer may treat the adoption as final for federal income tax purposes in the taxable year in which the competent authority enters the decree of adoption.

.02 *IR-4 visa.* A taxpayer who adopts an orphan who receives an IR-4 visa and enters the United States under a guardianship or legal custody arrangement may treat the adoption as final for federal income tax purposes in the taxable year in which a home state court enters a decree of adoption. A taxpayer who adopts an orphan who receives an IR-4 visa and enters the United States under a decree of simple adoption may treat the adoption as final for federal income tax purposes in the taxable year in which a home state court enters a decree of re-adoption or the home state otherwise recognizes the adoption decree of the foreign-sending country.

.03 *IR-2 visa.* A taxpayer who adopts a foreign-born child who receives an IR-2 visa may treat the adoption as final for federal income tax purposes in the taxable year in which a home state court enters a decree of re-adoption or the home state otherwise recognizes the adoption decree of the foreign-sending country.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for expenses paid or incurred after [date of publication of final revenue procedure]. However, the Service will not challenge the finality of adoptions by taxpayers who apply this revenue procedure in any taxable year for which the period of limitation under § 6511 has not expired.

DRAFTING INFORMATION

The principal author of this notice is Marilyn E. Brookens of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Ms. Brookens at (202) 622-4920 (not a toll-free call).