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FILE:

Office: NEW ORLEANS

Date:

NOV 21 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Petition to Classify Orphan as an Immediate Relative was denied by the District Director, New Orleans. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Petition to Classify Orphan as an Immediate Relative (I-600 Petition) on February 10, 2006. The district director concluded that the beneficiary, [REDACTED] did not meet the requirements of the definition of "orphan" under section 101(b)(1)(F) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101(b)(1)(F). The petition was denied accordingly.

The decision of the district director noted that based on the definition of "orphan" under the Act, the beneficiary was not considered an orphan because her parents had not died or disappeared, had not abandoned or deserted her, and she had not been lost or separated from them, as these terms are defined in Title 8 of the U.S. Code of Federal Regulations (8 C.F.R.). *District Director Decision*, July 18, 2006.

On appeal, the petitioner submits a brief summarizing the facts of the case to refute the district director's conclusions that the beneficiary was not abandoned by or separated from her parents. *Appellant's Brief*, dated August 12, 2006 (attachment to petitioner's Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B) submitted August 18, 2006). The petitioner contends that the beneficiary was abandoned by her biological parents when they voluntarily gave custody of her to her maternal grandmother at a time when they were involved in drugs and neglecting their children; that their vices took them away from their children, physically, emotionally and morally, and that "[a]bandonment was readily apparent from the physical separation of the children from their parents, inability to provide proper care and support, as well as the actual surrender of parental control to the grandmother early on in their lives." *Id.* The petitioner further states that the beneficiary was separated from her parents because they are both incarcerated for life without any possibility of parole, and cites to the Revised Penal Code of the Philippines to support a conclusion that the law of the Philippines terminates parental authority of felons who receive a maximum jail sentence. *Id.* The petitioner finally points out, citing to section 204(d)(2) of the Act, that in compliance with the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Convention), all of the documentary requirements for adoption have been met and the adoption has been approved by the central authority of the Philippines, the Intercountry Adoption Board (ICAB). *Id.*

The AAO emphasizes that the issue on appeal is not whether the beneficiary has been adopted according to the law of the Philippines, but whether the beneficiary meets the definition of an "orphan" for purposes of classification as an immediate relative under U.S. law.

Section 101(b)(1)(F)(i) of the Act, defines "orphan" in pertinent part as:

[A] child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), **who 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; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States

citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence (emphasis added).

“Abandonment by both parents” and “Separation from both parents” are defined terms in the regulations. 8 CFR 204.3(b) states in pertinent part:

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. **A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment.** Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned (emphasis added).

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

This decision addresses the three issues raised by the petitioner that are relevant to a determination of whether the beneficiary is an “orphan” under the Act: (1) compliance with the Hague Convention; (2) “abandonment” of the beneficiary by her biological parents; and (3) the beneficiary’s “separation from” her biological parents.

1. The Hague Convention

The petitioner cites to section 204(d)(2) of the Act, and submits a copy of a document entitled “Placement Authority” that was issued by the Intercountry Adoption Board of the Philippines, in support of the assertion that, as required under that section, an appropriate adoption or custody certificate has been issued that is conclusive evidence of the relationship between the adoptee and the adoptive parents. The AAO notes that an amendment of this section by the Intercountry Adoption Act of 2000 is to take effect upon entry into force, for the United States, of the Hague Convention, but it has not yet been carried out in the text of section 204(d). The text of section 204(d)(1) of the Act as amended refers to the approval of petitions on behalf of a child, including orphan petitions, and the requirement for a valid home-study favorably recommended by the

appropriate adoption agency. Section 204(d)(2) of the Act refers to petitions for adopted children as defined in section 101(b)(1)(G) of the Act.

Section 101(b)(1)(G) of the Act, with delayed effective date, provides in pertinent part that the term "child" means an unmarried person under twenty-one years of age who is –

[A] child, under the age of sixteen at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 201(b), who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States, by a United States citizen and spouse jointly, or by an unmarried United States citizen at least 25 years of age —

(i) if—

(I) the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States;

(II) the child's natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child's emigration and adoption;

(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;

(IV) the Attorney General is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated (and in carrying out both obligations under this subclause the Attorney General may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents); and

(V) in the case of a child who has not been adopted –

(aa) the competent authority of the foreign state has approved the child's emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents; and

(bb) the prospective adoptive parent or parents has or have complied with any pre-adoption requirements of the child's proposed residence.

The AAO finds that the definition set forth in section 101(b)(1)(G) of the Act does not apply to the present matter. The AAO notes that section 101(b)(1)(G) of the Act does not change or replace the definition of "orphan" contained in section 101(b)(1)(F) of the Act. Rather, the provision provides an alternative definition of "child" for Title I and II immigrant and non-immigrant based visa petitions. The AAO notes further that section 101(b)(1)(G) of the Act has a delayed effective date, and that the provision will not become effective until both the Department of Homeland Security and the Department of State publish implementing

regulations in the *Federal Register*. See U.S. Citizenship and Immigration Services "Information Sheet Regarding the Intercountry Adoption Act of 2000," at <http://uscis.gov>.

2. Abandonment

There is no evidence of "abandonment" by both parents as defined in the regulations outlined above. In fact, the evidence reflects an intention by both parents to **transfer their rights over their child to the petitioner**, which is expressly prohibited under the definition. Evidence in the record includes the following:

A Child Study Report noting that the Philippines ICAB had requested an eligibility assessment of the beneficiary, "who is being petitioned for adoption by her uncle and aunt, Mr. and Mrs. Feewee Bondad [the petitioner] of USA," and noting that in 2003 the prospective adoptive mother visited the birth mother at the Correctional Institute for Women and offered to adopt her child. Later, seeing no possibility for release, the beneficiary's birth mother, "gave up the minor for adoption. Since then, the prospective adoptive parents send financial support." *Child Study Report*, prepared by the Adoption Resource and Referral Unit of the Philippines Department of Social Welfare and Development, September 19, 2005.

Sworn declarations by the mother and father of the beneficiary stating that (1) the mother's first cousin, the petitioner in this case, would like to adopt the beneficiary; (2) that the mother and father have no objection to the adoption and give their consent thereto; and (3) that they are giving "parental authority over the [beneficiary] in favor of [petitioner]." *Sworn Declaration by Ma. Lovinia Santero-Padilla*, January 23, 2006; *Sworn Declaration by Donaldo S. Padilla*, January 30, 2006.

Petitioner's statements in the Appellant's Brief, *supra*, including:

[The beneficiary] has long been abandoned by her parents when they voluntarily committed her custody to the maternal grandmother at a young age . . . Abandonment is readily apparent from the physical separation of the children from their parents . . . as well as the actual surrender of parental control to the grandmother.

By virtue of the filial relationship of the parties and the bond that they have developed over the years, the biological parents of the adoptee have deemed it wise to transfer the physical custody of [their child] to the [petitioners]. Consistent with the prevailing law in [the] majority of the States in the US, the Act recognizes and protects the right of a child's parent to select adoptive parents for the child and to transfer physical custody of the child directly to the prospective parents.

Authorization by the Philippines ICAB for Crossroads Adoption Services in Minneapolis, Minnesota to entrust the beneficiary to [redacted] (the petitioner and her husband), stating that "the transfer of the child to the prospective adoptive parents shall only be carried out" if certain Hague Convention requirements are met and that "the above agency shall be responsible for the care, health and social well-being of the child . . . from the date of placement until the issuance of a Decree of Full Adoption in favor of the above-mentioned adoptive parents. *ICAB Placement Authority*, June 1, 2006.

A Deed of Voluntary Commitment signed by the beneficiary's biological parents "voluntarily, irrevocably and unconditionally" committing the beneficiary to the care and custody of the Department of Social Welfare and Development (DSWD) and authorizing the DSWD to release the child for adoption or guardianship. *Deed of Voluntary Commitment*, March 6, 2006 (to take effect six months after the execution of the document).

The AAO finds that the evidence listed above supports the conclusion that the beneficiary has not been abandoned, but rather has been released by her parents for a specific adoption. As noted by the District Director, although the parents signed a Deed of Voluntary Commitment, *supra*, indicating a relinquishment of all parental rights, the record indicates that the document was signed in anticipation of the planned adoption by the petitioner in this case. The evidence shows that since 2005 or earlier, there has been a continuous intention by the beneficiary's biological parents to transfer parental rights over the beneficiary to the petitioner and her husband. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on the record and the unresolved inconsistencies, the District Director found that the applicant had not abandoned the beneficiary. Lacking sufficient evidence in the record to the contrary, the AAO agrees with this decision.

3. Separation

The petitioner states that the beneficiary has been separated from her parents, asserting that because both of the beneficiary's parents are incarcerated for life without any possibility of parole, their parental authority over the beneficiary is terminated, as is the case for all felons who receive a maximum jail sentence, pursuant to the Revised Penal Code of the Philippines. However, there is no evidence to support this assertion. Whether the government of the Philippines has, in accordance with the laws of the Philippines, terminated all parental rights and obligations of the beneficiary's biological parents, permanently and unconditionally, is not a question that is addressed by the evidence in this case. Moreover, if all parental rights were terminated by law, there could be no abandonment or other action taken by the biological parents that would relinquish such rights. In either case, there is no evidence to support any of the statements made by the petitioner regarding the convictions or sentences or imprisonment of the beneficiary's parents, and thus no evidence of separation as defined by 8 C.F.R. § 204.3(b). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Given the evidence in the record, the AAO finds that the beneficiary does not meet the definition of "orphan" as set forth in section 101(b)(1)(F) of the Act.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met his burden in the present matter. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.