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AUG 02 2007

FILE: [REDACTED] OFFICE: CLEVELAND (CINCINNATI), OH DATE:

IN RE: PETITIONER: [REDACTED]
BENEFICIARY: [REDACTED]

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 District Director, Dallas, Texas denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the petition will be denied.

The petitioner filed the Form I-600, Petition to Classify Orphan as an Immediate Relative (Form I-600 Petition) in September 1998. The petitioner is a fifty-four-year-old married citizen of the United States. The beneficiary was born in India on July 10, 1991. She turned sixteen on July 10, 2007.

The district director approved the Form I-600 petition on April 22, 2002. On August 2, 2005, a consular investigation conducted by the American Embassy in New Delhi, India revealed that the beneficiary's natural mother and father were alive. The consular investigation revealed that the beneficiary's natural father had specifically relinquished his parental rights in writing for the purpose of allowing the petitioner and the petitioner's wife (his sister) to adopt the beneficiary. The consular investigation revealed further that the beneficiary's natural mother had given written permission for the beneficiary to immigrate to the United States, but that she had not relinquished her parental rights over the beneficiary.

The regulation at 8 C.F.R. § 204.3(k)(1) states in pertinent part that:

An I-604 investigation must be completed in every orphan case. The investigation must be completed by a consular officer except when the petition is properly filed at a Service office overseas, in which case it must be completed by a Service officer. . . . In any instance where an I-604 investigation reveals negative information sufficient to sustain a denial or revocation, the investigation report, supporting documentation, and petition shall be forwarded to the appropriate Service office for action. . . .

The regulation at 8 C.F.R. § 204.3(h)(14) states in pertinent part that:

[T]he approval of . . . an orphan petition shall be revoked if the director becomes aware of information that would have resulted in denial had it been known at the time of adjudication. . . .

Based on the consular investigation information, the district director issued a Notice of Intent to Revoke the approval of the petitioner's Form I-600 petition, on the basis that the beneficiary did not meet the definition of an *orphan*, as set forth in section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F). In response, the petitioner submitted a copy of a Mirzapur, India, district court judgment reflecting that on August 8, 2005, he was appointed as the beneficiary's legal guardian, and reflecting that the beneficiary's natural parents and grandfather had agreed to the petitioner's appointment as guardian over the beneficiary.

The district director found that the petitioner's response failed to establish that the beneficiary met the definition of an *orphan* as defined in the Act. The Form I-600 petition was subsequently revoked on September 6, 2006, based on the determination that the beneficiary did not meet the definition of an *orphan* because her natural parents were both alive and had not legally *abandoned* the beneficiary as defined in 8 C.F.R. § 204.3(b).

On appeal, the petitioner indicates that the beneficiary meets the definition of an *orphan* because her natural father is mentally and physically incapable of caring for the beneficiary, and because her mother left the beneficiary with her father and no longer provides care to the beneficiary.

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 pre-adoption requirements, if any, of the child's proposed residence. (Emphasis added.)

The regulation provides in pertinent part at 8 CFR 204.3(b) that:

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.¹

Surviving parent means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be *incapable of providing proper care* as that term is defined in this section.

Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the *foreign sending country*.

¹ It is noted that the provisions of Public Law 104-51, which changed the definitions of "child," "parent," and "father" as used in Titles I and II of the Act, replaced the words "legitimate child" with the words "child born in wedlock," and replaced "illegitimate child" with the words "child born out of wedlock" in sections 101(b)(1)(A), 101(b)(1)(D), and 101(b)(2) of the Act. The regulatory definition of "sole parent" contained in 8 C.F.R. § 204.3 has not been amended to conform to these changes.

The AAO finds that the *sole* and *surviving parent* definitions contained in 8 C.F.R. § 204.3(b) are not applicable to the present matter. The cumulative evidence in the record reflects that neither of the beneficiary's natural parents is deceased. The evidence additionally reflects that the applicant is the legitimate child of her natural parents. An affidavit of birth signed contained in the record certifies that the beneficiary was born on July 10, 1991, to her father, [REDACTED] and a letter from the beneficiary's school, Shri Hanumat Balika Intermediate College, reflects that the beneficiary was born on July 10, 1991, to [REDACTED] and [REDACTED]. The record also contains a judgment from the Court of District Judge, Mirzapur, India indicating that the beneficiary is the legitimate child of [REDACTED] and [REDACTED].

The regulation provides further at 8 C.F.R. § 204.3(b) that:

Desertion by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

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. . . .

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

The AAO finds that the petitioner failed to establish that the beneficiary's natural parents *deserted* or *abandoned* the beneficiary, as defined in 8 C.F.R. § 204.3(b). The record contains:

An affidavit dated 12-10-98, and signed by the beneficiary's father, stating that he is physically and mentally incapable of taking care of the beneficiary, and that he irrevocably releases the beneficiary for adoption by the petitioner and the petitioner's wife, and for emigration to the United States.

An affidavit dated 7-6-03, and signed by the beneficiary's mother, requesting a U.S. visa and stating that she is sending the beneficiary with her aunt (the petitioner's wife), so the beneficiary can receive an education in the United States.

A medical letter dated 10-8-00, and signed by [REDACTED] stating that the beneficiary's father, [REDACTED] has suffered from serious mental problems for 4-5 years, and that he is physically and mentally unfit to take care of his children.

A Judgment from the Court of District Judge, Mirzapur dated 8-8-05, reflecting that the petitioner was appointed as the beneficiary's guardian. The Judgment states that the beneficiary's mother left the beneficiary and lives at her father's home, and that the beneficiary's father is physically and mentally unable to provide for the child. The Judgment indicates further that the beneficiary has lived at her paternal grandfather's home [REDACTED] but that [REDACTED] is elderly and no longer able to provide for the beneficiary. The Judgment notes that the petitioner's wife is the child of [REDACTED], and the Judgment states that [REDACTED] and the beneficiary's natural parents have each stated that they have no objection to the petitioner taking guardianship over the beneficiary.²

A review of the evidence in the record indicates that the beneficiary resided with her paternal grandfather, [REDACTED] at the time the judgment for guardianship was issued. The record contains no evidence, however, to establish that the beneficiary's natural parents at any time legally surrendered their parental rights, obligations and claims over the beneficiary to [REDACTED]. Furthermore, the petitioner failed to establish that [REDACTED] is a governmental agency, adoption agency, orphanage or individual authorized under Indian child welfare laws to have legal custody or control over an orphan. He thus does not qualify as a *competent authority* or authorized third party, as set forth in 8 C.F.R. § 204.3(b). The AAO finds further that the, no objection to guardianship, statements referred to in the Mirzapur district court judgment clearly reflect that the beneficiary's natural parents specifically intended to transfer their parental rights over the beneficiary to the petitioner and his wife, in violation of the requirements set forth in 8 C.F.R. § 204.3(b). Accordingly, the petitioner failed to establish that the beneficiary's natural parents *deserted* or *abandoned* the beneficiary.

In addition, the AAO notes that U.S. Department of State (DOS) adoption procedure guidance for India, found at <http://www.travel.state.gov> reflects in pertinent part that the documents required for an orphan petition include:

A Court Order. A) For Hindu petitioners, a court order granting them the permission to adopt the child. The order requires them to execute and register an adoption deed within 7 days of the order. The deed must be registered with the Office of Sub-registrar. (Usually a copy of the deed with proof of fees paid will suffice).

The present record does not contain evidence that an adoption deed was registered with a Sub-Registrar Office with fees paid. The petitioner thus also failed to establish that he met the legal standards for adopting a child in India, as required by section 101(b)(1)(i) of the Act.

² It is noted that although the Mirzapur district court judgment refers to written statements made by the beneficiary's parents and grandfather, indicating no objection to petitioner's guardianship over the child, the written statements are not contained in the present record of proceedings. For purposes of analysis in the present decision, however, the AAO will accept that the written statements exist.

In visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. In the present matter, the petitioner has failed to meet his burden of establishing that the beneficiary is an *orphan*, as set forth in section 101(b)(1)(F) of the Act. The appeal will therefore be dismissed, and the petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.