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FILE:

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SIM 09 155 10014

Office: NATIONAL BENEFITS CENTER

Date:

OCT 06 2009

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, National Benefits Center, denied the Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of an adoptee as an immediate relative pursuant to section 101(b)(1)(G) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(b)(1)(G). The director denied the petition on the basis of his determination that, because the petitioner had failed to establish that the beneficiary’s birthparents are incapable of providing proper care, the petitioner had failed to establish that the beneficiary is eligible for classification as an immediate relative under the Act.

Section 101(b)(1)(G) of the Act, 8 U.S.C. § 1101(b)(1)(G), states, in pertinent part, the following:

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, 1993,¹ 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—

* * *

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

The regulation at 8 C.F.R. § 204.301 states, in pertinent part, the following:

Birth parent means a “natural parent” as used in section 101(b)(1)(G) of the Act.

* * *

Incapable of providing proper care means that, in light of all the relevant circumstances including but not limited to economic or financial concerns, extreme poverty, medical, mental, or emotional difficulties, or long term-incarceration, the child’s two living birth parents are not able to provide for

¹ See *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (May 29, 1993). The United States signed the Hague Convention on March 31, 1994, and ratified it on December 12, 2007, with an effective date of April 1, 2008.

the child's basic needs, consistent with the local standards of the Convention country.

The petitioner, a citizen of the United States, filed Form I-800A, Application for Determination of Suitability to Adopt a Child from a Convention Country, on December 26, 2008. The Form I-800A was approved on February 11, 2009. The petitioner filed the instant Form I-800 on March 3, 2009.

The facts of this case are not in dispute. The sole motivation of the birthparents in conceiving the beneficiary was to place him for adoption with the petitioner and his wife. The petitioner and his wife had been experiencing infertility and, as such, the beneficiary's birthparents, who are the sister and brother-in-law of the petitioner's wife, conceived the beneficiary with the intent to place him for adoption with the petitioner and his wife. As the birthparents noted in their March 21, 2009 testimony, "[t]he reason for the second child was to put him up for adoption." On appeal, counsel notes that the beneficiary's birthparents "conceived the child only to allow for adoption by the petitioner and his wife."

In his April 17, 2009 denial, the director found that the petitioner had failed to establish that the beneficiary's birthparents are incapable of providing proper care. The director noted that although the petitioner submitted a letter from the beneficiary's birthfather stating that he and the birthmother cannot afford a second child, the petitioner and his wife informed the social worker who completed the homestudy that he and his wife had appointed the beneficiary's birthmother as legal guardian of the beneficiary in the event the petitioner and his wife become unable to care for the beneficiary. The petitioner's homestudy indicated further that the beneficiary's birthmother is healthy and financially stable.

On appeal, counsel contends that the petition should be approved. Counsel contends that the director erred in determining that the beneficiary's birthparents are not incapable of providing proper care to the beneficiary; that the financial situation of the beneficiary's birthparents has changed since the Form I-800 was filed; that the Hague Convention does not require that the birthparents be deceased or incapable of caring for the child; and that section 502 of the Intercountry Adoption Act of 2000 (IAA 2000)² provides for authority to waive the adoption requirements in the interest of justice, on a case-by-case basis.

Upon review of the entire record of proceeding, the AAO has determined that the director properly denied this petition. However, before addressing the substantive issues raised by the director in his denial and by counsel on appeal, the AAO wishes to place counsel, the petitioner, and the director on notice that it considers the factual circumstances presented in this case to fall outside those contemplated by the framers of the Hague Convention. As noted previously, it is undisputed that in this case the birthparents of the beneficiary conceived him for the sole purpose of placing him for adoption. Even if the petitioner were able to overcome the basis of the

² Intercountry Adoption Act, Pub. L. No. 106-279, 114 Stat. 825 (2000).

director's denial of this petition, approval of the petition would accord legitimacy to the practice of conceiving children for the sole purpose of placing them for adoption. The AAO will not open the door to the types of abuses that the Hague Convention was designed to prevent.

In support of this finding, the AAO looks to Articles 1 and 4 of the Hague Convention. Article 1 of the Hague Convention states that one of the objects of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law."³ The AAO finds that facilitating the practice of conceiving children for the sole purpose of placing them for adoption, which approval of this petition would accomplish, would frustrate the Hague Convention's objective of establishing safeguards to ensure that intercountry adoptions take place in the best interest of children. Article 4 of the Hague Convention states that an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin (India in this case) have ensured that the consent of the birthmother has been given only after the birth of the child.⁴ As noted previously, it is not in dispute that such is not the case here. Again, not only did the birthmother in this case consent to the adoption before the beneficiary was born; she and the birthfather conceived the beneficiary for the sole purpose of placing him for adoption with the petitioner and his wife.

For all of these reasons, the AAO finds that, even if the petitioner were to overcome the grounds of the director's denial of the petition, the factual circumstances presented in this case fall outside those contemplated by the framers of the Hague Convention.

The AAO turns next to the substantive matters raised by the director in his decision and by counsel on appeal.

As noted previously, the director denied the petition on this basis of his determination that the petitioner had failed to establish that the beneficiary's birthparents are incapable of providing proper care. As noted by the director, the petitioner and his wife stated in their homestudy, which was filed in support of their Form I-800A, that they had appointed the beneficiary's birthmother as guardian of the beneficiary in the event they were unable to care for him. The homestudy stated the following with regard to the beneficiary's birthmother:

She lives in India and is employed by SNK (The Galaxy [E]ducation System – TGES), as a school teacher. She is 31 years of age, healthy, financially stable[,] and willing to serve as the guardian if this should become necessary.

In a document entitled "Particulars of Biological Parents," the beneficiary's birthfather's occupation is listed as "pharmaceutical business," and the beneficiary's birthmother is listed as a teacher.

³ *Hague Convention*, Article 1, Section A.

⁴ *Id.* at Article 4, Section C, Part 4.

In their March 21, 2009 letter to U.S. Citizenship and Immigration Services (USCIS), the beneficiary's birthparents state that their household consists of five individuals: the birthparents, the couple's older son, and the birthfather's parents. They state that a second child "was not [i]n the cards" and that they will not be able to care for the beneficiary due to their financial situation.

In their March 24, 2009 letter to USCIS, which was not signed, the beneficiary's birthparents state that the birthfather is the sole proprietor of a business, and that the birthmother is a teacher. They state that the birthfather has recently started his own business, which requires him to spend fifty percent of his time traveling. They state that the birthmother is a temporary teacher, and that she "would require additional months of teaching to be permanent." They state that a second child (i.e., the beneficiary) would require the birthmother to give up her position and become a full-time caregiver, as they would not be able to afford childcare for two children, and that they would suffer a huge loss in income. They also state that private education is "the norm" in India, and that the costs for such education are "very exorbitant."

In his March 28, 2009 letter to USCIS, the beneficiary's birthfather repeats the assertions of the March 24, 2009 letter, and adds that "[w]e do not have the emotional, financial, or endurance/strength to upbringing another child in the family."

The director found these letters insufficient to establish that the beneficiary's birthparents are incapable of providing proper care to the beneficiary, and denied the petition on April 17, 2009. On appeal, the petitioner, through counsel, asserts that the beneficiary's birthparents are in fact incapable of providing proper care to the beneficiary.

In order to establish that the birthparents are incapable of providing proper care, the petitioner must demonstrate, pursuant to 8 C.F.R. § 204.301, that they are "not able to provide for the child's basic needs, consistent with the local standards of the Convention country." In attempting to meet this criterion, counsel submits another letter from the beneficiary's birthfather. In his May 11, 2009 letter, the birthfather states that his wife, the beneficiary's birthmother, is no longer working, as she "has not been able to retain her job" due to the pregnancy with the beneficiary and pregnancy complications. He states that ninety percent of the couple's remaining salary is committed to taxes and their mortgage, and that they are using credit cards and "other personal loans" to finance their basic necessities. He also testifies that he has recently started his own business, which has consumed all of his savings and requires him to spend fifty percent of his time traveling. He states that the birthmother's previous job at a private school would have afforded the family a ninety percent discount on their older son's schooling, a discount they will no longer receive. The birthfather states that "[i]f I were to take the responsibility of the [beneficiary], I would have to render the rest of the family homeless or starving." He states that he will not introduce the beneficiary back into the family and, if required will have the Indian judicial system determine the beneficiary's future. He states that if the petitioner is unable to bring the beneficiary to the United States, the birthparents "will be forced to think about alternatives," such as finding a foster home or other adoptive parents.

In her July 24, 2009 appellate brief, counsel states that although the director properly cited the definition of “incapable of proper care” provided at 8 C.F.R. § 204.301, the director “failed to recognize, however, that the natural parents who conceived this child for the purposes of an infamily adoption meet the definition.” In support of her contention, counsel cites to subsections (I), (II), (IV), and (V) of section 101(b)(1)(G)(i) of the Act, 8 U.S.C. § 1101(b)(1)(G)(i). However, subsection (III) cannot be ignored. As was noted previously, subsection (III) specifically requires that when a child has two living natural parents, that the natural parents be incapable of providing proper care for the child. The Act contains no exception to subsection (III) for cases involving children who were conceived for the sole purpose of being placed for adoption, regardless of whether the adoption is completed by relatives or not.

Counsel also points to the May 11, 2009 testimony of the beneficiary’s birthfather, which she states indicates that the family’s circumstances have changed. As a preliminary matter, the AAO notes that none of the testimony of record is backed by documentary evidence. There is no supporting evidence to document the testimony of the birthparents with regard to their incomes, their expenses, their jobs, the loss of the birthmother’s job, the birthfather’s business, the birthfather’s travels, the number of individuals in the household, the birthmother’s health or that private education is the norm in India. Nor has any evidence been submitted to document counsel’s claim that the parent-child relationship has been terminated.⁵

However, even if such testimony were accepted in the absence of supporting documentation, the record of proceeding would be insufficient to establish that the beneficiary’s birthparents are incapable of providing proper care. As noted at 8 C.F.R. § 204.301, in order to establish that the birthparents are incapable of providing proper care, the record must demonstrate that the birthparents are unable to provide for the child’s basic needs, consistent with local standards. First, the petitioner has submitted no evidence whatsoever regarding “local standards” in India. Nor do the concerns of the birthparents set forth in their testimony, particularly their concerns over private school tuition, their mortgage, and business travel, relate to the beneficiary’s “basic needs.” The record fails to establish that they would be unable to provide for such “basic needs” as food and shelter.

The testimony from the birthfather regarding what he *may* be forced to consider, such as foster care, if the petition is denied cannot be afforded any weight. A visa petition may not be

⁵ Counsel states in her appellate brief that section 402 of the IAA “provides that documents originating in other Convention countries related to a Convention adoption shall require no authentication in order to be admissible.” While counsel’s citation is correct, the admission of such documents into the record does not mandate that USCIS consider such documents sufficient to satisfy the petitioner’s burden of proof. Here, USCIS has admitted the testimony of the beneficiary’s birthparents into the record. However, as noted, such testimony is unsupported by any documentary evidence, and such testimony is, alone, insufficient to establish that the birthparents are incapable of providing proper care to the beneficiary.

approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Nor does the AAO find counsel's assertion on appeal that the "Hague Adoption Convention does not require the parents of origin to be deceased or incapable of caring for the child." Section 101(b)(1)(G) of the Act, 8 U.S.C. § 1101(b)(1)(G), which governs this case, and was set forth previously, contains that requirement.

For all of these reasons, the AAO agrees with the director's determination that the petitioner has failed to establish that the beneficiary's birthparents are incapable of providing proper care to the beneficiary.

On appeal, counsel also raises section 502 of the IAA. According to counsel, this section "provides authority to waive Hague Convention requirements in the interest of justice, on a case-by-case basis." Counsel's citation, however, is misplaced.

Section 502 of IAA 2000 states the following:

SPECIAL RULES FOR CERTAIN CASES.

- (a) **AUTHORITY TO ESTABLISH ALTERNATIVE PROCEDURES FOR ADOPTION OF CHILDREN BY RELATIVES.**—To the extent consistent with the Convention, the Secretary may establish by regulation alternative procedures for the adoption of children by individuals related to them by blood, marriage, or adoption, in cases subject to the Convention.
- (b) **WAIVER AUTHORITY.**—
 - (1) **IN GENERAL.**— Notwithstanding any other provision of this Act, to the extent consistent with the Convention, the Secretary may, on a case-by-case basis, waive applicable requirements of this Act or regulations issued under this Act, in the interests of justice or to prevent grave physical harm to the child.
 - (2) **NONDELEGATION.**—The authority provided by paragraph (1) may not be delegated.

Counsel notes that subsection (a) of section 502 of IAA 2000 grants the Secretary of State authority to establish, by regulation, alternative procedures for the adoption of children by family members. Counsel is correct. Counsel, however, has failed to establish that the Secretary of State has exercised such authority to establish such alternative regulations. Counsel has cited to no such regulation established by the Secretary of State that would be applicable to this case.

With regard to subsection (b) of section 502 of IAA 2000, counsel notes that this subsection permits the Secretary of State discretionary authority, on a case-by-case basis, to waive applicable requirements of IAA 2000 or any regulations issued under IAA 2000 in the interests of justice or to prevent grave physical harm to the child. Counsel is again correct. However, counsel's request that the Secretary of State waive applicable requirements of IAA 2000 is improperly before USCIS.⁶ As section 502(b)(2) specifically states that the Secretary of State may not delegate the authority granted to her by subsection (b), counsel's request must be made directly to the Secretary of State.

For all of these reasons, the AAO finds counsel's citations to section 502 of IAA 2000 unpersuasive.

In accordance with the discussion above, the AAO finds that the petitioner has failed to overcome the grounds of the director's denial of the petition. As the petitioner has failed to establish that the beneficiary's birthparents are incapable of providing proper care, the petitioner had failed to establish that the beneficiary is eligible for classification as an immediate relative under the Act.

Beyond the decision of the director, the AAO finds that the petition may not be approved for three additional reasons.

Beyond the decision of the director, the AAO finds that the record of proceeding lacks the freely-given, written, irrevocable consent to the termination of their legal relationship with the beneficiary of the birth parents, as required by section 101(b)(1)(G)(i)(II) of the Act, 8 U.S.C. § 1101(b)(1)(G)(i)(II). The regulation at 8 C.F.R. § 204.301 defines "irrevocable consent" as follows:

Irrevocable consent means a document which indicates the place and date the document was signed by a child's legal custodian, and which meets the other requirements specified in this definition, in which the legal custodian freely consents to the termination of the legal custodian's legal relationship with the child. . . .

- (1) To qualify as an irrevocable consent under this definition, the document must specify whether the legal custodian is able to read and understand the language in which the consent is written . . . [Anyone other than an officer or an employee of the Central Authority] who signs a declaration must sign the declaration under penalty of perjury under United States law.

⁶ Counsel is reminded that USCIS is not part of the Department of State. Rather, USCIS is an agency of the Department of Homeland Security.

- (2) If more than one individual or entity is the child's legal custodian, the consent of each legal custodian may be recorded in one document, or in an additional document, but all documents, taken together, must show that each legal custodian has given the necessary irrevocable consent.

The February 28, 2009 "Consent for Adoption" falls far short of this definition. It is not an original document. Rather, it is a printout of a scanned document, and it is largely illegible. Nor does it meet the requirements set forth at 8 C.F.R. § 204.301. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the AAO also finds the record devoid of evidence that a competent authority in India has approved of the beneficiary's emigration for adoption in the United States. Section 101(b)(1)(G)(i)(V)(aa) of the Act, 8 U.S.C. § 1101(b)(1)(G)(i)(V)(aa), stipulates that in the case of a child who has not been adopted, as is the case here, the competent authority⁷ of the foreign state must approve the child's emigration to the United States for the purpose of adoption by the prospective adoptive parents.

The document from the Central Adoption Resource Authority (CARA), which appears to be dated April 21, 2009, does not satisfy this requirement, as it states explicitly that there are no official documents supporting the adoption, and tells the petitioner's adoption agency to obtain the requisite documents from the competent authority, which CARA apparently is not. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes further that the CARA document does not satisfy the requirements of 8 C.F.R. § 204.313, which states, in pertinent part, the following:

- (d) *Required evidence* . . . [T]he petitioner must submit the following evidence with the properly completed Form I-800:

* * *

- (3) The report required under article 16 of the Convention, specifying the child's name and date of birth, the reasons for making the adoption placement, and establishing that the competent authority has, as required under article 4 of the Convention:

- (i) Established that the child is eligible for adoption;

⁷ The regulation at 8 C.F.R. § 204.301 defines "competent authority" as "a court or governmental agency of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption."

- (ii) Determined, after having given due consideration to the possibility of placing the child for adoption within the Convention country, that intercountry adoption is in the child's best interests;
- (iii) Ensured that that the legal custodian, after having been counseled as required, concerning the effect of the child's adoption on the legal custodian's relationship to the child and on the child's legal relationship to his or her family of origin, has freely consented in writing to the child's adoption, in the required legal form;
- (iv) Ensured that if any individual or entity other than the legal custodian must consent to the child's adoption, this individual or entity, after having been counseled as required concerning the effect of the child's adoption, has freely consented in writing, in the required legal form, to the child's adoption;
- (v) Ensured that the child, after having been counseled as appropriate concerning the effects of the adoption; has freely consented in writing, in the required legal form, to the adoption, if the child is of an age that, under the law of the country of the child's habitual residence, makes the child's consent necessary, and that consideration was given to the child's wishes and opinions; and
- (vi) Ensured that no payment or inducement of any kind has been given to obtain the consents necessary for the adoption to be completed.

The CARA document falls far short of satisfying the requirements set forth at 8 C.F.R. § 204.313. Nor does any other evidence of record satisfy such requirements. For this additional reason, the petition may not be approved.

The petitioner has failed to overcome the grounds of the director's denial of the petition. As the petitioner has failed to establish that the beneficiary's birthparents are incapable of providing proper care, the petitioner had failed to establish that the beneficiary is eligible for classification as an immediate relative under the Act. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO also finds that the petition may not be approved for three additional reasons: (1) the record lacks the birth parents' freely-given, written, irrevocable consent to the termination of their legal relationship with the beneficiary; (2) the record lacks evidence that a competent authority in India has approved of the beneficiary's emigration for adoption in the United States; and (3) the record lacks a document satisfying the requirements set forth at 8 C.F.R. § 204.313(d)(3). For these additional reasons, the petition may not be approved.

The appeal, therefore, will be dismissed.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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