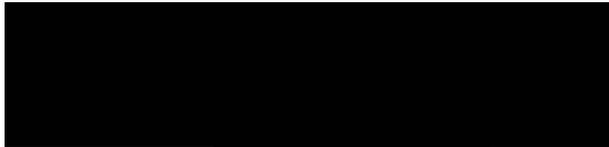


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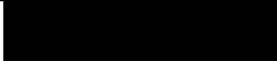
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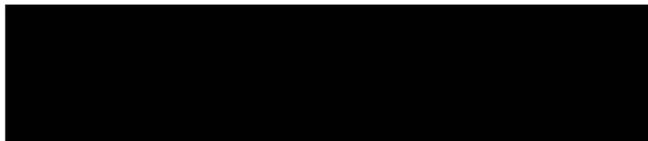
OFFICE: OKLAHOMA CITY, OK

Date:

AUG 20 2008

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 Field Office Director, Oklahoma City, Oklahoma denied the Form I-600, Petition to Classify Orphan as an Immediate Relative (Form I-600.) The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the Form I-600 petition will be denied.

The petitioner filed the Form I-600 in June 2007. The petitioner is a forty-year-old married citizen of the United States. The beneficiary was born in the Philippines on July 22, 2005, and she is presently three-years-old. The record reflects that the beneficiary's natural father is the petitioner's nephew.

The field office director denied the petitioner's Form I-600 on April 23, 2008, based on a finding that her Form I-600A, Application for Advance Processing of Orphan Petition (Form I-600A) was not approvable. Specifically, the field office director found that the petitioner and her husband [REDACTED] had failed to reveal to the home study preparer that [REDACTED] had been arrested in Austin, Texas on October 18, 1990, for Driving While Intoxicated (DWI).

The petitioner asserts on appeal that she and her husband sent information about [REDACTED]'s DWI arrest to U.S. Citizenship and Immigration Services (CIS), but that CIS lost the documentation, and she neglected to make copies of the arrest documents when they resubmitted information. The petitioner's husband indicates in a letter, that he did not attempt to deceive the home study preparer or CIS. He states that the home study preparer asked him only whether he had been arrested for drug related, violent, or sexual crimes, and he states that she at no time asked him whether he had been arrested for any other reason. The petitioner asserts that the Form I-600 should therefore be approved.

The Regulation provides at 8 CFR 204.3(a)(2) that:

[P]etitioning for an orphan involves two distinct determinations. The first determination concerns the [Form I-600A] advanced processing application which focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks, is essential for the protection of the orphan. The second determination concerns the orphan petition which focuses on whether the child is an orphan under section 101(b)(1)(F) of the Act An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application.¹

The Regulation provides in pertinent part at 8 C.F.R. 204.3(h)(2) that it is the:

¹ It is noted that the petitioner in the present matter did not file a separate Form I-600A. The Regulation at 8 C.F.R. § 204.3(d) provides in pertinent part that:

[P]rospective adoptive parents who do not have an advanced processing application approved or pending may file the application and petition concurrently on one Form I-600 if they have identified an orphan for adoption. . . .

[D]irector's responsibility to make an independent decision in [a Form I-600A] advanced processing application. No advanced processing application shall be approved unless the director is satisfied that proper care will be provided for the orphan. If the director has reason to believe that a favorable home study, or update, or both are based on an inadequate or erroneous evaluation of all the facts, he or she shall attempt to resolve the issue with the home study preparer, the agency making the recommendation pursuant to paragraph (e)(8) of this section, if any, and the prospective adoptive parents.

The above statutory and regulatory provisions permit CIS denial of a Form I-600A application based on a petitioner's failure to disclose an arrest, conviction, or other adverse information. Whether to deny the Form I-600A is a matter entrusted to CIS discretion, based on protective concerns for the orphan. The AAO notes that complete knowledge of the petitioner and his or her spouse's criminal history and any material adverse information is essential to a proper determination about whether they can provide a suitable home and proper care to an adopted orphan. Denial of a Form I-600A is therefore justified when a petitioner fails to make required disclosures, unless the undisclosed information is clearly immaterial to a determination regarding whether the petitioner and his or her spouse can provide a suitable home and proper care to an orphan.

In the present matter, the field office director found that the petitioner and her husband failed to disclose that was arrested in Texas in 1990, for Driving While Intoxicated.

The record contains an FBI record reflecting that the applicant was arrested in Austin, Texas on October 18, 1990 for Driving While Intoxicated (DWI.) Mr. ██████ states on appeal that he sent CIS information relating to his 1990 arrest, but that CIS lost the documents due to no fault of his own. Mr. ██████ states further that, although not discussed in the field office director's decision, he was arrested a second time for **Driving While Intoxicated in 1980.** Mr. ██████ states that the 1980 arrest information was also provided in his initial submission of materials to CIS.² Mr. ██████ states that he did not try to conceal his arrest history from the home study preparer, and that the home study preparer asked him specifically whether he had been arrested for drug-related, violent, or sexual crimes, not whether he had been arrested for any other reason. Mr. ██████ indicates that his arrests occurred over eighteen years ago, and he states that they were not of a violent or immoral nature.

The record contains a Home Study Report and Addendum recommending the petitioner and her husband as adoptive parents. A supplemental, May 7, 2008, letter from the home study preparer, ██████, states further that the home study preparer does not believe that ██████ knowingly lied to her about his arrest history. Rather, she believes that he misunderstood her questions to emphasize violent criminal activity rather than nonviolent arrest histories. Ms. ██████ reaffirms her belief that the petitioner and her husband would be qualified and suitable parents for two orphaned children.

The AAO finds, upon review of the cumulative evidence, that the petitioner and her husband established that they did not intentionally withhold information relating to ██████'s DWI arrests in Texas from the home study preparer and from CIS. The AAO finds further that the applicant has established that Mr. ██████'s DWI arrest history, over eighteen years ago, does not materially affect a decision regarding

² The record reflects that the applicant's documents were mistakenly sent to the wrong CIS office.

whether the petitioner and her husband can provide a suitable home and proper care to an orphan. Based upon the totality of the evidence, the AAO finds the petitioner and her husband have demonstrated that they would be suitable parents who could provide a proper home environment and care to two adopted children. The Form I-600A advance processing application is therefore approvable.

The AAO finds upon full review of the record, however, that the petitioner's Form I-600 remains deniable, in that the petitioner failed to establish that the beneficiary meets the definition of an "orphan" for immigration purposes, or that she was adopted in accordance with Philippine laws for intercountry orphan adoptions.

The issue of whether the beneficiary qualifies as an orphan under section 101(b)(1)(F)(i) of the Act was not discussed in the field office director's final denial decision. The AAO notes, however, that the petitioner was provided with an opportunity to address the issue in response to a Notice of Intent to Deny, sent by the field office director. The AAO notes further that it 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).

Section 101(b)(1)(F)(i) of the Act, defines the term, "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: Provided, That the Attorney General [now Secretary, Homeland Security] is satisfied that proper care will be furnished the child if admitted to the United States. . . . (Emphasis added.)

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

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 regulation provides further 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.³

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.

The record contains the following evidence relating to the beneficiary's status as an orphan:

A birth certificate reflecting that the beneficiary was born out of wedlock in the Philippines on July 22, 2005 to [REDACTED] (mother) and [REDACTED] (father.)

An Affidavit of Acknowledgment/Admission of Paternity reflecting that the beneficiary's natural father formally acknowledged his paternity over the beneficiary on August 12, 2005.

A sworn affidavit signed by the beneficiary's natural mother and father on December 22, 2006, reflecting that they are not married, and stating that they are the beneficiary's natural parents, and give their consent to the petitioner and her husband to adopt their daughter, [REDACTED]. The beneficiary's natural parents indicate that the petitioner and her

³ 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.

husband have supported the beneficiary in all of her needs since birth, and they indicate that the adoption is in the best interest of the beneficiary.

A final adoption order from the Republic of the Philippines, Regional Trial Court, Third Judicial Region, Branch 73, Olongapo City, dated December 27, 2007, reflecting in pertinent part that the petitioner and her husband are suitable parents, that the petitioner is a blood-relative of the beneficiary's natural father, and that the beneficiary's natural mother and father voluntarily consented to the petitioner and her husband's adoption of the beneficiary, in order for the beneficiary to have better security and a brighter future.

The field office director issued a Notice of Intent to Deny (NOID) to the petitioner on November 8, 2007. The NOID stated that evidence in the record reflected that both of the beneficiary's natural parents had relinquished their parental rights over the beneficiary with the specific intent of transferring those rights to the petitioner and her husband. On this basis, the NOID informed the petitioner of CIS' intent to deny the Form I-600 based on the petitioner's failure to: 1) provide evidence that the beneficiary had been abandoned by her parents, as defined in 8 C.F.R. § 204.3(b); and 2) establish that the beneficiary met the definition of an orphan as set forth in section 101(b)(1)(F) of the Act.

The petitioner responded to the NOID on November 28, 2007, by stating that the beneficiary met the definition of an abandoned child and an orphan for immigration purposes. Specifically, the petitioner asserted that prior to their relinquishment of parental rights to the petitioner and her husband, the beneficiary's natural parents relinquished and released the beneficiary to the Philippines Regional Trial Court, Third Judicial Region Branch 73, for custodial care in preparation for adoption. The petitioner indicated that the Philippines Regional Trial Court is a court of competent jurisdiction in the foreign-sending country, as set forth in 8 C.F.R. § 204.3(b), and the petitioner indicated that the Philippines Regional Trial Court had custodial care of the beneficiary and subsequently released its custody by awarding legal custody and possession of the beneficiary to the petitioner. The petitioner made no other assertions on rebuttal, and provided no new evidence.

The AAO notes that the field office director erroneously used "abandonment by both parents" criteria in determining whether the beneficiary qualified as an orphan for immigration purposes. A review of the totality of the evidence reflects that the beneficiary was born out of wedlock, and that her parents remain unmarried. The AAO notes that in order to legitimate a child under Philippine law, the parents of the child must marry one another. *Matter of Blancaflor*, 14 I&N Dec. 427, 428 (BIA 1973.) Because the record reflects that the beneficiary's parents never married, the beneficiary was not legitimated under Philippine law. She is therefore an illegitimate child for immigration purposes. The record additionally contains evidence that the beneficiary's natural father irrevocably released the beneficiary, in writing, for adoption and emigration. The "sole parent" definition contained in 8 C.F.R. 204.3(b) is therefore applicable in determining whether the beneficiary qualifies as an orphan in the present matter. The requirements and specific transfer limitations contained in the "abandonment by both parents" definition do not apply to the beneficiary.

The present record contains no evidence to establish that the beneficiary's natural mother is unable to provide proper care to the beneficiary in accordance with the local standards in the Philippines. The petitioner has thus failed to establish that the "sole parent" definition requirements have been fully met. It is noted, however, that the petitioner was never provided with an opportunity to address the issue of whether the

beneficiary qualifies as an orphan under the sole parent definition. In a situation such as this, the AAO would normally provide the petitioner with an opportunity to supplement the record with any evidence relating to the beneficiary's natural mother's inability to provide proper care to the beneficiary in accordance with local standards in the Philippines. In the present matter, however, the evidence in the record reflects that the Form I-600 is deniable on an additional ground. Issuance of a Request for Evidence would therefore serve no purpose in the present matter.

The Regulation provides at 8 C.F.R. § 204.3(d)(1)(iv) that:

[T]he following supporting documentation must accompany an orphan petition filed after approval of the advanced processing application:

...

(iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has custody of the orphan for emigration and adoption **in accordance with the laws of the foreign-sending country**. . . . (Emphasis added.)

The evidence in the record reflects that the petitioner did not to adopt the beneficiary in accordance with domestic and inter-country orphan adoption procedures in the Philippines.

U.S. Department of State (DOS) adoption procedure guidance for the Philippines, found at <http://www.travel.state.gov> reflects in pertinent part that:

The main government authorities responsible for domestic adoptions in the Philippines are the Regional Trial Courts where adopting parents can file the adoption petitions. These courts work closely with the Department of Social Welfare and Development (DSWD) to investigate and process adoption cases. For intercountry adoptions, the Inter-Country Adoption Board (ICAB) also works with the DSWD and foreign adoption agencies to ensure that children and adopting parents are qualified.

....

The Department of Social Welfare and Development (DSWD) should endorse to the ICAB a child who has been previously committed to the Philippine government. A child is "committed" by way of the "Deed of Voluntary Commitment," a document used by DSWD asking for the biological mother and/or biological parents' signature prior to matching the child with a prospective adoptive parent. The document is essentially the parents' consent releasing the child to DSWD for subsequent adoption. In the event that the child is abandoned or neglected and no parent is available to sign the "Deed of Voluntary Commitment," DSWD instead obtains a commitment order from the court. This endorsement certifies that inter-country adoption is in the best interests of the child. . . .

The record contains no evidence to indicate or establish that the DSWD or ICAB were involved in the beneficiary's adoption process, or that the beneficiary's natural parents or the Philippines Regional Trial Court at any time committed the beneficiary to the care of the Philippine government. The petitioner thus failed to demonstrate that she adopted the beneficiary in accordance with Philippine laws for the inter-country adoptions of orphans, as required by 8 C.F.R. § 204.3(d)(1)(iv).

In visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to meet her burden of proof in the present matter. The appeal will therefore be dismissed, and the Form I-600 petition will be denied.

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