



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



71

FILE: [REDACTED] OFFICE: OKLAHOMA CITY, OK Date: **AUG 20 2008**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 November 22, 2001, and she is presently six-years-old. The record reflects that the petitioner is the beneficiary's maternal aunt.

The district 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] 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] 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.) [REDACTED] 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. [REDACTED] 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. [REDACTED] states that the 1980 arrest information was also provided in his initial submission of materials to CIS.² [REDACTED] 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. [REDACTED] 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 [REDACTED], states further that the home study preparer does not believe that [REDACTED] 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. [REDACTED] 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 [REDACTED]'s DWI arrests in Texas from the home study preparer and from CIS. The AAO finds further that the applicant has established that Mr. [REDACTED] 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. Upon review of the record, however, the AAO finds that the petitioner's Form I-600 must nevertheless be denied because the petitioner failed to establish that the beneficiary meets the definition of an "orphan" for U.S. immigration purposes.

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. . . . (Emphasis added.)

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

A birth certificate reflecting that the beneficiary was born in the Philippines on November 22, 2001, to [REDACTED] (mother) and [REDACTED] (father.) The birth certificate reflects that the beneficiary's natural parents married on February 14, 1994, prior to the beneficiary's birth.

A sworn affidavit signed by the beneficiary's natural mother and father on December 22, 2006, reflecting that they are 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 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 mother, 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.

A birth certificate issued after the beneficiary's adoption reflecting that the petitioner and her husband are the beneficiary's parents.

A review of the evidence reflects that the beneficiary was born the legitimate child of married parents. The "abandonment by both parents" definition contained in 8 C.F.R. § 204.3(b) is therefore applicable to the present matter.

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, due to 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 finds, upon review of the totality of the evidence, that the evidence in the record fails to establish that the beneficiary's natural parents abandoned the beneficiary, as defined in 8 C.F.R. § 204.3(b).

Contrary to the rebuttal assertions made by the petitioner, the AAO finds that the evidence in the record fails to demonstrate that the beneficiary was under the legal custody or control of a governmental agency, adoption agency, orphanage or individual authorized under Philippines child welfare laws to have legal custody or control over an orphan. While the Philippines Regional Trial Court that issued the adoption order in the beneficiary's case clearly had legal jurisdictional authority over matters relating to the beneficiary's adoption process, the petitioner provided no evidence, legal or otherwise, to establish that the Philippines Regional Trial Court that issued the adoption order in the beneficiary's case was authorized under Philippine law to have legal custody or control over the beneficiary, or that the court in fact had legal custody or control over the beneficiary prior to her adoption by the petitioner.

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 present 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. Rather, the evidence in the record clearly reflects that the beneficiary’s natural parents specifically transferred their parental rights over the beneficiary to the petitioner and her husband. Accordingly, the petitioner failed to establish that the beneficiary’s natural parents abandoned the beneficiary, as set forth in 8 C.F.R. § 204.3(b). The beneficiary therefore does not meet the definition of an 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. *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.