

PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

F1

[REDACTED]

FILE:

[REDACTED]

OFFICE: EL PASO Date:

APR 21 2009

IN RE:

[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:

[REDACTED]

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, El Paso Field Office, denied the orphan petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(b)(1)(F). The director denied the petition for failure to establish that the beneficiary met the definition of an orphan at section 101(b)(1)(F)(i) of the Act.

On appeal, counsel submits a brief and additional evidence.

Section 101(b)(1)(F) of the Act defines an 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) of this title, 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, . . . 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, . . . who have . . . complied with the preadoption requirements, if any, of the child’s proposed residence: *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States[.]

The regulation at 8 C.F.R. § 204.3(f)(2) defines the term “coming to the United States for adoption” as follows, in pertinent part:

Child coming to be adopted in the United States. An orphan is coming to be adopted in the United States if he or she will not be or has not been adopted abroad If the prospective adoptive parents reside in a State with preadoption requirements and they plan to have the child come to the United States for adoption, they must submit evidence of compliance with the State’s preadoption requirements to the Service. Any preadoption requirements which by operation of State law cannot be met before filing the advanced processing application must be noted. Such requirements must be met prior to filing the petition, except for those which cannot be met by operation of State law until the orphan is physically in the United States. Those requirements which cannot be met until the orphan is physically present in the United States must be noted.

The regulation at 8 C.F.R. § 204.3(k)(3) further prescribes:

Child in the United States. A child who is in parole status and who has not been adopted in the United States is eligible for the benefits of an orphan petition when all the requirements of sections 101(b)(1)(F) and 204(d) and (e) of the Act have been met. A child in the United States either illegally or as a nonimmigrant, however, is ineligible for the benefits of an orphan petition.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a U.S. citizen and her husband is a U.S. lawful permanent resident. The beneficiary was born in Mexico on January 7, 1992. The beneficiary's biological father is not listed on his birth certificate. His biological mother died on February 17, 1999. On November 15, 2007, the petitioner and her husband were granted temporary custody of the beneficiary by a state district court judge in New Mexico.¹ On January 4, 2008, the petitioner filed the instant Form I-600 for the beneficiary, just three days before the beneficiary's sixteenth birthday. On February 29, 2008, the New Mexico court issued a final decree of adoption of the beneficiary by the petitioner and her husband.² On June 5, 2008, the director denied the petition because the beneficiary had been adopted in the United States, was not coming to the United States for adoption and thus did not meet the definition of an orphan at section 101(b)(1)(F)(i) of the Act. The petitioner, through counsel, timely appealed.

On appeal, counsel contends that because the beneficiary left the United States on a boat before the Form I-600 petition was filed, he met the requirements of section 101(b)(1)(F) of the Act even though he was in the United States before the petition was filed and returned to the United States a few hours after the petition was filed. Counsel submits copies of two photographs of the beneficiary on a boat purportedly on the date the Form I-600 was filed. We concur with the director's determination. Counsel's claims and the documents submitted on appeal fail to overcome the ground for denial. Beyond the director's decision,³ the petitioner has also failed to demonstrate that her and her husband's failure to comply with New Mexico's preadoption requirements at the time of filing the Form I-600 petition was due to state law requiring the orphan's physical presence in the United States.

Presence in the United States

To be classified as an orphan, a child must either have been adopted abroad by the petitioner or be "coming to the United States for adoption." Section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F). The regulation at 8 C.F.R. § 204.3(k)(3) specifies that a "child in the United States either illegally or as a nonimmigrant, however, is ineligible for the benefits of an orphan petition." The record shows that the beneficiary had been in the United States since at least November 15, 2007, when the petitioner and her husband were granted temporary custody and that he was formally adopted in New Mexico on February 29, 2008. The record contains no evidence that the beneficiary was paroled into or legally

¹ Lea County, New Mexico, Fifth District Court, Number [REDACTED], *Order for Temporary Custody* (Nov. 15, 2007).

² Lea County, New Mexico, Fifth District Court, Number [REDACTED], *Final Decree of Adoption* (Feb. 29, 2008).

³ 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 Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Manufacturing Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990).

entered the United States as an immigrant. Rather, the relevant evidence indicates that the beneficiary was in the United States illegally when the Form I-600 petition was filed.

On appeal, counsel claims that the beneficiary left U.S. territory for a few hours during which the Form I-600 was filed and the beneficiary then “came to the United States for the purpose of being adopted.” Counsel submits copies of two photographs of the petitioner, her husband and the beneficiary on a boat. In one photograph, the beneficiary holds a local newspaper dated January 4, 2008. The copied photographs are insufficient to support counsel’s assertion. Yet even if the beneficiary was outside of the United States at the time the petition was filed, counsel submits no evidence that the beneficiary was initially or subsequently paroled into, or legally entered the United States as an immigrant. Accordingly, the beneficiary is ineligible for the benefits of an orphan petition under section 101(b)(1)(F)(i) of the Act.

Compliance with State Preadoption Requirements

Beyond the director’s decision, the petitioner also failed to demonstrate that her and her husband’s failure to comply with New Mexico’s preadoption requirements at the time of filing the Form I-600 petition was due to state law requiring the orphan’s physical presence in the United States.

On the Form I-600, the petitioner stated that the preadoption requirements had not been met, but would be met later. In an attachment, the petitioner stated: “The following pre-adoption requirements have been fulfilled: the fingerprint check is complete, the background investigation is complete, and there is one month left in the home study.” However, the home study is dated December 30, 2007, before the Form I-600 petition was filed on January 4, 2008. Counsel filed the home study on February 20, 2008. In her cover letter dated February 11, 2008, counsel stated that “all pre-adoption requirements for the State of New Mexico have now been met.” Counsel did not explain her inability to submit the home study initially with the Form I-600 petition. The record also contains no evidence that the petitioner and her husband were prevented from complying with any applicable preadoption requirements of New Mexico due to state law necessitating the orphan’s physical presence in the United States, the only exception for delayed compliance allowed by the regulation at 8 C.F.R. § 204.3(f)(2). Even if New Mexico required the orphan’s physical presence to meet certain preadoption requirements, the record indicates that the petitioner and her husband could have complied with any such requirement because the beneficiary had been in the United States since at least November 15, 2007 when the petitioner and her husband obtained custody.⁴

Accordingly, the petitioner has not established that she and her husband met the preadoption requirements of the beneficiary’s proposed residence, as required by the Act and specified in the regulation at 8 C.F.R. § 204.3(f)(2). The petitioner has failed to demonstrate that the beneficiary meets the definition of an orphan at section 101(b)(1)(F)(i) of the Act for this additional reason.

⁴ The adoption decree states that the beneficiary was in the United States even earlier, as he had resided with the petitioner and her spouse for “approximately two years,” since early 2006.

Conclusion

The petitioner has not established that the beneficiary is an orphan, as defined at section 101(b)(1)(F)(i) of the Act because: 1) the beneficiary is not a child who is coming to the United States for adoption; and 2) the petitioner did not demonstrate that her and her husband's failure to comply with the applicable preadoption requirements was due to operation of state law necessitating the physical presence of the child in the United States. The petition consequently cannot be approved.

The petition will be denied for the reasons stated above, with each considered an independent and alternative basis for denial. 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 this burden and the appeal will be dismissed

ORDER: The appeal is dismissed.