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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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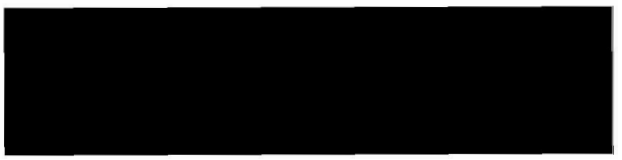
FILE: [redacted] OFFICE: MIAMI Date: APR 21 2009

IN RE: PETITIONER:
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:



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, Miami 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 as, in pertinent part:

> 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 . . . [.]

The regulation at 8 C.F.R. § 204.3(b) provides the following pertinent definition:

> *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 surrending 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. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

The record in this case provides the following pertinent facts and procedural history. The petitioner and his wife are U.S. citizens. The petitioner's Form I-600A, Application for Advance Processing of Orphan Petition, was approved on April 17, 2007. On October 16, 2008, the petitioner filed the instant Form I-600 for the beneficiary whom he and his wife had adopted in Haiti. On December 18, 2008, the

director issued a Notice of Intent to Deny (NOID) the petition because the evidence indicated that the child had not been abandoned by, deserted, separated or lost from her biological parents. In particular, the director cited the contract between the biological parents and the Haitian orphanage, which was revocable and allowed the parents continued contact with the child. In response, the petitioner submitted a second contract without the provisions cited by the director. On January 21, 2009, the director denied the petition because the court decree indicated that the biological parents had only conditionally released the child to the orphanage. The petitioner timely appealed.

On appeal, counsel contends that the child was abandoned by her biological parents who never expressed an intention to reclaim the child and did not exhibit any parental interest in the child after she was surrendered to the orphanage. In addition, counsel asserts that under Haitian law, the court must secure the biological parents' consent to an adoption, a requirement which does not negate their abandonment of the child. Counsel's claims and the evidence submitted on appeal do not overcome the ground for denial. In addition, beyond the director's decision, the petitioner has not established that he and his wife personally saw and observed the child prior to or during the adoption proceedings.

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).

Abandonment

With the Form I-600, the petitioner submitted a contract dated September 7, 2005 between the biological parents and the orphanage, which stated that the parents could "come see the child every four months." In addition, the contract specified that if the parents gave their consent for the child to be adopted but then changed their minds, they agreed to repay the orphanage all the money it had spent on the child. The petitioner also submitted the [redacted], the Extract of the Minutes of the Clerk's Office of the Port-au-Prince Civil Court dated September 11, 2008, in which the court approved the adoption of the child by the petitioner and his wife "with the consent" of the biological parents.

The director determined that the child had not been abandoned by her natural parents because the contract with the orphanage was revocable and allowed the parents continued access to the child. In response to the NOID, the petitioner submitted a new contract between the biological parents and the orphanage dated December 15, 2008, which omitted the language cited by the director and added, "I understand that I give my child to [the orphanage] without any conditions. I understand that I don't have any rights towards this child." The director determined that:

> the new contract is irrelevant since it does not negate the fact that the Haitian court sought and obtained the parents' consent to the adoption . . . . [T]he fact that the parents exercised their parental rights during the court proceedings substantiates the USCIS' contention that the beneficiary was conditionally released to the orphanage and that they alone maintained control over the beneficiary.

The director misinterpreted the court extract. Haiti requires that the adoptive parents obtain the biological parents' release of the child through the from the court with jurisdiction over the child's residence. *See* U.S. Dept. of St., *Intercountry Adoption, Haiti Country Information,* http://adoptions.state.gov/country/haiti.html (last updated May 2008). Accordingly, the director was mistaken in concluding that the court extract showed that the natural parents had conditionally released the child to the orphanage. On appeal, the petitioner also submits letters from the secretary and director of the orphanage who attest that the natural parents never visited, inquired about, or requested to see the child after she was released to the orphanage, even during the adoption proceedings.

Nonetheless, the record still indicates that the child was not abandoned by her natural parents. The language of the original contract between the natural parents and the orphanage was revocable. Although the clauses rendering the original contract revocable were removed in the December 15, 2008 contract, the revised document had no apparent legal effect as it was executed after the adoption was finalized. The authorization to adopt issued by the Haitian Institute for Social Welfare and Research (IBESR), the adoption decree issued by the Port-au-Prince Municipal Court (both submitted on appeal) and the were all issued before the revised contract was executed. Accordingly, the revised contract evidences the natural parents' release for a specific adoption, which does not constitute abandonment pursuant to the regulation at 8 C.F.R. § 204.3(b).

Personal Sight and Observation of the Child or Compliance with Preadoption Requirements

The statute permits classification of an orphan adopted abroad or coming to the United States for adoption. However, section 101(b)(1)(F)(i) of the Act places restrictions on both classifications which the petitioner has failed to meet.

First, the record does not establish that the adoptive parents personally saw and observed the child prior to or during the adoption proceedings, as required for orphans adopted abroad pursuant to section 101(b)(1)(F)(i) of the Act. The regulation at 8 C.F.R. § 204.3(d)(1)(iv)(A) requires "evidence that the . . . married petitioner and spouse [] saw the orphan prior to or during the adoption proceeding abroad." The petitioner submitted no such evidence and none of the documents submitted below or on appeal indicate that the petitioner and his wife were present in Haiti before or during the adoption proceedings. We note that the Haitian government does not always require the adoptive parents to travel to Haiti before the adoption is finalized. *See U.S. Department of State, Intercountry Adoption, Haiti Country Information, supra.* The petitioner also marked "No" in response to Question 18 on the Form I-600, "did the petitioner and spouse . . . personally see and observe the child prior to or during the adoption proceedings?"

Second, section 101(b)(1)(F)(i) of the Act permits the classification of an orphan adopted by proxy abroad only if the petitioner meets certain requirements, which the petitioner here has not. If adoption was concluded by proxy abroad, the regulation at 8 C.F.R. § 204.3(d)(1)(iv)(B) requires the adoptive parents to submit, in pertinent part:

> (*3*) Evidence of compliance with all preadoption requirements, if any, of the State of the orphan's proposed residence. (Any such requirements that cannot be complied with prior to the orphan's arrival in the United States because of State law must be noted and explained); and
>
> (*4*) Evidence that the State of the orphan's proposed residence allows readoption or provides for judicial recognition of the adoption abroad if there was an adoption abroad which does not meet statutory requirements pursuant to section 101(b)(1)(F) of the Act, because the unmarried petitioner, or married petitioner *and* spouse, did not personally see the orphan prior to or during the adoption proceeding abroad . . . .

The petitioner submitted no such evidence. Accordingly, the petitioner has not established that the beneficiary is an orphan coming to the United States for adoption as specified in section 101(b)(1)(F)(i) of the Act.

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 record does not demonstrate that the beneficiary was abandoned, deserted, separated or lost from her natural parents; and 2) the evidence does not show that the petitioner and his wife personally saw and observed the beneficiary prior to or during the adoption proceedings, or that they complied with any preadoption requirements of the beneficiary's proposed residence. 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.