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U.S. Citizenship
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Services

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[REDACTED]

FILE:

OFFICE: HO CHI MINH CITY

Date:

JAN 09 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)

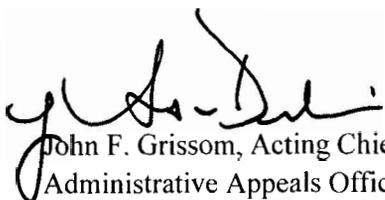
ON BEHALF OF PETITIONER:

[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, Ho Chi Minh City, denied the petitioner's Form I-600, Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act (I-600 Petition), on August 21, 2008. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner and his wife are U.S. citizens. The beneficiary was born in Vietnam on June 5, 2007. The petitioner filed an I-600A, Application for Advance Processing of Orphan Petition, on April 10, 2007, which was approved on June 1, 2007. After a beneficiary was identified and referred by an adoption agency in Vietnam and accepted by the petitioner, the petitioner filed the I-600 Petition on January 4, 2008. On February 5, 2008, U.S. Citizenship and Immigration Services (USCIS) in Ho Chi Minh City, Vietnam, referred the case to the Consular Section of the U.S. Embassy in Hanoi for an I-604 consular field investigation.

The regulation at 8 C.F.R. § 204.3(k)(1) provides in pertinent part:

An I-604 investigation must be completed in every orphan case. . . . An I-604 investigation shall be completed before a petition is adjudicated abroad. . . . In any case in which there are significant differences between the facts presented in the approved advanced processing application and/or orphan petition and the facts uncovered by the I-604 investigation, the overseas site may consult directly with the appropriate [USCIS] office. In any instance where an I-604 investigation reveals negative information sufficient to sustain a denial or revocation, the investigation report, supporting documentation, and petition shall be forwarded to the appropriate [USCIS] office for action. Depending on the circumstances surrounding the case, the I-604 investigation shall include, but shall not necessarily be limited to, document checks, telephonic checks, interview(s) with the natural parent(s), and/or a field investigation.

Based on information obtained from the I-604 consular field investigation conducted in Vietnam (*Field Investigation*, April 28, 2008) and a review of the I-600 Petition, the director issued a Notice of Intent to Deny (NOID), finding that (1) there was evidence of "child-buying" in the case; (2) the petitioner had not established that the beneficiary's birth parents had relinquished their child unconditionally; and (3) the Vietnamese requirement to publish information about an abandoned child had not been met, and the orphanage director had not confirmed the unavailability of domestic prospective adoptive parents. *NOID*, May 28, 2008. The director concluded, therefore, that the petitioner had not established that the beneficiary had been abandoned by both parents so as to meet the definition of an orphan under section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F), and had failed to establish that this was not a child-buying case, as prohibited by regulation. *Id.*

In response, the petitioner, through counsel, argued that funds provided by [REDACTED] Adoption International Mission, the Adoption Service Provider in this case, to the Centre for Nourishment in Ha Tay Province, the orphanage caring for the beneficiary, and funds provided to the beneficiary's birth parents by the Centre for Nourishment amount to humanitarian assistance and not child-buying; that the beneficiary's biological parents voluntarily and unconditionally relinquished the beneficiary

to the Centre for Nourishment; and that Vietnamese law did not require that information be broadcast for babies who had been “relinquished” by their birth parents as in this case. *Response to NOID*, July 10, 2008. The director, however, found that the passage of money amounted to payment for the child or as an inducement to release the child, constituting child-buying; the director also found that Vietnamese law requires an announcement for abandoned children, and no announcement had been published to provide an opportunity for a family member to care for the child or for domestic adoption; accordingly, the director denied the I-600 Petition. *Notice of Decision*, August 21, 2008.

On appeal, the petitioner, through counsel, proposes a definition of “child-buying” and asserts that the facts show that it does not apply in this case because there is no evidence that the birth parents were induced to make an adoption plan, and the financial aid was not excessive; the petitioner also asserts that Vietnamese law regarding searching for domestic adoptive parents was followed and submits additional evidence in the form of a legal opinion and official correspondence, including certification from Ha Tay Province that no domestic Vietnamese family has come forward interested in adopting the beneficiary. *Form I-290B, Notice of Appeal*, September 15, 2008; *Brief*, October 21, 2008.

Counsel also filed a Motion to Request Contemporaneous Review of Cases and Contemporaneous Oral Arguments for the present case and another case currently before the AAO. Counsel states the cause for oral argument before the AAO, in accordance with 8 C.F.R. § 103.3(b), asserting that (1) there is no definition of child-buying in the Act, 8 C.F.R. § 204.3(b) or case law for intercountry adoption; (2) there are at least three cases with similar fact patterns currently before the AAO on the relevant issues; and (3) the AAO’s decision is important for present and future cases under section 101(b)(1)(F) of the Act. USCIS has sole authority to grant or deny a request for oral argument, and will grant such argument only in cases that involve unique facts or issues of law that cannot be adequately addressed in writing. In the present matter, the AAO finds that the regulations are clear regarding what constitutes child-buying, and the issues can be adequately addressed in writing. The request for oral argument before the AAO will therefore be denied. The AAO has reviewed the director’s decision on a de novo basis and considered all the evidence in the record in coming to this decision.¹

The issues on appeal are (1) whether the funds provided to the birth parents by the orphanage and/or adoption agency amount to payment for the child or as an inducement to release the child; and (2) whether Vietnamese procedures were followed regarding finding domestic adoptive parents. The AAO finds that the funds given to the birth parents amount to payment for the beneficiary, constituting “child-buying.” The AAO also finds that Vietnamese procedures, while not requiring publication of information in the mass media in this case, were not properly followed regarding finding domestic adoptive parents.

¹ The AAO maintains plenary power to review each decision 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) of the Act defines the term, “orphan,” 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 the Act], 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.

Volume 8 of the Code of Federal Regulations (8 C.F.R.) section 204.3 provides in pertinent part:

(b) *Definitions.* . . .

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. 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.

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.

(d) *Supporting documentation for a petition for an identified orphan.*

(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 . . .

(i) *Child-buying as a ground for denial.* An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will given [sic] money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.

Vietnamese requirement to find domestic adoptive parents

The prospective adoptive parents in this case must provide evidence of adoption abroad or that they, or a person or entity working on their behalf, have custody of the beneficiary for emigration and adoption in accordance with the laws of the foreign-sending country. 8 C.F.R. § 204.3(d)(iv). In this regard, it is important to note the meaning of "abandonment" in the context of Vietnamese law and to distinguish the Vietnamese definition from the U.S. definition found at 8 C.F.R. § 204.3(b):

Intercountry adoption in Vietnam is regulated by two decrees: Decree 68/2002 and Decree 69/2006. . . . The definition of an adoptable orphan is provided in Decree 68/2002 Article 44, which states that a child cannot be released for adoption without "the written voluntary agreement of the father and/or mother of that child." The decree lists only three exceptions to this rule. The first is if both parents are deceased; the second is if the child "has been abandoned or left at a medical establishment;" and the third is if "the child's parents have lost their civil act capacity"[sic]. Decree 69/2006 clarifies that the orphanage or People's Committee must prove that a child is covered by one of these exceptions . . . Decree 68/2002 and Decree 69/2006 also establish that in the case of a child who has been abandoned or left at a medical facility, a 30 day search must be made for the birth parents, and in all cases a separate 30 day search must be made for domestic adoptive parents. These searches are conducted by the orphanage or local People's Committee. *Summary of Irregularities in Adoptions in Vietnam*, http://vietnam.usembassy.gov/irreg_adoptions042508.html, last accessed December 9, 2008, p. 2.

The relevant instruction, found in Circular No. [REDACTED] of the Ministry of Justice, clarifies that only for "abandoned" children must a mass media announcement be made. It provides in pertinent part (at Section II. 2.1):

(a) Priority shall be given to introducing children for adoption by persons in the country; the introduction of a child for adoption in a foreign country shall be regarded as the last resort when it is impossible to find in the country a family wishing to adopt the child.

(b) Only after 30 days from the date of being sent to a nurturing establishment may a child be introduced for adoption; for abandoned newborns, only after 60 days from the date of their discovery may they be introduced for adoption;

(c) An abandoned child living in a nurturing establishment may be introduced for adoption by a foreigner only when after 30 days from the date of announcement on the provincial-level mass media there is no relative coming to claim the child and no person who lives in the country adopting him/her.

Unlike the U.S. definition of “abandonment by both parents,” Vietnamese law, as can be determined from the language of the above Decrees and Circular, distinguishes between an “abandoned” child, meaning one whose birth parents are unknown, and a child who has been released for adoption by “the written voluntary agreement of the father and/or mother of that child,” as in the present case. Where the identity of the birth parent(s) is known, a child has not been “abandoned” and section (c), *supra*, would not, therefore, apply.

In the case of an abandoned child, defined under Vietnamese law, a search must be made for the child’s birth parents by publication in the mass media. While foreign adoptions are considered to be a last resort when it is impossible to find domestic adoptive parents, regardless of whether the birth parents are known or unknown, there is no requirement that a search for domestic adoptive parents be made by publication in the mass media; the purpose of an announcement in the mass media is to find the child’s birth parent(s). The petitioner submitted official correspondence and a legal opinion confirming this interpretation of Vietnamese law. *Letter from the Vietnamese Ministry of Justice, Department of International Adoption, July 12, 2007; Memorandum from Vietnam International Law Firm (VILAF), July 17, 2008.*

The AAO agrees that publication of information in the mass media is not required for children whose birth parent or parents are known. However, Vietnamese law includes a provision that the introduction of a child for adoption in a foreign country is a last resort when it is impossible to find domestic adoptive parents. While the procedure to find domestic adoptive parents is not set forth in the Decrees and Circular noted above, it is clear that some process is required before a child can be “introduced for adoption by a foreigner.” On appeal, the petitioner submitted a statement from the director of the Centre for Nourishment that “no domestic families came to apply for adopting . . . [the beneficiary] . . . as their adopted child. According to Vietnamese law, for children with clear family origin like the above, there is no need to post announcement on mass media to find their relatives or a cozy home.” *Statement from [REDACTED], June 11, 2008.* The statement confirms that no publication of information is required in this case, but fails to describe what attempt was made to find a domestic adoptive parent as required. In the present case, there is no evidence that any attempt has been made to find domestic adoptive parents. In this regard, therefore, the AAO finds that procedures were not followed in accordance with the laws of Vietnam.

Evidence of child-buying

The record includes inconsistent accounts by the birth father, the birth mother and the competent authorities in this case regarding the exact amount of money, the timing of payments and the use of funds received by the birth parents from the agencies involved in the adoption process. However, there is no question regarding the fact that the birth parents received money from the agencies involved, as described below.

The record reflects, and the petitioner, through counsel, has confirmed that the beneficiary, [REDACTED] (hereinafter “[REDACTED]”), was born on June 5, 2007 at Hoa Son Medical Center in Ha Tay Province and that two days later her birth parents placed her in the care of the Centre for Nourishment in Ha Tay Province (also referred to as the “Centre for Nursing disable Children” or “Center for Nourishment of Disable Children”), an organization under the Ha Tay Department of Labor, War Invalids and Social Affairs (DOLISA). Included among the responsibilities of the Centre for Nourishment is the “receiving and nursing [of] orphans, relinquished children, and children of extremely poor families from infants to 15 year-old children so that they can be adopted domestically or internationally as per regulations provided for by law [and] [s]upporting families that have difficult economic living and have children being nourished in the centre.” DOLISA of Ha Tay Province, *Report on Results of Verification*, June 16, 2008. On August 23, 2007, [REDACTED] birth parents voluntarily relinquished their rights to [REDACTED] in writing. A week later, the Centre for Nourishment “disperse[d] financial assistance to the biological family, 6,467,000 VN Dong, approximately \$400.00 US Dollars.” *Brief in Support of Appeal, supra*, p. 2.

The record also reflects that DOLISA of Ha Tay Province has a Memorandum of Understanding (MOU) with [REDACTED] Adoption International Mission (AIM), an adoption agency licensed in Texas and which operates in Ha Tay Province. The MOU indicates that [REDACTED]s AIM provides monthly assistance to DOLISA of Ha Tay Province, including contributions for the care of children in the Centre for Nourishment and for support to families “with especially difficult living conditions” who have children in the Centre. On October 7, 2007, an agreement was signed by DOLISA of Ha Tay Province indicating that “[d]uring the time living in the Centre, the child [REDACTED] will enjoy nutritional regime supported by [REDACTED] AIM.” DOLISA, *Decision on admittance of child having special difficulty to the Center for Nourishment of disable children*, October 2, 2007. [REDACTED] AIM is the agency assisting the prospective adoptive parents in this case; on November 20, 2007, the agency officially referred Thao to the petitioner via email correspondence; on December 18, 2007, the director of the Centre for Nourishment signed an Adoption Agreement, stamped by [REDACTED] AIM, to allow the adoption by the petitioner.

On January 31, 2008, [REDACTED]s birth parents requested additional aid from the Centre for Nourishment and received 9,000,000 VN Dong, approximately \$562 (U.S.). According to the petitioner, the additional amount “was to help the [birth] family’s economic situation and was independent of the relinquishment of their child, which now occurred over 7 months ago.” *Response to NOID, supra*, [REDACTED], Exhibit 14.

There is no documentary evidence in the record to indicate for what purpose the funds were provided to the birth parents or how the funds were used in this case. Statements from the birth parents are inconsistent, and the petitioner indicates that some of the money was for the purpose of helping the family's economic situation. It is also not clear whether some of the money came indirectly from funds provided by I [REDACTED] AIM to the Centre for Nourishment. However, the evidence does establish, and it is not disputed, that the Centre for Nourishment and/or [REDACTED] AIM, agencies working on behalf of the prospective adoptive parents, gave money directly or indirectly to [REDACTED] birth parents at various times during the adoption process. The record indicates that these agencies are authorized to provide humanitarian aid to families who have children in the care of the Centre, and the petitioner has submitted evidence in support of his claim that the agencies exercised their authority to do so in this case. He claims that such humanitarian aid is not considered "child-buying."

However, under U.S. regulations, an orphan petition must be denied if any payment is provided to the birth parents "as payment for the child or as an inducement to release the child" unless it is "reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings." 8 C.F.R. § 204.3(i). The petitioner in this case has not alleged or established a connection between the payments to the birth parents and the necessary activities related to the adoption proceedings. The regulation does not permit an agency working on behalf of prospective adoptive parents to provide "humanitarian aid" to a birth parent. The regulation reflects the concern of both the United States and Vietnam over "child-buying" and recognizes that payments, with the limited exceptions noted, to a birth parent who is relinquishing a child, regardless of whether it is called "humanitarian assistance," is grounds for denying an orphan petition. 8 C.F.R. § 204.3(i). As the evidence shows that the beneficiary was not given unconditionally to an orphanage, but rather for payment, he is not considered to be "abandoned" for purposes of classification as an orphan under the Act. Section 101(b)(1)(F) of the Act.

Conclusion

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989) If the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).

In the present case, the evidence submitted fails to establish that adoption procedures were followed in accordance with the laws of Vietnam, which require that attempts be made to locate domestic adoptive parents before allowing foreign adoption. The prospective adoptive parents have thus failed to provide evidence of adoption or custody for emigration and adoption as required. 8 C.F.R. § 204.3(d)(iv). The evidence also establishes that payments were given to the birth parents of the

beneficiary by an agency working on behalf of the prospective adoptive parents. Despite the petitioner's claim that at least a portion of those payments were for "humanitarian assistance" to a family in need, no documentary evidence has been submitted to establish that any of the payments were for necessary activities related to the adoption proceedings. The payments are, thus, regarded as payment to the birth parents for relinquishing their child, constituting "child-buying," and the I 600 Petition must, therefore be denied. 8 C.F.R. § 204.3(i).

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that the record lacks evidence establishing that this is not a case of "child-buying" and that the petitioner has failed to establish that the beneficiary is an "orphan" as set forth in section 101(b)(1)(F) of the Act. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.