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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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MAR 04 2010

FILE: [Redacted] Office: GUATEMALA CITY, GUATEMALA Date:
AAO 10 043 50005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

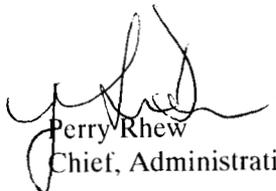
PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(i)

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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and, in response to two subsequent motions to reopen or reconsider, affirmed its decision to deny the petition. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decisions of the field office director and the AAO will be affirmed. The petition will be denied.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i). The field office director denied the petition on July 22, 2008. The AAO dismissed the petitioner's appeal on February 5, 2009. The AAO affirmed that decision, in response to subsequent motions to reopen or reconsider, on May 11, 2009 and October 19, 2009. As the facts and procedural history of this case were adequately documented in its February 5, 2009 decision, the AAO will only repeat certain facts as necessary here.

In its February 5, 2009 decision, the AAO dismissed the petitioner's appeal on the basis of its determination that (1) because the identity of the beneficiary had not been established, the record lacked conclusive evidence to establish that the beneficiary meets the definition of an orphan; and (2) the record lacked sufficient evidence regarding the parentage of the beneficiary to establish that the biological mother was a "sole parent" or that the beneficiary was an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents.

In its May 11, 2009 decision, the AAO found that the petitioner had again failed to resolve these issues. In its conclusion, the AAO found that the record still contained multiple, and unresolved, contradictions and inconsistencies. The AAO noted that the petitioner had not submitted a valid birth certificate or any other credible documentation to resolve the contradictory evidence in the record regarding the circumstances of the beneficiary's birth. Moreover, the contradictory statements by the beneficiary's birth mother regarding whether she consents to the emigration and adoption of her child had not been explained. The AAO noted further that the record lacked evidence that the beneficiary's biological father had severed his parental ties or irrevocably released the beneficiary for emigration and adoption. In the alternative, the record also lacked any documentary evidence that the beneficiary's mother, if she were to be considered a "sole parent," was incapable of providing for the beneficiary's basic needs in a manner consistent with local standards in Guatemala. The AAO found that in light of such unresolved inconsistencies and lack of evidence, there were questions as to whether either or both parents have abandoned the beneficiary or irrevocably released him for emigration and adoption. Accordingly, the AAO found that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan, as that term is set forth at section 101(b)(1)(F)(i) of the Act, and affirmed its February 5, 2009 decision.

In its October 19, 2009 decision, the AAO rejected counsel's request to delay adjudication of the motion pending the outcome of a hearing that was to take place in October 2009.

On motion to reopen or reconsider, counsel submits a transcript and certified English translation from the referenced hearing, which took place in Guatemala on October 5, 2009. Counsel agrees

that “[t]he merits of this child’s eligibility are not yet ripe for adjudication by USCIS.” Counsel states that the Guatemalan Family Court has favorably adjudicated the issue of the beneficiary’s adoptability, asserts that the case is now before “other Guatemalan agencies” to complete processing, and requests that the AAO delay its adjudication of the case pending the outcome of such proceedings. Counsel does not identify such “other agencies” and submits no evidence demonstrating that any such proceedings are ongoing. Nor does she provide any sort of timeframe as to how long such proceedings will take. Counsel’s request to delay adjudication of the case is denied.

Nor will the AAO remand the matter for further processing, as suggested by counsel. As will be discussed, the petitioner has failed to overcome the grounds of denial or establish any error on the part of the field office director. As such, remanding this petition for additional processing by the field office director would serve no purpose.

I. Motion to reconsider

Counsel’s submission does not qualify as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part the following:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel’s submission does not qualify as a motion to reconsider. Again, in order for a submission to qualify as a motion to reconsider, that submission must, at the time it is filed, establish that the decision it seeks to have reconsidered was incorrect at the time it was issued. 8 C.F.R. § 103.5(a)(2). As noted previously, counsel concedes that the substantive issues at hand “are not yet ripe for adjudication.” Rather, counsel refers the AAO to ongoing proceedings before “other Guatemalan agencies.” As counsel’s motion is dependent upon evidence not yet in existence at the time the decision she seeks to have reconsidered was issued, it does not establish that the decision was incorrect based upon the record before the AAO at the time it issued its decision. Accordingly, counsel’s submission does not qualify as a motion to reconsider.¹

¹ Although counsel’s submission does not qualify as a motion to reconsider, the AAO will nonetheless address her assertion that the petitioner filed the Form I-600 at the “insistence” of USCIS. In its October 19, 2009 decision the AAO stated, in response to counsel’s assertion that the petitioner had been “prejudiced” by “the premature adjudication of this case,” that “[h]ad the petitioner not wanted the Form I-600 adjudicated, he should not have filed it.” In her undated brief submitted on motion, counsel cites to e-mail correspondence between the petitioner and the field office and states that “USCIS cannot demand that Petitioners file the I-600, then insist that ‘had the petitioner not wanted the Form I-600 adjudicated, he should not have filed it.’” She further refers to “USCIS’ culpability in insisting that this family file the I-600 at all.” The AAO does not find counsel’s analysis persuasive. The e-mail correspondence submitted by counsel does not demonstrate that the USCIS Guatemala City field office either insisted or demanded that the Form I-600 be filed. The petitioner filed a Form I-600, incorrectly, on November 20, 2007. In a May 19,

II. Motion to reopen

Counsel's submission meets the requirements of a motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, the following:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based upon the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.² Counsel's submission contains one document that may be considered *new* under 8 C.F.R. § 103.5(a)(2): the previously-referenced transcript and certified English translation from the hearing that took place in Guatemala on October 5, 2009. The AAO, therefore, will reopen the proceeding.

Although the AAO has reopened the proceeding, the new evidence submitted on motion, i.e., the transcript and translation from the court hearing, fails to overcome the grounds of denial and establish that the petition is approvable. Moreover, counsel agrees that the substantive issues at hand "are not yet ripe for adjudication." This new evidence fails to demonstrate that any of the AAO's previous decisions, or the decision of the field office director, were issued in error. The AAO's previous decisions, therefore, are affirmed.

III. Conclusion

Although counsel's submission does not qualify as a motion to reconsider, it does qualify as a motion to reopen. Although the AAO reopened the proceedings in order to issue a new decision, the new evidence submitted by counsel on motion failed to establish that any of the previous decisions were issued in error. In accordance with the previous discussion, the AAO affirms its previous decisions to deny this petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The decisions of the field office director and the AAO are affirmed. The petition is denied.

2008 notice delivered via e-mail, the field office notified the petitioner that the Form I-600 had been filed incorrectly, and that in order for the field office to adjudicate it, the petitioner was required to file it while physically present within the jurisdiction of the field office. As such, the field office notified the petitioner that that no action would be taken until the petitioner either appeared in person to sign and date the previously-filed Form I-600, or filed a new Form I-600, in person. As such, the field office neither insisted nor demanded that a new Form I-600 be filed. Rather, the field office director was simply notifying the petitioner of the proper course of action to be taken in order to cure an improper filing.

² The word "new" is defined as "1. Having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" *Webster's II New College Dictionary* 736 (Houghton Mifflin 2001)(emphasis in original).