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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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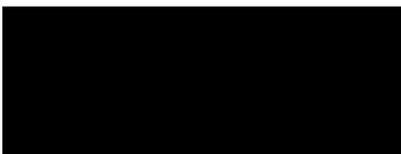
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IN RE: 

PETITION: Petition to Classify Convention Adoptee as an Immediate Relative Pursuant to Section 101(b)(1)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(G)

ON BEHALF OF PETITIONER:

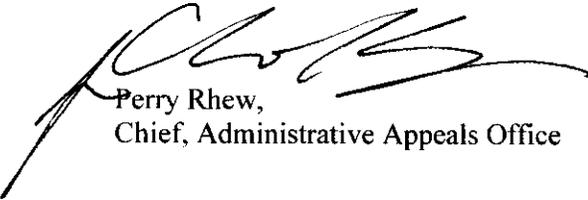


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed.

The petitioner seeks classification of a Convention adoptee as an immediate relative pursuant to section 101(b)(1)(G) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(b)(1)(G). The director denied the petition on four grounds: (1) that the petitioner¹ had failed to establish that the beneficiary's birthparents are incapable of providing proper care to the beneficiary; (2) that the petitioner had failed to demonstrate that the competent authority had determined that the beneficiary is eligible for adoption and had given the possibility of placing her for adoption within Belize due consideration; (3) that the petitioner had failed to demonstrate that the beneficiary's birthparents had irrevocably consented to her adoption in the required legal form; and (4) that the petitioner had failed to establish that the competent authority had certified the Article 16 report. On appeal, counsel submits a memorandum of law reasserting the beneficiary's eligibility and additional testimonial and documentary evidence.

Applicable Law

For the purpose of classifying a Convention adoptee as a "child," so that the child may be subsequently classified as an immediate relative for the purpose of emigrating to the United States, section 101(b)(1)(G) of the Act provides, in pertinent part, the following definition:

a child, under the age of sixteen at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 201(b), who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993,² or who is emigrating from such a foreign state to be adopted in the United States, by a United States citizen and spouse jointly, or by an unmarried United States citizen at least 25 years of age—

¹ The regulation at 8 C.F.R. § 204.301 defines the term "petitioner" as follows:

Petitioner means the U.S. citizen (and his or her spouse, if any) who has filed a Form I-800 under this subpart . . . Although the singular term "petitioner" is used in this subpart, the term includes both a married U.S. citizen and his or her spouse.

As this case involves a married couple, the term "the petitioner" could refer to either spouse. To ease reading of this decision, we will refer to [REDACTED] as the "petitioner" (as he was named on the Form I-800 as the petitioner) and to [REDACTED] as the "petitioner's wife."

² See *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (May 29, 1993). The United States signed the Hague Convention on March 31, 1994 and ratified it on December 12, 2007, with an effective date of April 1, 2008.



- (i) if–
 - (I) the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States;
 - (II) the child’s natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child’s emigration and adoption;
 - (III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;
 - (IV) the Attorney General is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated (and in carrying out both obligations under this subclause the Attorney General may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents); and
 - (V) In the case of a child who has not been adopted –
 - (aa) the competent authority of the foreign state has approved the child’s emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents; and
 - (bb) the prospective adoptive parent or parents has or have complied with any pre-adoption requirements of the child’s proposed residence

The regulation at 8 C.F.R. § 204.301 states, in pertinent part, the following:

Competent authority means a court or governmental agency of a foreign country that has jurisdiction and authority to make decisions in matters of child welfare, including adoption.

* * *

Incapable of providing proper care means that, in light of all the relevant circumstances including but not limited to economic or financial concerns, extreme poverty, medical, mental, or emotional difficulties, or long term-incarceration, the child's two living birth parents are not able to provide for the child's basic needs, consistent with the local standards of the Convention country.

A Form I-800 must be accompanied by a report issued by the competent authority pursuant to Article 16 of the Hague Convention (the "Article 16 report"). Pursuant to 8 C.F.R. § 204.313(d)(3), the Article 16 report must state that the competent authority has established that the child is eligible for adoption; and that it has determined, after having given due consideration to the possibility of placing the child for adoption within the Convention country, that intercountry adoption is in the child's best interests.

The regulation at 8 C.F.R. § 204.313(d)(4)(iii) further requires that the Article 16 report be accompanied by a statement, signed under penalty of perjury by the primary provider (or an authorized representative if the primary provider is an agency or other judicial person), certifying that the report is a true, correct, and complete copy of the report obtained from the central authority.

Pertinent Facts and Procedural History

The petitioner and his wife are citizens of the United States. The beneficiary was born in Belize on [REDACTED]. Following approval of their Form I-800A on March 20, 2009, the petitioner and his wife filed the instant Form I-800 on May 18, 2010. The director issued a request for additional evidence (RFE) to which the petitioner and his wife, through counsel, filed a timely response. However, counsel's response did not address the substantive matters raised by the director in his RFE; instead, she requested additional time during which to prepare a response. As the regulation at 8 C.F.R. § 103.2(b)(8)(iv) specifically precludes the granting of additional time during which to respond to an RFE, and counsel's response did not resolve the deficiencies of record, the director denied the petition on September 30, 2010.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). On appeal, the petitioner and his wife submit evidence which overcomes some, but not all of the director's grounds for denial of the petition.

Counsel's request to extend the period of time during which to file a response to the RFE

Counsel argues on appeal that the director erred in not granting the petitioner additional time during which to respond to the June 21, 2010 RFE, and cites 8 C.F.R. § 103.2(b)(2)(ii) in support of her assertion. Counsel's citation is misplaced.

The regulation at 8 C.F.R. § 103.2(b)(2) governs the submission of secondary evidence and affidavits, and subsection (ii) of that regulation, which counsel cites, states that when a certain required record does not exist, the petitioner must submit an original written statement, on government letterhead, from the relevant governmental authority in order to demonstrate that the particular record is unavailable. For example, if an RFE requested an original copy of an applicant's birth certificate, but the original document did not exist because it had been destroyed during warfare or in a natural disaster, 8 C.F.R. § 103.2(b)(2)(ii) provides a course of action that the applicant in that case could pursue in order to demonstrate the unavailability of the original birth certificate. However, the issue in this case was not that the evidence requested by the director in RFE did not exist; the issue was that the petitioner had not yet obtained it. The regulation at 8 C.F.R. § 103.2(b)(2)(ii) does not apply to the facts in this case. The regulation at 8 C.F.R. § 103.2(b)(8)(iv) states unequivocally that additional time during which to submit evidence in response to an RFE may not be granted, and the director correctly declined counsel's request. As counsel submitted an incomplete response to the RFE, the director properly considered it a request for a decision on the record pursuant to 8 C.F.R. § 103.2(b)(11) and denied the petition because the evidence of record at that time did not establish eligibility.

Incapability of the Birth Parents to Provide Proper Care to the Beneficiary

The petitioner and his wife stated on the Form I-800 that the beneficiary was residing with her birthparents. In an electronic mail transmission dated January 6, 2010, the petitioner's wife notified counsel that the Belize Department of Human Services had informed her that it could not state the birthparents were incapable of providing proper care to the beneficiary because the birthparents were in fact caring for her, and, if it made such a statement, the birthparents would be at risk of having to submit to an investigation into how well they were caring for their other children.

In her May 14, 2010 affidavit, the petitioner's wife stated that the beneficiary's birthparents felt the financial hardship of raising another child would be too intense.

The record also contains a June 14, 2009 document constituting the Article 16 report entitled [REDACTED].” With regard to the ability of the birthparents to provide for the beneficiary's basic needs, the Article 16 report conveyed the birthparents' statement that they would not be able to provide for the beneficiary's basic needs because they have to support their four other children, as well as a niece who lives with them. The report stated that the family lives in a small wooden house in good condition that consists of two small bedrooms, a small living room and kitchen area, and a bathroom located outside the home. The birthfather is employed as a fisherman, with a fluctuating salary, and the birthmother is a homemaker. The beneficiary was ten months of age at the time of this report, and she had been living with her birthparents since birth. The author of the report opined that the family home is “cramped,” and that as the children grow they will require additional space and privacy.

On appeal, counsel submits a November 30, 2010 addendum to the Article 16 report that addresses the issue of the birthparents' incapability of providing the proper care to the beneficiary. The

addendum states that placement of the beneficiary with the petitioners is in her best interest; that it “will be hard” for the birthparents to provide for the beneficiary’s basic needs as a result of their financial insecurity and cramped living conditions; and that the birthparents’ income is barely enough to buy food and provide for the basic needs of the other five children for whom they are responsible.

The current record contains no information regarding local conditions in Belize, which is required in order to determine whether the beneficiary’s birthparents are incapable of providing her with the proper care pursuant to the regulation at 8 C.F.R. § 204.301. There is no evidence that the birthparents have been unable to meet the beneficiary’s basic needs consistent with the local standards in Belize. The Article 16 report and addendum note the financial challenges facing the birthparents, but the competent authority does not conclude that the birthparents are incapable of providing for the beneficiary’s basic needs. Rather, the addendum states that “it will be hard” for them to do so because they are responsible for five other children and “their income is barely enough to buy food and basic needs.” The brief references in the report and addendum to the birthparents’ financial insecurity, low income and cramped dwelling are insufficient to establish their inability to provide proper care to the beneficiary without evidence of how their situation compares to the local conditions in Belize.

On appeal, the petitioner and his wife have failed to establish that the beneficiary’s birthparents are incapable of providing for the beneficiary’s basic needs, consistent with local standards in Belize. The petitioner and his wife, therefore, have failed to demonstrate that the beneficiary’s natural parents are incapable of providing her with proper care, as required by section 101(b)(1)(G)(i)(III) of the Act, 8 U.S.C. § 1101(b)(1)(G)(i)(III).

Additional Requirements of Article 16 Report

The regulation at 8 C.F.R. § 204.313(d)(3)(i) requires the Article 16 report to state that the competent authority has established that the child is eligible for adoption. On appeal, counsel submits a November 30, 2010 addendum to the Article 16 report which states that the competent authority has determined the beneficiary is eligible for adoption. Accordingly, the Article 16 report now satisfies 8 C.F.R. § 204.313(d)(3)(i) and this portion of the director’s decision is hereby withdrawn.

The regulation also requires the Article 16 report to establish that the competent authority has ensured that the legal custodian, after having been counseled as required concerning the effect of the child’s adoption, has freely consented in writing to the child’s adoption in the required legal form. 8 C.F.R. § 204.313(d)(3)(iii). On appeal, the petitioner submits a November 30, 2010 letter from the competent authority confirming that it has ensured that the beneficiary’s birth parents were counseled as required concerning the effect of the child’s adoption and that the document entitled [REDACTED] signed by the birthparents and notarized on May 20, 2009 is the required legal form used in the courts of Belize to relinquish parental rights. Accordingly, the Article 16 report now satisfies the regulatory requirement at 8 C.F.R. § 204.313(d)(3)(iii) and the director’s determination to the contrary is hereby withdrawn.

The regulation at 8 C.F.R. § 204.313(d)(4)(iii) requires that the Article 16 report be accompanied by a statement, signed under penalty of perjury by the primary provider (or an authorized representative if the primary provider is an agency or other judicial person), certifying that the report is a true, correct, and complete copy of the report obtained from the central authority. The November 30, 2010 "Certification of the Article 16 Report" submitted on appeal satisfies that requirement. Accordingly, the Article 16 report now satisfies 8 C.F.R. § 204.313(d)(4)(iii) and this portion of the director's decision is hereby withdrawn.

The regulation at 8 C.F.R. § 204.313(d)(3)(ii) requires the Article 16 report to state that the competent authority has determined, after having given due consideration to the possibility of placing the child for adoption within the Convention country, that intercountry adoption is in the child's best interests. The petitioner's appellate submission does not satisfy this requirement, and he has not overcome this ground of the director's denial.

Conclusion

The petitioner and his wife have established on appeal: (1) that the competent authority ensured that the beneficiary's birthparents were counseled as required regarding the effect of the adoption and freely gave their consent; and (2) that the Article 16 report is a true, correct, and complete copy of the report obtained from the central authority. The director's contrary determinations, therefore, are withdrawn.

However, the petitioner and his wife still have not established: (1) that the beneficiary's birthparents are incapable of providing proper care to the beneficiary, consistent with local standards in Belize; and (2) that the competent authority has determined that intercountry adoption is in the beneficiary's best interest, after having given due consideration to the possibility of placing her for adoption within Belize. The petitioner and his wife, therefore, have failed to establish that the beneficiary is eligible for immigrant classification as an immediate relative pursuant to section 101(b)(1)(G) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(b)(1)(G) and the appeal will be dismissed.

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 appeal is dismissed.