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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



F1

Date: **OCT 17 2011**

Office: NATIONAL BENEFITS CENTER

File: 

IN RE:

Petitioner:
Beneficiary:



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:

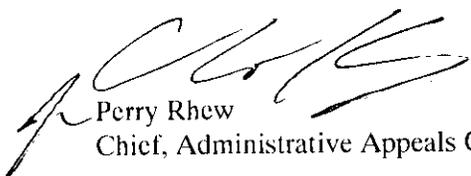


INSTRUCTIONS:

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 Director, National Benefits Center, denied the Petition to Classify Orphan as an Immediate Relative (Form I-600), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will remain denied.

The petitioner seeks to classify the beneficiary as an orphan pursuant to section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F). The director denied the petition because the petitioner failed to submit: (1) evidence that the surviving parent is unable to provide for the beneficiary's basic needs; and (2) proof that the beneficiary is in the United States in parole status. On appeal, counsel submits a brief and additional evidence.

Applicable Law

Section 101(b)(1)(F) of the Act defines an orphan, in pertinent part, as:

(i) 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

The regulation at 8 C.F.R. § 204.3(k)(3) relates to beneficiaries who are in the United States rather than abroad, and states:

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.

Factual and Procedural History

The petitioner filed the instant Form I-600 with U.S. Citizenship and Immigration Services (USCIS) on February 10, 2011, when the beneficiary was two years old. The director issued a Notice of Intent to Deny (NOID) the petition on March 31, 2011 to which the petitioner responded with additional evidence. On May 20, 2011, the director denied the Form I-600 and the petitioner timely appealed. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Analysis

The director determined that the petitioner failed to submit evidence that the surviving parent is unable to provide for the beneficiary's basic needs as well as proof that the beneficiary is in the

United States in parole status. Preliminarily, we note the director's error in referring to a surviving parent of the beneficiary, as the evidence of record indicates that the beneficiary's biological parents are both alive, married, and living in Japan with their four other children. Accordingly, we withdraw that stated basis for the director's denial decision. We affirm, however, the director's other stated basis for denying the petition and find another issue of ineligibility as well.

According to counsel, the beneficiary's biological parents were surrogates for a couple who, due to the wife's cancer, decided to not take custody of the beneficiary after the birth.¹ Counsel asserts that the beneficiary's biological mother confided in the petitioner's wife about the beneficiary's birth and her and her husband's inability to care for the beneficiary, which led the petitioner and his wife to agree to assume custody of the beneficiary and eventually adopt her. Counsel maintains that the beneficiary's mother brought the beneficiary to the United States in December 2008 from Japan and relinquished her parental rights to the petitioner and his wife, who became the beneficiary's guardians. According to the record, the beneficiary was issued a Japanese passport that she used to gain admission into the United States under section 217 of the Act, 8 U.S.C. § 1187. According to her arrival and departure record (Form I-94W), the beneficiary entered the United States on December 22, 2008 and was authorized to remain until March 21, 2009 as permitted under section 217(a)(1) of the Act, which authorizes an alien to apply for admission as a nonimmigrant visitor for a period to not exceed 90 days.²

The regulation at 8 C.F.R. § 204.3(k)(3) precludes from eligibility as an orphan any child who is in the United States as a nonimmigrant. The beneficiary is presently in the United States pursuant to her admission as a nonimmigrant visitor under section 217 of the Act and she is therefore ineligible to be classified as an orphan. For this reason alone, the petition may not be approved.

Beyond the director's decision, even if the beneficiary's nonimmigrant classification did not preclude her eligibility, the petition would not be approvable.

The regulation at 8 C.F.R. § 204.3(b) contains definitions for the terms "death or disappearance of, abandonment or desertion by, or separation or loss from, both parents" found at section 101(b)(1)(F) of the Act. The beneficiary's family's household registration indicates that the beneficiary has two parents and, the record indicates that they are both alive and living in Japan with their four other children. The record also indicates that when she brought the beneficiary to the United States, the mother executed a declaration giving specific consent to the petitioner and his wife for the

¹ We note that other than counsel's statement, there is no evidence to establish which couple is the beneficiary's biological parents – the couple who were the surrogates, or the couple who would have taken custody of the beneficiary but for the wife being stricken with cancer.

² Section 101(a)(15)(B) of the Act describes a nonimmigrant as: "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure."

beneficiary's adoption. The beneficiary's father executed a similar declaration in April 2010. As the beneficiary's parents are alive and their whereabouts are known, the beneficiary cannot be considered an orphan due to their deaths or disappearances. In addition, the beneficiary's parents did not desert and were not separated or lost from the beneficiary, as those terms are defined at 8 C.F.R. § 204.3(b).³ The petitioner also cannot show that the beneficiary's parents abandoned her, as that term is defined at 8 C.F.R. § 204.3(b).⁴ The record reflects that the beneficiary's adoption by the petitioner and his wife was arranged directly by the beneficiary's parents, which is prohibited by the definition of "abandonment by both parents" at 8 C.F.R. § 204.3(b). Accordingly, the beneficiary cannot meet the definition of an orphan at section 101(b)(1)(F)(i) of the Act.

Conclusion

Based upon the above discussion, we withdraw the director's finding that the beneficiary is the child of a surviving parent, but affirm his denial of the petition on the basis of the beneficiary's entry into the United States as a nonimmigrant, which precludes her from eligibility as an orphan. In addition, we find that the beneficiary could not meet the definition of orphan at section 101(b)(1)(F)(i) of the Act, even if her entry into the United States as a nonimmigrant was not a determinative factor.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied.

³ *Desertion by both parents* means: "that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country." *Loss from both parents* means: "the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents . . ." *Separation from both parents* means: "the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. . . ." 8 C.F.R. § 204.3(b).

⁴ *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). . . . A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. . . ." 8 C.F.R. § 204.3(b).