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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



F<sub>1</sub>

Date:

Office: NATIONAL BENEFITS CENTER

FILE:



IN RE:

OCT 18 2011

Petitioner:

Beneficiary:



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 Director, National Benefits Center (the director), denied the Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks classification of the beneficiary 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 because the Form I-800 was filed after the beneficiary turned 16 years of age, and the petitioner failed to establish that the competent authority in China had issued a report pursuant to Article 16 of the Hague Convention (Article 16 report). On appeal, counsel submits a brief and additional evidence.

*Applicable Law*

For the purpose of classifying an intending 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,<sup>1</sup> 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  
(i) if –

\* \* \*

(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 . . . .

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.

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<sup>1</sup> 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.

A Form I-800 must be accompanied by a report from the competent authority, as required by Article 16 of the Convention. 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. *Id.*

### *Factual and Procedural History*

The petitioner is a citizen of the United States. The beneficiary was born in China on November 9, 1994 and is the petitioner's niece. According to the petitioner, the beneficiary is currently living with him and his wife in the United States while attending high school, after being granted an F-1 nonimmigrant student visa.

The petitioner's Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A) was approved by U.S. Citizenship and Immigration Services (USCIS) on September 7, 2010, and the petitioner filed the instant Form I-800 on May 9, 2011, after the beneficiary turned 16 years old. The director issued a Notice of Intent to Deny (NOID) the petition on May 27, 2011, to which the petitioner responded. Noting that the petitioner had filed the Form I-800 after the beneficiary turned age 16 and failed to submit the Article 16 report, the director denied the petition on June 30, 2011. Counsel has timely appealed the director's adverse decision, stating that the filing deadline should be equitably tolled to the date (September 29, 2010) that the petitioner was informed by his home study provider that the competent authority in China needed to see the beneficiary's name on documents from U.S. immigration authorities before it would issue the Article 16 report.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petitioner has failed to establish that the beneficiary is eligible to be classified as a child under section 101(b)(1)(G) of the Act, and we shall affirm the director's denial of the petition.

### *Analysis*

The definition of a child at section 101(b)(1)(G) of the Act specifies that the intending Convention adoptee must be under the age of 16 at the time the Form I-800 is filed. This age requirement is also incorporated into the regulation at 8 C.F.R. § 204.313(c). The beneficiary turned 16 years old on November 9, 2010; however, the petitioner did not file the petition until May 9, 2011. For this reason alone, the petition may not be approved.

Counsel asserts on appeal that the filing deadline should be equitably tolled but cites no legal authority for her claim. Although courts have found certain filing deadlines to be statutes of limitations subject to equitable tolling in the context of removal or deportation, counsel cites no case finding visa petition filing deadlines subject to equitable tolling. *Compare Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9<sup>th</sup> Cir. 2005) (time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling) with *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9<sup>th</sup>

Cir. 2008) (deadline for filing a visa petition to qualify under section 245(i) of the Act is a statute of repose not subject to equitable tolling). The requirement of a petitioner to file the Form I-800 before the beneficiary turns 16 years old is not subject to equitable tolling, and we lack the authority to waive the statutory deadline.<sup>2</sup>

On appeal, counsel recounts that the petitioner was unable to get an Article 16 report from the competent authority and claims that the competent authority violated the Hague Convention by asking for an additional document that the petitioner could not obtain. While the petitioner has documented her difficulties in timely obtaining the Article 16 report, USCIS lacks the authority to waive this requirement. Article 16 of the Hague Convention requires this report and the requirement is codified at section 101(b)(1)(G)(i)(V)(aa) of the Act and incorporated into the regulation at 8 C.F.R. § 204.313(d)(3).

*Conclusion*

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained her burden of establishing that the beneficiary meets the definition of a child at section 101(b)(1)(G) of the Act, and her appeal shall be dismissed.

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

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<sup>2</sup> Even if the deadline were found to be a statute of limitations subject to equitable tolling, the petitioner would still have to show that she exercised due diligence in pursuit of her claim. See *Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100.