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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

[redacted]

F1

DATE: APR 2 6 2012 OFFICE: NATIONAL BENEFITS CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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:

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 of the National Benefits Center ("the director") initially approved the Petition to Classify Orphan as an Immediate Relative (Form I-600) but ultimately revoked the approval after proper notice. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will remain revoked.

Applicable Law

Regarding the revocation of approved visa petitions, section 205 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1155, states, in pertinent part:

> The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition[.]

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i), which defines an orphan, in pertinent part, as:

> a child, under the age of sixteen at the time a petition is filed . . . 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. . . . *Provided*, That the [Secretary of the Department of Homeland Security] is satisfied that proper care will be furnished the child if admitted to the United States[.]

Regarding the varying definitions of an orphan at section 101(b)(1)(F)(i) of the Act, the regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

> *Incapable of providing proper care* means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign-sending country.
>
> *Surviving parent* means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be *incapable of providing proper care* as that term is defined in this section.

As supporting documentation for an orphan petition where the beneficiary is the child of a surviving parent, the regulation at 8 C.F.R. § 204.3(d)(1)(iii)(C) requires a petitioner to submit, in part: "evidence that the . . . surviving parent . . . has irrevocably released the orphan for emigration and adoption[.]"

Facts and Procedural History

The petitioner is a 53-year-old native of Tibet who filed the Form I-600 on October 26, 2009. The petitioner stated that she had adopted the beneficiary in India in February 2008 and provided documents to show the claimed adoption. The director subsequently approved the Form I-600 in March 2010 and notified the Department of State (DOS) of such approval. In April 2010, the U.S. Consul in New Delhi, India, returned the approved Form I-600, stating that "no petitionable relationship seems to exist between the beneficiary and the petitioner." According to the consular officer adoptions in India are governed by the Hindu Adoption and Maintenance Act of 1956 (HAMA), which provides, in part, that an adoptive mother may not already have a daughter if she is seeking to adopt a girl. According to the consular officer any adoption made in contravention to the HAMA is void and therefore the Form I-600 could not be approved.

The director issued a Notice of Intent to Revoke (NOIR) the approval of the Form I-600 to which the petitioner through counsel responded. The director ultimately revoked the approval of the petition based upon the reasons stated in the NOIR, namely that the adoption of the beneficiary was invalid for immigration purposes because it was obtained in contravention to the HAMA. On appeal, counsel states that the director failed to disclose the evidence that he and the consular officer relied upon to find that the adoption was invalid, and that the adoption may be valid under the Juvenile Justice (Care and Protection of Children) Act of 2000 ("JJA 2000") and its 2006 amendments ("JJA 2006").

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3rd Cir. 2004). As we shall discuss, we find no error in the director's ultimate decision to revoke approval of the Form I-600 based upon the evidence in the record, and find additionally, that the petition may not be approved for reasons not raised by the director.

Analysis

Counsel asserts on appeal that the petitioner was not provided access to the entire record that the director and the consular officer relied upon to determine that the adoption of the beneficiary was invalid under the HAMA. Our review of the record indicates that the director did disclose to the petitioner through the issuance of the NOID the evidence that the consular officer relied upon when determining that the petition should not have been approved. The consular officer noted the relevant sections of the HAMA as well as the fact that the petitioner already had a daughter, and concluded that the adoption was invalid under the HAMA and ultimately void under U.S. immigration law. The record does not contain any other evidence or information from the consular officer that was not disclosed to the petitioner in the NOID. The adoption is invalid under the HAMA, as the petitioner already has a daughter. On appeal, counsel does not dispute the adoption's invalidity under the HAMA. Consequently, we do not find any procedural error or resultant prejudice to the petitioner.

Counsel states on appeal that the beneficiary's adoption could be valid under the JJA 2006, stating: "The Deed of Adoption . . . is inconclusive, at best, as to which law controls . . . since neither law pertaining to adoptions is specifically referenced in the document." Section 41 of the JJA 2006, which concerns adoptions and amended certain sections of the JJA 2000, provides:

(i) for sub-sections (2), (3) and (4), the following sub-sections shall be substituted, namely:—

(2) Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.

(4) The State Government shall recognise one or more of its institutions or voluntary organisations in each district as specialised adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3): Provided that the children's homes and the institutions run by the State Government or a voluntary organisation for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3);

(ii) for sub-section (6), the following sub-section shall be substituted, namely:—

(6) The court may allow a child to be given in adoption—

(a) to a person irrespective of marital status; or

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or

(c) to childless couples.

The Deed of Adoption in the record was issued on February 5, 2008 by The Court of Judicial Magistrate First Class Tawang, District Tawang, in Arunachal Pradesh, India. While section 41(6) of the JJA 2006 authorizes a court to allow a child to be given in adoption, there is insufficient evidence that the appropriate procedures at subsection 41 were followed for this adoption.

Under section 41(4), a child who is orphaned, abandoned or surrendered must be placed with a state government-approved adoption agency and must be declared free for adoption by the Committee.[1]

[1] Under section 2(f) of the JJA 2000, *Committee* means a Child Welfare Committee as defined at section 29, which was amended by the JJA 2006.

According to section 32(1) of the JJA, only one of the following may produce a child before the Committee:

(i) any police officer or special juvenile police unit or a designated police officer;
(ii) any public servant;
(iii) child line, a registered voluntary organization or by such other voluntary organization or an agency as may be recognised by the State Government;
(iv) any social worker or a public spirited citizen authorized by the State Government; or
(v) by the child himself.

The Deed of Adoption states that the petitioner "approached [the biological mother] for taking her only daughter, [the beneficiary], in adoption to which [the biological mother] agreed." This statement indicates that the beneficiary was not surrendered to a state government-approved adoption agency who would have presented her before the Committee. The record also does not indicate that the petitioner was authorized by the State Government to independently present the beneficiary before the Committee. In addition, section 41(5) of the JJA 2000 states:

No child shall be offered for adoption-

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

There is no evidence that subsection (a) or (b) was followed before the court issued the Deed of Adoption. Additionally, as the beneficiary was 14 years old at the time of the adoption, she would have been required to provide her consent under subsection (c); there is no evidence that her consent to the adoption was given. Accordingly, we do not find that the Deed of Adoption is valid under the JJA 2000 as amended by the JJA 2006.

On appeal, counsel asserts that "USCIS has not met its burden of proof that the Deed of Adoption is invalid," but concludes that it "is inconclusive" whether the adoption in this case is governed by the HAMA or the JJA. Contrary to counsel's assertion, the petitioner, not USCIS, bears the burden of proof to establish the beneficiary's eligibility. Section 291 of the Act, 8 U.S.C. § 1361. When a petitioner relies on foreign law to establish the beneficiary's eligibility, the application of foreign law is a question of fact, which the petitioner also bears the burden of proving. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008).

Beyond the director's decision, even if the petitioner had secured a valid adoption under the laws of India, the evidence would fail to demonstrate that the beneficiary meets the definition of an orphan under section 101(b)(1)(F) of the Act.[2]

The record establishes that the beneficiary's biological father died on January 5, 2008. Other than stating that the biological mother belonged to a poor family and had "no source of income as such," the Deed of Adoption does not contain any probative details about the biological mother's ability to provide for beneficiary's basic needs consistent with the local standards in the community. In addition, the court's statement in the documents supporting the Deed of Adoption that "[the biological mother] shall have no claim and responsibility herein after as to the custody of or any other right against [the beneficiary]" is not equivalent to an irrevocable release of the beneficiary for emigration and adoption. The biological mother has not provided a written statement in a language that she understands in which she has consented to the petitioner's adoption of the beneficiary and emigration to the United States, and which does not contain any stipulations or conditions which would cause custody of the beneficiary to revert to her biological mother. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Conclusion

Based upon the evidence in the record, the beneficiary is ineligible for status as an orphan under section 101(b)(1)(F)(i) of the Act. First, the petitioner has not demonstrated that the Deed of Adoption is valid under the laws of India. The consular notice that the adoption was invalid under the HAMA provided the director with good and sufficient cause to revoke the approval of the petition pursuant to section 205 of the Act. Second, even if the adoption could be considered valid, the petitioner has failed to demonstrate that the biological mother is incapable of providing proper care for the beneficiary consistent with the local standards in her community and that she has irrevocably released the beneficiary for emigration and adoption.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

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

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[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).