

(b)(6)

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



U.S. Citizenship
and Immigration
Services

JUN 12 2015

DATE:

FILE:

PETITION RECEIPT:

IN RE:

Petitioner:

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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director of the National Benefits Center (the Director) denied the Petition to Classify Orphan as an Immediate Relative (Form I-600), and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. We granted a motion to reopen; the appeal remained dismissed and the petition remained denied. The matter is before us again on a motion to reopen and reconsider. The motion will be granted, the appeal will remain dismissed, and the petition will remain denied.

Applicable law

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act, 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; who has been adopted abroad by a U.S. citizen and spouse jointly. . . or who is coming to the United States for adoption by a United States citizen and spouse jointly . . . who have or has complied with the preadoption requirements, if any, of the child's proposed residence: *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[.]

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

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). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

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

* * *

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.

* * *

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

The pertinent provisions of 8 C.F.R. § 204.3(d) state the following:

- (d) *Supporting documentation for a petition for an identified orphan . . .* An orphan petition must be accompanied by full documentation as follows:

* * *

(1)(iii) Evidence that the child is an orphan as appropriate to the case:

- (A) Evidence that the orphan has been abandoned or deserted by, separated or lost from both parents, or that both parents have disappeared as those terms are defined in paragraph (b) of this section[.]

Facts and Procedural History

The petitioner is a 38-year-old U.S. citizen. He filed the Form I-600 with U.S. Citizenship and Immigration Services (USCIS) on September 18, 2013, seeking to classify the beneficiary, a citizen of Bangladesh, as an orphan under section 101(b)(1)(F)(i) of the Act, due to abandonment by both parents. The director denied the petition on January 9, 2014 because the evidence failed to establish that the relevant court in Bangladesh gave permission for the beneficiary to emigrate to the United States, and because the petitioner failed to establish that the beneficiary was abandoned by both parents, as that phrase is defined in the regulations. On appeal, the petitioner overcame the issue relating to the beneficiary's ability to emigrate, but we ultimately dismissed the appeal because the beneficiary had not been abandoned by both of his parents. On the prior motion, we again found that the beneficiary had not been abandoned by both of his parents and concluded that new evidence supported finding the adoption had been brokered.

On motion, the petitioner states that he retained new counsel and he has started the process of filing a bar complaint against prior counsel due to ineffective assistance of counsel, based in part on "incorrect information" prior counsel had submitted. The record does not include supporting documentary evidence showing that he has filed a bar complaint against prior counsel. The petitioner states that he told prior counsel that the beneficiary was left at the doorsteps of an imam of a local mosque; two children witnessed this abandonment and told their mothers, who told their neighbors; Mr. [REDACTED] approached the natural parents, as he knew them; the natural parents declined to take the beneficiary back; Mr. [REDACTED] was contacted by the police, who investigated and confirmed that the natural parents abandoned the beneficiary and wished to place him up for adoption; the petitioner's older brother commenced guardianship proceedings on his behalf; and he and his spouse were issued a legal guardianship order. The petitioner asserts that we have the impression that Mr. [REDACTED] acted as a broker who ignored adoption laws in Bangladesh; but Mr. [REDACTED] did not break, nor could he have broken, adoption laws in Bangladesh, as there are no adoption laws or agencies there. The petitioner states that prior counsel advised him not to mention the police contact with the natural parents and his older brother, as it would complicate things; his current counsel advised the petitioner that he should have requested an affidavit from the imam. The petitioner also states that his parents, who are caring for the beneficiary, are no longer able to care for him due to their age and serious medical problems.

The petitioner, through counsel, asserts that we did not consider that there are only guardianship laws and procedures in Bangladesh, and an irrevocable release of a child by his or her parents is required to obtain legal guardianship over the child. The petitioner states he did not evade the adoption laws of Bangladesh by attempting to adopt the beneficiary through a third person instead of an adoption agency, as Bangladesh does not have adoption laws or adoption agencies. The petitioner also states that we overlooked and thus did not consider a previously submitted affidavit from [REDACTED] an attorney in Bangladesh, who states that to receive legal guardianship, Bangladesh law requires the biological parents to relinquish their parental rights to the proposed legal guardian, and the relinquishment was not made in anticipation of or preparation for an adoption rather it was made to comply with the applicable guardianship laws.

In addition, the petitioner states that we did not consider whether the beneficiary was deserted by the natural parents. The petitioner, through counsel, states that under the laws of Bangladesh a child is considered a "ward" of the court in charge of guardianship proceedings until a legal guardian is appointed; the Guardians and Wards Act of 1890 at chapter 1, section 4(3) provides, "ward means a minor for whose person or property, or both, there is a guardian;" and the Guardians and Wards Act of 1890, section 5(b)(ii) provides that the court in charge of guardianship proceedings has jurisdiction over the "person of the ward."

On motion, the petitioner, through counsel, states he will provide additional information, including an affidavit from the imam and a police report, as soon as they become available. To date, however, we have not received additional evidence from the petitioner. The record, therefore, is considered complete as of the date of this decision.

We conduct *de novo* review. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Based on the evidence in the record, the beneficiary remains ineligible for orphan status.

Analysis

As we stated in our prior decision, the term *abandonment by both parents* is specifically defined at 8 C.F.R. § 204.3(b), and the petitioner must demonstrate that both of the beneficiary's biological 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)." 8 C.F.R. § 204.3(b).

The regulation emphasizes that if the child was relinquished or released to a third party for custodial care in anticipation of, or preparation for, adoption, then a finding of abandonment cannot be made unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. *See id.*

Previously, the petitioner submitted an affidavit from [REDACTED] dated August 24, 2014, stating that the beneficiary's biological parents came to him and requested that he take their child because they could not provide for him; that adoption agencies are corrupt, with many instances of child abuse; and that nonetheless, because of the financial burden he was incurring, he sought to place the beneficiary in an adoption agency. The petitioner previously submitted an affidavit from Mr. [REDACTED] spouse, dated August 24, 2014, in which she stated that "My husband told me that Mr. [REDACTED] financially [sic] condition was so poor that he could not afford to take care of the baby and that he begged my husband to take [the beneficiary]." She also states that they "almost had to" place the beneficiary in an adoption agency.

As mentioned, the petitioner now asserts that he told prior counsel that the beneficiary was left at the doorsteps of an imam of a local mosque; two children witnessed this abandonment; Mr. [REDACTED] approached the natural parents, as he knew them; the natural parents declined to take the beneficiary back; and Mr. [REDACTED] was then contacted by the police who confirmed that the natural parents abandoned the beneficiary and wished to place him up for adoption. The petitioner states that prior counsel advised him not to mention the police contact with the natural parents and his older brother, who assisted with the guardianship proceedings, as it would complicate things.

The record includes, as the petitioner acknowledges, two versions of what happened to the beneficiary before Mr. [REDACTED] began caring for him. In their affidavits, both Mr. [REDACTED] and his spouse stated that the beneficiary's biological parents directly asked Mr. [REDACTED] to take their child. On motion, the petitioner asserts that the beneficiary was left at a local mosque, there were witnesses to this, and Mr. [REDACTED] approached the beneficiary's biological parents. The petitioner does not assert that prior counsel advised him not to mention the beneficiary having been left at a mosque. Rather, he claims that prior counsel advised him not to mention the police contact with the biological parents and his older brother. Therefore, the nature of how the beneficiary came under the care of Mr. [REDACTED] is not clear. The record does not include supporting evidence from the imam or of other witnesses to the new set of facts presented on motion. In addition, though Mr. [REDACTED] previously discussed adoption agencies in Bangladesh, counsel asserts on motion that there are no adoption agencies in Bangladesh.

Regardless, had the beneficiary been relinquished or released to a third party for custodial care in anticipation of, or preparation for, adoption, then a finding of abandonment cannot be made unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. The petitioner states that Mr. [REDACTED] was contacted by the police, who investigated and confirmed that the natural parents abandoned the beneficiary and wished to place him up for adoption. Therefore, the beneficiary was relinquished to a third party, Mr. [REDACTED] and the biological parents intended to place the beneficiary up for adoption. The petitioner presented no evidence that Mr. [REDACTED] was authorized under the child welfare laws of Bangladesh to act in the capacity of a third party to provide custodial care to the beneficiary in preparation for this adoption.

We acknowledge the U.S. Department of State documentation reflecting that Bangladesh has no statutory provisions governing adoptions; there are only guardianship laws and procedures in Bangladesh; and an irrevocable release of a child by his or her parents is required to obtain legal guardianship over the child. The record includes an affidavit from the biological parents of the beneficiary, in which they relinquish their rights to the beneficiary to the petitioner, that was submitted during the guardianship proceedings. [REDACTED] previously asserted that the relinquishment was not made in anticipation of or preparation for an adoption; rather, it was made to comply with the applicable guardianship laws. Although these laws require an irrevocable release of a child by his or her parents, it does not affect the finding above that prior to the guardianship proceedings, the beneficiary was relinquished to a third party, Mr. [REDACTED], and the biological parents intended to place the beneficiary up for adoption.

Despite the petitioner's assertions, *abandonment by both parents* at 8 C.F.R. § 204.3(b) is clearly defined and the definition prohibits a petitioner from circumventing a country's child welfare laws to arrange for an adoption directly with the biological parents or through a private intermediary, in this case, Mr. [REDACTED]. Accordingly, the petitioner has not established that the beneficiary meets the definition of *orphan*, as that term is defined at section 101(b)(1)(F)(i) of the Act, due to abandonment by both parents.

Next, we will discuss counsel's claim that the beneficiary was deserted by his biological parents. As mentioned above, the term *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. The petitioner, through counsel, asserts that under the laws of Bangladesh a child is considered a "ward" of the court in charge of guardianship proceedings until a legal guardian is appointed. The record, however, does not include evidence to support this claim. The Guardians and Wards Act of 1890, Chapter 1, Section 4(3) provides that ward "means a minor for whose person or property, or both, there is a guardian." and Chapter 1, Section 4(2) provides that guardian "means a person having the care of the person of a minor or of his property, or of both his person and property." Mr. [REDACTED] states in his August 24, 2014 affidavit that he and his spouse carried out all responsibilities for the beneficiary until the petitioner was declared the beneficiary's legal guardian. Therefore, the record reflects that the beneficiary was a ward with Mr. [REDACTED] as his guardian, and not that he "become a ward of a competent authority in accordance with the laws of the foreign-sending country."

Furthermore, The Guardians and Wards Act of 1890, Chapter 1, Section 5, which counsel cites, states that:

“[T]he Court” means-

- (a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or
- (b) where a guardian has been appointed or declared in pursuance of any such application-
 - (i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or
 - (ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides[.]

This section of the law defines “the Court” and which court has jurisdiction over proceedings involving guardianship. The petitioner does not show that this law supports finding that the beneficiary “become a ward of a competent authority in accordance with the laws of the foreign-sending country.” Accordingly, the petitioner has not established that the beneficiary meets the definition of *orphan*, as that term is defined at section 101(b)(1)(F)(i) of the Act, due to desertion by both parents.

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted. Our prior decision is affirmed. The appeal remains dismissed and the petition remains denied.