U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-M-T-

DATE: FEB. 10, 2016

APPEAL OF NATIONAL BENEFITS CENTER DECISION

PETITION: FORM I-600, PETITION TO CLASSIFY ORPHAN AS AN IMMEDIATE RELATIVE

The Petitioner, a citizen of the United States, seeks to classify an orphan as an immediate relative. *See* Immigration and Nationality Act (the Act) section 101(b)(1)(F)(i), 8 U.S.C. § 1101(b)(1)(F)(i). The Director of the National Benefits Center initially approved the Form I-600, Petition to Classify Orphan as an Immediate Relative, but ultimately revoked the approval after proper notice. The matter is now before us on appeal. The appeal will be dismissed.

I. APPLICABLE LAW

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 relevant part, as:

> a child, under the age of sixteen at the time a petition is filed in [her] behalf . . . 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 proper care and has in writing irrevocably released the child for emigration and adoption[.]

The regulation at 8 C.F.R. § 204.3(b) states, in relevant 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.

Disappearance of both parents means that both parents have accountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by 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.

. . . .

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.

. . . .

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. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children

born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.

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

Supporting documentation for a petition for an identified orphan . . . An orphan petition must be accompanied by full documentation as follows:

. . . .

(1)(ii) The orphan's birth certificate, or if such a certificate is not available, an explanation together with other proof of identity and age;

(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; or

. . . .

(C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption; and

(iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign sending country:

(A) A legible, certified copy of the adoption decree, if the orphan has been the subject of a full and final adoption abroad, and evidence that the ...married petitioner and spouse, saw the orphan prior to or during the adoption proceeding abroad[.]

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by [him] under section 204. Such revocation shall be effective as of the date of approval of any such petition[.]

The regulation at 8 C.F.R. § 205.2 governs the procedures for revoking approved visa petitions on notice, and states, in pertinent part:

> (a) [A]ny Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in 205.1 when the necessity for the revocation comes to the attention of this Service.
>
> (b) [R]evocation of the approval of a petition or self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.

The *preponderance of the evidence* standard requires that the record demonstrate that the applicant's claim is "probably true," based on the specific facts of each case. *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-,* 20 I&N Dec. 77, 79-80 (Comm'r. 1989)).

II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a 45 year-old U.S. citizen who seeks to classify the Beneficiary, a national of the Democratic Republic of the Congo (DRC), as an orphan. The Petitioner filed the Form I-600 with U.S. Citizenship and Immigration Services (USCIS) on August 13, 2013, and on September 7, 2013, USCIS approved the Form I-600. On December 1, 2014, the U.S. Consulate in DRC returned the approved Form I-600 to the Director because the petition was not clearly approvable due to adverse information not available to USCIS at the time of the Form I-600 filing. On December 30, 2014, the Director issued a NOIR, notifying the Petitioner that the Form I-600 was approved in error. The Petitioner timely responded to the NOIR. On March 31, 2015, the Director issued a Notice of Revocation finding that there is no evidence regarding the Beneficiary's biological parents' relinquishment of parental rights and evidence of the lack of means to care for the Beneficiary per DRC requirements; there is a lack of evidence that the Juvenile Court which issued the adoption with the incorrect information that the Beneficiary's parents were unknown would let its decision stand in light of the new information; and the Beneficiary does not qualify for classification as an *orphan,* as that term is defined at section 101(b)(1)(F)(i) of the Act.

On appeal, the Petitioner asserts that the Director applied the incorrect standard when he issued the revocation. She states that the revocation was not in accordance with 8 C.F.R. §205.2(a) or case law in that there was not substantial evidence to warrant a finding of "necessity" for revocation and the Notice of Intent to Revoke (NOIR) did not include a consular investigation report as required under 8 C.F.R. § 103.2(b)(16). The Petitioner further asserts that the Beneficiary is not the "prospective" adopted child of the Petitioner, but has been adopted by order of the Juvenile Court. She states that because the Beneficiary's visa was issued, she no longer has the burden of proof in establishing the requirements of a Form I-600. The Petitioner asserts that there is substantial

evidence in the record that the Beneficiary has been abandoned by both of her parents; both of her parents disappeared; her parents deserted her; and she is an orphan within the meaning of the statute. In addition, the Petitioner asserts the Director erred in considering the father's interests as relevant and in concealing that the birth mother consented to the adoption and emigration of the Beneficiary; erred in not applying the preponderance of the evidence standard; and erred in not giving full faith and credit to the adoption judgment of the Juvenile Court of

The record includes, but is not limited to: counsel's brief; a report from a private investigator in the DRC, dated December 27, 2014; an email record between the Petitioner and a U.S. State Department Consular Officer in the Beneficiary's immigrant visa, which had been voided without prejudice; other documentation showing that on October 9, 2014 the Beneficiary's visa was issued; photographs of the Beneficiary; a news article concerning the expulsion of Congolese from Minutes of Abandonment concerning the Beneficiary from the in Tutorship Council from the Act of Consent from the Certification of Notification of a Judgment concerning the adoption of the Beneficiary in the Juvenile Court of a memo from the consular officer involved in the case; a sworn statement from the attorney of the orphanage where the Beneficiary was residing; a Pre-Placement Adoption Report; the Beneficiary's birth certificate; and additional identity and background documentation on the Petitioner.

III. ANALYSIS

First, we will address the Petitioner's assertion that the Beneficiary is not her "prospective" adopted child, but has been adopted by order of the Court and by this court order is legally her child. The fact that the Petitioner successfully adopted the Beneficiary in the Juvenile Court does not exempt the Petitioner from having to meet the other requirements for adopting the Beneficiary and the Beneficiary meeting the definition of an orphan under the Act. Furthermore, the order of the Juvenile Court was given based on incorrect information, specifically, the Beneficiary's birth certificate, because it stated that her parents were "unknown" when in fact they were known.

Second, we will address the assertions related to issues with the Notice of Revocation. The revocation of the petition was done in accordance with the Act and 8 C.F.R. § 205.2. The Petitioner's assertions, through counsel, are not supported by the record and a plain reading of the statute. In November 2014, the necessity of the revocation came to the attention of USCIS when the Beneficiary's birth mother withdrew her consent to her daughter being adopted, indicating that the Beneficiary no longer met the definition of an orphan under the Act. Whether or not the Beneficiary is an orphan, as it is defined by the Act, is one factor that is determinative of whether a Form I-600 is approved or denied, thus, a revocation was necessary. In addition, the record includes three sources indicating that the Beneficiary's birth mother did not consent to the adoption. These sources include: a statement from a private investigator hired by the Petitioner; a sworn statement from the lawyer representing the Beneficiary's birth mother; and documentation from the U.S. Embassy in stating that the birth mother has withdrawn her consent to the adoption. Therefore, there was substantial evidence in the record of the necessity for the revocation.

Moreover, the Petitioner was notified of the intent to revoke on December 30, 2014. The NOIR stated that the birth mother of the Beneficiary appeared at the U.S. Embassy in [redacted] two times, ultimately stating she did not consent to the adoption. Given the appearance of the Beneficiary's birth mother, a person whose whereabouts were previously unknown, and the mother withdrawing consent to the adoption, the NOIR provided specific information as to how the Petitioner could meet her burden in establishing the Beneficiary as an orphan under the Act. Specifically, the NOIR stated that the Petitioner may include: documentation to establish that the Juvenile Court of [redacted] has been presented with the new information about the Beneficiary's birth mother; amended adoption judgment, including the birth parents' names and their consent to the adoption; and a corrected birth certificate for the Beneficiary, showing the known names of the birth parents. We acknowledge that the investigative reports did not accompany the NOIR, but these reports were not required by 8 C.F.R. § 103.2(b)(16). Furthermore, the NOIR was not based solely on the information in these reports. As stated above, the NOIR was based on the appearance and testimony of the Beneficiary's birth mother. In accordance with 8 C.F.R. § 103.2(b)(16)(i), the Petitioner was properly notified of the derogatory information in the record. Thus, the Petitioner was properly notified of the revocation and given an opportunity to respond.

Third, we will address the Petitioner's statements regarding the issuance of the Beneficiary's visa. We note that even if the burden of proof is discharged on an applicant when a visa is issued, in this case the visa has been made void. The burden of proof in these proceedings is on the Applicant. USCIS adjudicates the Form I-600 and the Petitioner must show by a preponderance of the evidence that they meet the requirements under the statute for a Form I-600 approval. *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-,* 20 I&N Dec. 77, 79-80 (Comm'r. 1989)). As such, we are addressing the Form I-600 merits in this decision.

Fourth, we turn to the question of whether the record establishes the Beneficiary meets the definition of an orphan. We find that she does not. The Petitioner must demonstrate that both of the Beneficiary's parents intended and actually 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 standard for *abandonment by both parents* is not "incapable of providing proper care," but showing 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." 8 C.F.R. § 204.3(b). The Petitioner asserts that the Beneficiary was abandoned because she did not contact the child or show interest for over two years. The Petitioner states that the birth mother refused to parent the Beneficiary for over two years and has not demonstrated an ongoing interest in the Beneficiary as she gave the Beneficiary unconditionally to an orphanage, she expressed her intention to give her up for adoption, the Beneficiary has not lived with her since the placement, she has not provided any support to the Beneficiary's upbringing; and she has never, until recently, expressed an intent to take custody of the beneficiary. The Petitioner asserts that the Beneficiary left for [redacted] for 32 months and she only came back because she was forced out due to being an illegal alien.

We find the evidence in the record insufficient to demonstrate the Beneficiary's birth mother abandoned the Beneficiary, as that standard is defined in the regulation. The record includes three sources that indicate that the Beneficiary's birth mother does not consent to the adoption. In a statement, dated December 27, 2014, a private investigator hired by the Petitioner stated that on December 16, 2014 the birth mother of the Beneficiary contacted him and stated that she wanted to meet with him urgently. When the investigator met with the birth mother, she stated that she wanted her daughter and did not want to proceed with the adoption. She also stated that she wanted the adoptive parents to work with a certain person and that she had taken this matter to the courts. She stated further that she was upset about not being able to see her child and she is having second thoughts about the adoption. She expressed further unhappiness about the official documents in the case including incorrect information. She stated that she visited her daughter at times and the staff at the orphanage knew who she was.

In addition to this report, the record contains a sworn statement from the lawyer representing the orphanage where the Beneficiary was initially placed. This statement is dated November 12, 2014, and was taken at the U.S. Embassy in The lawyer states that to his knowledge, the birth mother of the Beneficiary is opposed to the adoption because it voids her parental rights to the Beneficiary, the adoptive parents do not want to "work with" the birth mother, and because the family, including the birth father, have been chased from their homes as a result of bringing a complaint about their inability to see their daughter. The third statement in the record is from the consular officer in who has been involved in this case. She writes, in a memorandum to the Field Office Director in Kenya, that although the birth mother came to the U.S. Embassy in on October 16 or 17, 2014 and orally consented to the adoption, on October 23, 2014, the attorney from the orphanage in the DRC stated that the birth mother no longer consented and intended to have the adoption judgment revoked. The memorandum then states that on November 12, 2014, the birth mother was interviewed by a consular officer for a second time and stated that she no longer consented to the adoption. She stated that she went to the Tribunal and told a judge of her decision, but there was no definitive outcome. Thus, the record does not show that the Beneficiary's birth mother declared an intention to forsake her parental rights over the Beneficiary.

We find the evidence in the record also insufficient to demonstrate the Beneficiary's birth father abandoned the Beneficiary, as that standard is defined in the regulation. The record indicates that the birth father was not involved in parenting the Beneficiary, but it does not show that the Beneficiary's birth father had "willfully forsaken all parental rights, obligations and claims" to the Beneficiary and "control over the possession" of the Beneficiary. *See* 8 C.F.R. § 204.3(b). In addition, whether he discussed the case with consular officials or cooperated with them does not affect this finding.

Moreover, the record does not show that the Beneficiary's birth parents deserted the Beneficiary or that her birth parents have disappeared, as those standards are defined in the regulation. For reasons reiterated above, the record does not indicate that he Beneficiary's birth mother has willfully forsaken her child or that she has refused to carry out parental rights and obligations, and as a result the Beneficiary has become a ward of a competent authority. Similarly, although the Beneficiary's parents did not live in the same region as the Beneficiary for a period of time, the whereabouts of the

Beneficiary's mother were known and there was reasonable hope for the mother's reappearance as she periodically visited her child.

Lastly, in regard to issues related to the Beneficiary's adoption, the record shows that the initial documentation presented in an effort to adopt the Beneficiary was incorrect. As mentioned above, the birth certificate states that the Beneficiary's birth mother and birth father were unknown and that she was found abandoned in the [redacted] all of which was found to be incorrect as a result of both the private investigation completed by the Petitioner and the U.S. Embassy in [redacted] The contention that the Beneficiary is a ward of the state lacks merit, as the underlying information for this finding was incorrect. In addition, the Petitioner's assertions regarding the revocation failing to give full faith and credit to the adoption judgment and that she should not have the burden to have the judgment reaffirmed because based on the true facts at the time of judgment, the judgment was valid, and the birth mother had ratified the judgment by consenting to the adoption are not supported by the record. The judgment included incorrect information as to the whereabouts of the Beneficiary's parents. The record still does not include evidence that the Beneficiary's biological parents' relinquished their parental rights and evidence of the lack of means to care for the Beneficiary per DRC requirements and that the Juvenile Court which issued the adoption with the incorrect information would let its decision stand in light of the new information. Also, even though the birth mother previously consented to the adoption, it is not clear that she was given all of the correct information at the time of that consent and the record currently indicates she is no longer consenting to the adoption. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

IV. CONCLUSION

We acknowledge the Petitioner's sincerity and good intentions, but USCIS has no discretion to approve a Form I-600 when a Petitioner has not established a child's eligibility under the statutory criteria at section 101(b)(1)(F)(i) of the Act. We have thoroughly reviewed the administrative record and considered the facts and legal issues presented. The record does not demonstrate by a preponderance of the evidence that the Beneficiary is eligible for orphan classification under any of the definitions found under the pertinent regulations.

The Petitioner has the burden of proving eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden. Accordingly, we dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of E-M-T-*, ID# 14533 (AAO Feb. 10, 2016)