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FILE:



OFFICE: ANCHORAGE, AK

Date:

**JUN 11 2008**

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PETITIONER:

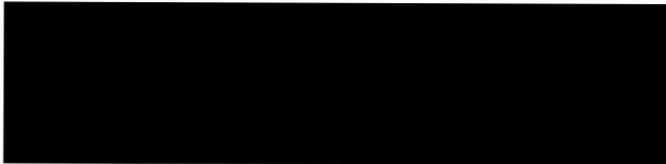
BENEFICIARY:



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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Anchorage, Alaska denied the Form I-600, Petition to Classify Orphan as an Immediate Relative (Form I-600.) The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied.

The petitioner filed the Form I-600 on June 21, 2007. The petitioner is a forty-six-year-old married citizen of the United States. The beneficiary was born in India on September 7, 1993, and he is presently fourteen years old. The record reflects that the beneficiary is the petitioner's spouse's nephew.

The district director denied the Form I-600 on November 15, 2007, based on: 1) the petitioner's failure to comply with requests for a home study report from a licensed agency in India; 2) the petitioner's failure to provide legible and certified court dispositions relating to his criminal history; and 3) the petitioner's failure to provide evidence of the beneficiary's mother's inability to provide proper care to the beneficiary. Citing to the Board of Immigration Appeals (Board) case, *Matter of Marquez*, 20 I&N Dec. 160 (BIA 1990), the district director found further that the petitioner had failed to establish that the beneficiary's mother irrevocably released the beneficiary for adoption, or that the beneficiary's adoption was valid, in light of the fact that the beneficiary continues to live with her natural mother. The district director concluded that the petitioner therefore failed to meet the definition of an orphan, as set forth in section 101(b)(1)(F) of the Act.

Through counsel, the petitioner asserts on appeal that he made no attempt to hide his convictions or the circumstances surrounding his criminal history, and he asserts that he submitted evidence of his criminal conviction dispositions. The petitioner asserts that he provided a valid home study report prepared by a licensed agency in Alaska, where he lives, and he asserts that the regulations do not require him to submit a home study report from India. The petitioner asserts that evidence in the record establishes that the beneficiary's natural mother is not able to provide proper care to the beneficiary. Through counsel he asserts further that the *Matter of Marquez*, Board decision referred to by the district director is not applicable in the present matter, because the Board case relates to physical and legal custody requirements for an adopted child, and not to statutory requirements for establishing orphan status under the Act.

The regulation at 8 C.F.R. § 204.3(a)(2) provides that:

[P]etitioning for an orphan involves two distinct determinations. The first determination concerns the [Form I-600A] advanced processing application which focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks, is essential for the protection of the orphan. The second determination concerns the orphan petition which focuses on whether the child is an orphan under section 101(b)(1)(F) of the Act . . . . An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application.

The regulation at 8 C.F.R. § 204.3(e) provides that:

[F]or immigration purposes, a home study is a process for screening and preparing prospective adoptive parents who are interested in adopting an orphan from another country . . . . A home study must be conducted by a home study preparer, as defined in paragraph (b) of this section. . . .

The regulation at 8 C.F.R. § 204.3(b) provides that:

*Home study preparer* means any party licensed or otherwise authorized under the law of the State of the orphan's proposed residence to conduct the research and preparation for a home study, including the required personal interview(s). This term includes a public agency with authority under that State's law in adoption matters, public or private adoption agencies licensed or otherwise authorized by the laws of that State to place children for adoption, and organizations or individuals licensed or otherwise authorized to conduct the research and preparation for a home study, including the required personal interview(s), under the laws of the State of the orphan's proposed residence. . . .

A review of the regulations reflects that for Form I-600A Advance Processing Application purposes, an applicant must submit a valid home study from a licensed agency in the State of the orphan's proposed residence. The regulations do not require an applicant to submit a home study report from a licensed agency in the country of the orphan's residence (in this case, India.) In the present matter, the beneficiary's proposed residence is in the State of Alaska. The record contains a timely submitted valid home study report from a licensed agency in the State of Alaska. Accordingly, the petitioner complied with the home study submission requirements contained in the regulations.

As previously noted, petitioning for an orphan involves a U.S. Citizenship and Immigration Services (CIS) determination of the prospective adoptive parents' ability to provide a proper home environment, and on their suitability as parents. 8 C.F.R. § 204.3(a)(2). In the present matter, the district director additionally found that the petitioner failed to provide legible documentation relating to a Driving While Intoxicated conviction, and that he failed to submit certified court dispositions relating to his criminal convictions. Knowledge of an applicant's arrest and conviction information is clearly essential for a proper CIS decision regarding whether an applicant will provide proper care to an adopted orphan. An advance processing application should not be approved, if 8 C.F.R. § 204.3(e)(2)(iii)(D) justifies a denial, unless the applicant clearly shows that the information that he or she failed to disclose was immaterial to a determination regarding whether the applicant and his or her spouse can reasonably be expected to provide proper care to an orphan.

The record contains court disposition evidence reflecting that on January 22, 1988, the petitioner plead guilty, in Texas, to Fraud, Non-Government Writing Level MA. The petitioner received a \$200.00 fine and four days penalty. In addition, the record contains court evidence, submitted on appeal, reflecting that on June 18, 1987, the petitioner plead guilty, in Texas, to Driving While Intoxicated. The petitioner received a \$200.00 fine, three days confinement in jail, and a one-year suspension of his driver's license.

The home study report reflects that the petitioner fully disclosed his criminal history to the home study preparer. The home study report discusses the petitioner's criminal history stating that:

In 1987, [REDACTED] was living in Houston, Texas and was stopped for having a burned out tail light. He had drunk a few beers with his friends before he was stopped. The police officer arrested [REDACTED] for drinking under the influence. [REDACTED] went to court, and because he had no prior arrests and a clear record, the judge fined him \$200. [REDACTED] promptly paid the fine, now only drinks lightly and only occasionally, and does not drive if he has been drinking. In January of 1988, [REDACTED] was shopping with a male friend. The friend handed [REDACTED] a pair of shoes and asked [REDACTED] to pay for them because the friend had no money. When [REDACTED] went

to pay for the shoes, the clerks accused him of switching price tags on the pair of shoes. The police came, arrested him, and █████ ended up paying a \$200 fine. After the arrest he never saw his friend again. He was ashamed, angry and embarrassed by the arrest because he did not know what his friend had done.

The AAO notes that the home study preparer discussed the petitioner's criminal history, and took the criminal history into account prior to approving the petitioner as an adoptive parent. The AAO notes further that the home study account of the petitioner's criminal history is consistent with the criminal record information contained in the record. Upon review of the evidence, the AAO finds that the applicant submitted court disposition information related to his criminal history and that he did not withhold information concerning his criminal history from the home study preparer or from CIS. The AAO finds further that in the present matter, the applicant's criminal history, now twenty years old, does not materially affect a decision regarding whether the applicant can provide proper care to an orphan. Based upon the totality of the evidence, the AAO finds the applicant has established that he would be a suitable parent who could provide a proper home environment and care to an adopted child. The Form I-600A advance processing application is therefore approvable.

The district director also found that the petitioner failed to establish that the beneficiary met the definition of an orphan. The district director determined that the petitioner failed to establish that the beneficiary's natural mother was incapable of providing proper care to the beneficiary. The district director determined further that the petitioner failed to establish that the beneficiary's natural mother released the beneficiary for adoption, or that the beneficiary had been adopted by the petitioner and his wife.

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

[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), 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 United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: Provided, That the Attorney General [now Secretary, Homeland Security] is satisfied that proper care will be furnished the child if admitted to the United States. . . .

In the present matter, the record contains an Indian death certificate reflecting that the beneficiary's natural father, █████, died on October 10, 2006. The regulation at 8 C.F.R. § 204.3(b) provides in pertinent part that:

*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.

*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*.

*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.

The evidence relating to the beneficiary's status as an orphan consists of the following:

A birth certificate reflecting that the beneficiary was born in India on September 7, 1993 to [REDACTED] (mother) and [REDACTED] (father).

A death certificate reflecting that the beneficiary's natural father died in India on October 10, 2006.

An October 18, 2006 Deed of Adoption signed in New Delhi, India, by the petitioner, his wife, the beneficiary's natural mother, and two witnesses, reflecting in pertinent part: that the beneficiary's natural mother is widowed; that she has no source of income to look after her children and to maintain them properly; that she gave the beneficiary to the petitioners for adoption; and that the petitioner and his wife took the child as their own.

A December 7, 2007 affidavit signed by the beneficiary's natural mother, stating that her health is not well, that she is unable to work because she suffers from depression, and that she wants to reside in her village with her brother, who will take care of her. She indicates that due to health concerns and an inability to fulfill the beneficiary's basic needs, she gave the beneficiary to the petitioner and his wife by virtue of an adoption deed. She indicates that the beneficiary resides with her pending the resolution of U.S. orphan petition matters, and that the petitioner and his wife send her money to provide for the basic needs of the beneficiary.

A December 7, 2007 affidavit signed by the petitioner's natural mother's niece, indicating that she presently lives with the beneficiary and her natural mother, and that she looks after the beneficiary. She indicates that she wants to return home to her village to reside at her parents' house, and to continue her education.

Upon review of the evidence, the AAO finds that the petitioner has established that that the beneficiary's natural mother irrevocably released the beneficiary, in writing, for adoption and emigration purposes. The AAO agrees with counsel's assertion that the findings contained in the *Matter of Marquez, supra*, Board decision referred to by the district director, apply to section 101(b)(1)(E)(i) of the Act, 8 U.S.C. § 1101(b)(1)(E)(i), residence and legal custody requirements for an adopted child who is not an orphan.<sup>1</sup> The

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<sup>1</sup> As used in titles I and II-

provisions do not apply in the context of a section 101(b)(1)(F) of the Act, orphan case, such as the one presently on appeal. The AAO notes that although the beneficiary's continued residence with his natural mother raises questions about his mother's inability to provide proper care to the beneficiary, the continued residence does not, in the present matter, negate that the beneficiary's natural mother, in writing, irrevocably released the beneficiary for adoption.

Chapter II, Section 11(vi) of the Hindu Adoptions and Maintenance Act, 1956 (HAMA) requires in pertinent part that:

[t]he child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth . . . to the family of its adoption. . . .

Chapter II, Section 12 of the HAMA states in pertinent part that:

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

In the present matter, the adoption deed evidence in the record reflects that the petitioner complied with the giving and taking provisions set forth in HAMA.

United States Department of State (DOS) adoption procedure guidance for India, found at <http://www.travel.state.gov> reflects that the documents required for an orphan petition include:

A Court Order. A) For Hindu petitioners, a court order granting them the permission to adopt the child. The order requires them to execute and register an adoption deed within 7 days of the order. The deed must be registered with the Office of Sub-registrar. (Usually a copy of the deed with proof of fees paid will suffice.)

The record reflects that the adoption deed submitted by the petitioner was registered with a Sub-Registrar Office and it contains proof of fees paid.

Chapter II, Section 16 of the HAMA provides that:

Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

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[A] child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years . . . .

Chapter II, Section 11 of the HAMA also provides at subsection (i) however that, in every adoption, the following conditions must be complied with:

[I]f the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption.

Under Chapter II, Section 6 of the HAMA, no adoption shall be valid unless-

- (i) the person adopting has the capacity, and also the right to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

Chapter II, Section 5 of the HAMA provides that:

- 1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.
- 2) An adoption which is void shall neither create any rights in the adoptive family in favor of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

In the present matter, the Home Study report clearly reflects that the petitioner and his wife have two biological sons, aged eighteen and fourteen. Statements contained in the beneficiary's natural mother's affidavit also reflect that the petitioner has two biological sons. Under Chapter II, Section 11(i) of the HAMA, it therefore appears that the petitioner did not have the right to adopt the beneficiary as his son, and that the adoption is void. The petitioner therefore failed to establish that he has adopted the beneficiary in India, as required by section 101(b)(1)(F) of the Act.

The AAO finds further that that the evidence contained in the record fails to establish that the beneficiary's natural mother is incapable of providing for the beneficiary's basic needs, consistent with local standards in India as required by 8 C.F.R. § 204.3(b). As previously noted, the beneficiary's continued residence with his natural mother raises questions about his natural mother's inability to provide proper care to the beneficiary. Furthermore, the statements made by the beneficiary's mother and the petitioner for adoption deed purposes, as well as the beneficiary's mother's affidavit statements that she suffers from depression and is unable to work and take care of the beneficiary, are vague and uncorroborated by independent medical, financial expense, employment-related or other evidence to demonstrate that the beneficiary's natural mother is unable to provide for the beneficiary's basic needs, consistent with the local standards in India. Accordingly, the beneficiary does not meet the definition of an orphan, as set forth in section 101(b)(1)(F) of the Act.

In visa petition proceedings, the burden of proof rests solely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to meet his burden of proof in the present matter. The appeal will therefore be dismissed, and the petition will be denied.

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