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[Redacted]

File:

[Redacted]

Office: NEW DELHI, INDIA

Date: FEB 22 2005

IN RE:

Petitioner:

[Redacted]

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)

IN BEHALF OF PETITIONER:

[Redacted]

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.

*Mari Johnson*

*R* Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Officer-in-Charge (OIC), New Delhi, India denied the immigrant visa petition. The matter was subsequently appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks to classify an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F). The applicable regulations at 8 C.F.R. § 204.3(d)(1)(iv) require, in part, that the petition submit evidence of adoption or guardianship "in accordance with the laws of the foreign-sending country." In its previous decision, the AAO found that the court that issued the guardianship order lacked jurisdiction to issue the order and that Bangladeshi law prohibits the appointment of non-Bangladeshi citizens as guardians of a Bangladeshi child. Based upon these determinations, the AAO concluded that the guardianship documents were not in conformity with the laws of Bangladesh, and, therefore, could not be recognized for immigration purposes.

In her motion to reconsider, counsel states that the AAO relied on "outdated" law, "misapplied" the law, and failed to "respect Bangladeshi law and Bangladeshi interpretation of that law." Counsel argues that the Court of the Assistant Judge, the court from which the petitioner obtained the guardianship order, "has exclusive jurisdiction over guardianship matters," pursuant to the Family Courts Ordinance of 1985.

In its decision, the AAO relied on a legal opinion from the Library of Congress, which stated, "the Assistant Judge's court is a subordinate court [to the District Court] which only exercises jurisdiction to try cases."

On motion, counsel argues:

[CIS] appears to have erroneously relied exclusively on the Library of Congress' opinion of foreign law, dated July 25, 2001, regarding the appropriateness of jurisdiction in this case. A closer reading of the most current legislation regarding appropriate jurisdiction for guardianship cases clearly establishes that with respect to its interpretation of jurisdictional requirements, the Library of Congress was patently incorrect. The Library of Congress may have relied on the 1982 amendments to *The Guardian and Wards Act of 1890*, but failed to consider the later enacted *Family Courts Ordinance of 1985*. Clearly the more recently enacted law takes precedence over the 1982 amendments . . .

In support of her argument, counsel provides excerpts from the *Family Courts Ordinance of 1985* [1985 Ordinance]. Section 5 of the 1985 Ordinance states, "A Family Court [all Courts of Assistant Judge are Family Courts <sup>1</sup>] shall have exclusive jurisdiction to entertain, try, and dispose of any suit relating to, or arising out of: . . . guardianship and custody of children."

To establish that the Family Court has sole jurisdiction over guardianship matters, counsel also submits evidence from the Department of State, as well as opinions from two Bangladeshi lawyers familiar with the law of Bangladesh as it relates to guardianship.

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<sup>1</sup> See Section 4(1) of the *Family Courts Ordinance of 1985*.

We find counsel's argument and evidence persuasively establishes that the Court issuing the guardianship order to the petitioner was the competent authority to do so. However, such a finding does not resolve the issue as to whether the Court had the authority to grant an order for guardianship to a non-Bangladeshi citizen.

Counsel does not dispute the AAO's previous determination that "Bangladesh law prohibits the adoption or guardianship of Bangladesh citizens by non-Bangladesh citizens."<sup>2</sup> Moreover, the letter submitted by counsel on motion from [REDACTED] Bangladeshi practitioner, further supports this determination. Mr. [REDACTED] states:

[A]s far as foreigners being appointed or declared guardian of a Bangladeshi child is concerned, though this was earlier allowed, it has been expressly prohibited by amendment of the Guardians and Wards Act, 1890 . . . There is nothing in the Family Court Ordinance 1985 that actually overrides this. Therefore, in my view, the basic contention of the American [CIS] is correct. I would further say that the order of the Court granting [the petitioner] guardianship would appear to have exceeded its jurisdiction when it conferred guardianship of a Bangladeshi child on a foreign citizen.

Though counsel does not contest the prohibition on appointing non-Bangladeshi citizens as guardians of Bangladeshi citizens, she argues that the statute of limitations to contest the validity of the order expired 30 days after its issuance. Counsel further argues that the Bangladeshi government "officially recognize[d] and sanction[ed]" the order by issuing the beneficiary a passport and a "No Objection certificate." To support this argument, counsel states, "U.S. immigration law and BIA precedent recognize finality of adoption decrees and [have] specifically upheld adoptions for purposes of immigrant visa issuance under circumstances almost identical to those at issue in this case."

We find counsel's arguments cannot be supported. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefits sought. *Matter of Saucedo*, 18 I&N Dec. 199 (BIA 1982); *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). In such proceedings, the law of a foreign country is a question of fact which must be proved by the petitioner if he relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Accordingly, the petitioner bears the burden of proving the validity of the foreign guardianship order despite the Bangladeshi law that prohibits the adoption or guardianship of Bangladeshi citizens by non-citizens. The petitioner has not met this burden.

Despite the arguments of counsel, the petitioner has not established that, under the laws of Bangladesh, the guardianship order is valid until declared null by a competent court, rather than void *ab initio*. Because the guardianship order was issued despite the clear prohibition on granting guardianship to non-Bangladeshi citizens, the AAO deems the order to be void *ab initio*. As the order was void at its inception, no further act, such as the "No-objection certificate," or non-act, such as the expiration of the statute of limitations, can render the order valid.

While counsel relies on *Matter of Mendoza*, 18 I&N Dec. 66 (BIA 1981) for the proposition that the guardianship order is valid because the "guardianship appointment was made by a court of competent jurisdiction, and was

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<sup>2</sup> On page 3 of the AAO's decision on appeal, the AAO stated, "The petitioner concedes that Bangladesh law prohibits the adoption or guardianship of Bangladesh citizens by non-Bangladesh citizens."

never appealed,” we find the facts of *Mendoza* to be clearly distinguishable from the facts of this case. Most importantly, the BIA noted that its decision was based on an “assessment of Philippine law,” not the laws of Bangladesh which are applicable in this case. *Id.* at 69.

In her reliance on *Mendoza*, counsel states:

Whether such guardianship appointment was technically correct or not is irrelevant under the *Mendoza* analysis. The critical questions are whether the guardianship order was made by a court of competent jurisdiction, and whether the guardianship order was appealed or otherwise declared null within the statutorily recognized timeframe.

We disagree with counsel’s analysis and characterization of the holding in *Mendoza*. Contrary to counsel’s assertion, the critical question was not whether the order was made by a court of competent jurisdiction, or whether it was appealed or otherwise declared null and void but rather, whether the order was void at its inception. Even if issued by a court of competent authority, if the order was void at inception there can be no remedy or cure.

The critical importance of the issue of whether the order is considered void *ab initio* or voidable is discussed in the BIA’s decision. In making its decision, the BIA noted a report by the Library of Congress, which stated: “[N]o statutory provisions or court cases could be found on the specific issues of whether an adoption granted by a court to a disqualified adopter, which is duly registered, is void *ab initio* or merely voidable.” *Id.* (emphasis in original).

In the absence of statutory provisions and court cases related to the issue of whether the order was void *ab initio*, the BIA then focused on a memorandum prepared by a Philippine judge, which indicated that the adoption order became “final and binding . . . in the absence of an appeal filed within 30 days of the decision.” More importantly, however, the BIA further relied on a letter from the Philippine Consul General which “reiterates the view that the adoption order in this case is not void *ab initio*, but valid until declared null by a competent court.”

Clearly, in finding that the adoption order in *Mendoza* was valid, the BIA first made the determination that the order was *not* void *ab initio* based on the evidence and the legal opinions that were submitted for the record. It was only after making this determination that the BIA found that because the order was not appealed in the allotted timeframe, the order was considered binding.

In the instant case, counsel has provided no evidence on the issue of whether the guardianship order is considered to void *ab initio*. Without such evidence, counsel’s assertion that the order remains in effect because it was not appealed, or because the government of Bangladesh recognized and sanctioned the order, cannot be supported. CIS cannot presume that the adoption order, which was entered contrary to Bangladesh law as conceded by the petitioner’s own legal expert, is voidable rather than void *ab initio*. Again, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. at 502.

We must also note that in *Mendoza*, the BIA found that a provision of the Philippine code was repealed “so that persons formerly prohibited from adopting . . . can now do so.” Such facts are distinguishable from those of this case in which the law prohibiting the grant of guardianship to non-Bangladeshi citizens remains in effect.

We, therefore, uphold our previous decision, as well as the decision of the district director, that the petitioner has failed to establish that he has secured custody of the orphan in accordance with the laws of Bangladesh.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion will be approved, the previous decision of the AAO will be affirmed and the petition will be denied.