U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: [redacted] Office: HO CHI MINH CITY, VIETNAM Date: NOV 30 2001

IN RE: Petitioner:
Beneficiary: [redacted]

Application: 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 APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge (OIC), Ho Chi Minh City, initially approved the immigrant visa petition. On the basis of new information received and on further review of the record, the OIC determined that the petitioner was not eligible for the benefit sought. Accordingly, the OIC properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reason therefore, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the Service on December 5, 2000. The petitioner is a 39-year-old unmarried citizen of the United States. The beneficiary is 19 months old at the present time and was born in Ho Chi Minh City, Vietnam on April 28, 2000. The record reflects that the petitioner adopted the beneficiary on December 1, 2000 in Vietnam.

The OIC revoked the petition pursuant to 8 C.F.R. 204.3(i) after determining that the beneficiary's biological mother was induced to sell the beneficiary to the petitioner.

On appeal, counsel submits a brief, the results of a polygraph test to which the petitioner submitted, and copies of documents already included in the record. In part, counsel asserts that the OIC's decision was improper, as it was not based on evidence contained in the record of proceeding.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F), defines 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.

8 C.F.R. 204.3(i) states:

> (i) *Child-buying as a ground for denial.* An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for

> the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.

In issuing the Notice of Intent to Revoke, the OIC relied upon an interview that a member of his staff conducted with the biological mother. According to the OIC, the biological mother stated that she met the petitioner and an interpreter in a hospital in Vietnam when the beneficiary was approximately 3 months old, at which time the petitioner asked the biological mother to relinquish her child for adoption in return for 5,000,000 VND[1]. The OIC stated that the biological mother admitted that she received 5,000,000 VND directly from the petitioner following the completion of the adoption, and that the interpreter and an adoption facilitator prepared all of the documents that were needed for the adoption. The OIC found the biological mother to be credible and did not doubt the veracity of her claims.

The OIC also noted in the Notice of Intent to Revoke that during an interview that took place with him, a consular officer and the petitioner, the petitioner initially denied ever meeting the biological mother at a hospital but then recanted and stated that she had met the beneficiary's biological mother at a hospital. According to the OIC, the petitioner admitted to giving the biological mother money after the adoption was completed in the amount of $50 USD.

In a December 20, 2000 response to the OIC's Notice of Intent to Revoke, the petitioner did not dispute the OIC's allegation that she gave the biological mother money; the petitioner emphasized in her response that the money was merely a gift to the biological mother, not payment for the beneficiary:

> The concerns of the gift I gave to the birth mother were also addressed. I informed you that I had given the gift to the birth mother after the official Giving and Receiving Ceremony. I would like to reiterate that the money given was a GIFT, not payment for the child.

In support of her position that the payment of money to the biological mother was merely a gift, the petitioner submitted an affidavit from the biological mother. According to the biological mother:

> . . . [w]hen things were done [the adoption], I did ask Madam for 5,000,000 to start a petty trading life but

[1] 1 U.S. Dollar (USD) equals approximately 15,000 Vietnamese Dong (VND). Therefore, 5,000,000 VND is approximately $333 USD.

she did not have much money in Vietnam, so she gave me $50.00 as a gift. She promised to help me, and also promised that she will send me pictures of [redacted] birthday.

On appeal, counsel states that the statements of the biological mother are not entirely credible because the petitioner could not have met the beneficiary when the beneficiary was 3 months old because the petitioner was not in Vietnam until the beneficiary was approximately 5 months old. In support of his claim, counsel submits a copy of the petitioner's passport with entry and exit stamps from Vietnamese immigration authorities. Counsel also submits a copy of the biological mother's December 11, 2000 affidavit, an affidavit from the adoption facilitator, [redacted] and an affidavit from [redacted] Both [redacted] and [redacted] testify that the petitioner did not meet the birth mother at the hospital, as alleged by the OIC in his Notice of Intent to Revoke. Finally, counsel submits the results of a polygraph examination that was administered to the petitioner.

Counsel maintains that the OIC relied upon incorrect facts and made inferences that were not supported by evidence in the record. As presently constituted, the record supports a different conclusion. Evidence in the record, which will be discussed in detail, establishes that the petitioner gave money to the birth mother as payment for the beneficiary and she, therefore, engaged in child-buying as that term is defined in the regulation.

As noted by the OIC in his decision, the record of proceeding contains a cable indicating the approval of the petitioner's Form I-600A advance processing application, a copy of the petitioner's home study report, the Form I-600 petition and accompanying documentation, and the OIC's notice of intent to revoke. The record also contains an investigative report, the contents of which the OIC disclosed to the petitioner in the Notice of Intent to Revoke.

The record contains conflicting evidence regarding the amount of money that the petitioner gave to the biological mother. First, according to the initial investigative report, the biological mother admitted that she received 5,000,000 VND directly from the petitioner after the adoption was complete. Next, as stated in the Notice of Intent to Revoke and acknowledged by the petitioner in her response, the petitioner admitted to giving the biological mother only $50 USD. Finally, the biological mother modified her original statement and testified in her affidavit that she asked the petitioner for 5,000,000 VND ($333 USD) but received only $50 USD.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent

competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Id. at 591.

The petitioner has not clarified how much money she gave to the biological mother; however, the petitioner has conceded that she did give money to the biological mother after the completion of the adoption. While the petitioner regards the money as a "gift," the Service can reasonably conclude that the money was payment to the biological mother for the beneficiary.

In accordance with 8 CFR 204.3(i), an orphan petition must be denied for "child-buying" if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child.

The regulation further provides that "[n]othing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings."

The regulation stipulates that a reasonable payment to the biological mother is allowed only for necessary activities related to the adoption proceedings; therefore, the burden is on the petitioner to clearly establish that any money given to a biological mother by a petitioner (or an entity working on the petitioner's behalf) is reasonable payment for necessary activities related to the adoption proceeding. If the petitioner cannot establish a connection between the payment of money to a biological mother and the necessary activities outlined in § 204.3(i), the Service can only regard the provision of money to a biological mother as payment for a child. The regulation does not allow a petitioner or an entity working on a petitioner's behalf to give a "gift" of money to a biological mother.

The petitioner does not present any evidence that the money she gave to the biological mother was for necessary activities related to the adoption proceedings such as administrative, court, legal, translation, and/or medical services. Thus, although the petitioner regards the payment of money to the biological mother as a gift, the Service can only regard it as direct payment for a child.

On appeal, counsel presents a polygraph examination report, which he believes establishes that the petitioner did not engage in child-buying. In federal court proceedings, evidence of the

results of a polygraph test is inadmissible and may not be "introduced into evidence to establish the truth of the statements made during the examination." United States v. Bowen, 857 F.2d 1337, 1341 (9th Cir. 1988); see also United States v. Frogge, 476 F.2d 969 (5th Cir. 1973), cert. denied, 414 U.S. 849 (1974). In immigration proceedings, however, documentary evidence need not comport with the strict judicial rules of evidence. Instead, as in deportation proceedings, "such evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law." Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986); see also Matter of D, 20 I&N Dec. 827, 831 (BIA 1994).

In the present case, the polygraph results are not found to be probative. First, the scope of the polygraph questions is limited to whether the petitioner 1) lied about any of the facts surrounding the adoption, 2) met the birth mother during July of 2000, 3) offered to buy the beneficiary from the birth mother, and 4) deliberately withheld information about the adoption. The polygraph results do not establish whether the birthmother was induced to give up her child by the promise of a gift, nor do the test results establish that the petitioner gave the birth mother money to cover allowable expenses related to the adoption. For these reasons, the results of the petitioner's polygraph test do not overcome the objections of the OIC.

Furthermore, the value of the polygraph is questionable for the same reasons that have led the federal courts to find them inadmissible. As previously mentioned, the results of a polygraph test may not be used to establish the veracity of the assertion tested. In establishing this rule, the courts have determined that "the polygraph has not yet been accepted . . . as a scientifically reliable method of ascertaining truth or deception." United States v. Gloria, 494 F.2d 477 (5th Cir. 1974). Finally, it is noted that the petitioner has not revealed the methodologies of the polygraph testing but rather submitted a cursory summary of the results, and has not established the credentials of the polygraph examiner or the standards used.

Based on the above discussion, the decision to revoke the petition based upon child-buying, as that term is defined in the regulation, is affirmed.

An approved visa petition is merely a preliminary step in the visa application and does not guarantee that the visa will be issued. Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he Attorney General 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 [of the Act]."

A Notice of Intent to Revoke approval of a visa petition is properly issued for "good and sufficient cause" where the

evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. Matter of Li, 20 I&N Dec. 700, 701 (BIA 1993); Matter of Arias, supra at 569-70; Matter of Ho, supra at 590; Matter of Estime, 19 I&N Dec. 450 (BIA 1987).

In the present case, the OIC did raise sufficient factual issues to support the revocation. The Notice of Intent to Revoke and the subsequent revocation were based on evidence that was in the record at the time the notice was issued. The petitioner did not offer a complete explanation or rebuttal to the Notice of Intent to Revoke and has not overcome the factual inconsistencies contained in the record.

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; it is concluded that the petitioner has not established that the beneficiary is eligible for classification as an orphan pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F).

ORDER: The appeal is dismissed.