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**U.S. Department of Justice**

Immigration and Naturalization Service

Public Copy

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

Date: JUL - 3 2001

[redacted]

File: [redacted] Office: HO CHI MINH CITY, VIETNAM

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]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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, Acting Director
Administrative Appeals Office

**DISCUSSION:** The Officer-in-Charge (OIC), Ho Chi Minh City, denied the visa petition to classify the beneficiary as an immediate relative, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the OIC on March 5, 2001. The petitioner is a 34-year-old unmarried citizen of the United States. The beneficiary is 8-months old at the present time and was born in Ho Chi Minh City, Vietnam on October 27, 2000. The record reflects that the petitioner adopted the beneficiary on February 28, 2001 in Vietnam.

The OIC denied the petition pursuant to 8 C.F.R. 204.3(i) after determining that the beneficiary's biological mother sold the beneficiary to an adoption facilitator, Asian Orphans of Hope, located in Vietnam.

On appeal, counsel submits a brief and additional evidence. 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.

The sole issue in this matter is whether the evidence contained in the record of proceeding supports the OIC's conclusion that the beneficiary's biological mother was paid to give her child up for adoption. The OIC provided no other basis for denying the petition.

In his decision, the OIC found that the petitioner's adoption facilitator, Asian Orphans for Hope, had procured the beneficiary for adoption on behalf of the petitioner through a cash payment to the beneficiary's biological mother. The OIC based his finding on an investigation conducted by employees of his office in conjunction with Vietnamese authorities. According to the OIC's decision, the investigation allegedly uncovered the following information: first, the chief agent of Asian Orphans for Hope, Don Phan, admitted to Vietnamese authorities that he and his siblings were engaged in the business of buying babies for international adoptions; second, many of the biological mothers who worked with Asian Orphans for Hope had confirmed to Vietnamese authorities that they willingly sold their babies; and finally, the beneficiary's biological mother confessed to police that she sold the beneficiary to Asian Orphans for Hope.

The OIC concluded in his denial that:

> The initial inquiries and investigations into this case and the activities of the facilitator/agent who procured the Beneficiary for adoption were conducted prior to issuing the Notice of Intent. These inquiries established that the mother of the beneficiary was approached by an Asian Orphans of Hope (AOH) agent who induced her to relinquish her child for foreign adoption with offers of money. This fact has been established through collateral investigations involving INS and Vietnamese authorities. This fact has been established to a degree of certainty that meets with our standards and requirements in arriving at adverse decisions as in the instant case.

On appeal, counsel states that the petitioner was not provided a full and fair disclosure of the adverse evidence upon which the OIC relied in reaching his decision. Counsel maintains that the decision only set forth the OIC's conclusions and did not identify the evidence on which these conclusions were based. Counsel asserts the following:

> In particular, [the decision] does not give the specifics of the alleged witness statements or the circumstances under which they were taken. This information is highly relevant. Whether the INS conclusions are reasonable depends entirely on exactly what the witnesses said, and whether the statements

were freely given.

Counsel submits several affidavits to rebut the OIC's allegations that the beneficiary's biological mother is one of the individuals who sold her child to Asian Orphans of Hope. One of the affiants is the biological mother, who states that she was never interviewed by Vietnamese police or paid money to give her child up for adoption. Another affiant is the "chief agent" for Asian Orphans of Hope, who states that he never paid the beneficiary's biological mother money in order to induce her to give the beneficiary up for adoption. Other affiants include, but are not limited to, the aunt of the biological mother, the father of the biological mother, the mother of the biological mother, a neighbor of the biological mother, the petitioner, and an employee of Asian Orphans of Hope.

Counsel maintains that the testimony of each affiant contradicts the OIC's finding that the biological mother of the beneficiary received payment as part of a child-buying operation. As presently constituted, the record supports no other conclusion.

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 deny. The record does not contain copies of any investigative report, sworn witness statements, or any other evidence that would support the OIC's decision. Denial of this petition cannot be based upon the serious allegations of the OIC without evidence offered in support of those conclusions. Just as the unproven assertions of counsel are not evidence, neither are the unsupported conclusions of the OIC. Cf. Matter of Obaigbena, 19 I&N Dec. 533, 534 note (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

In accordance with Service regulations, a petitioner must be permitted to inspect the record of proceeding which constitutes the basis of an adverse decision. 8 C.F.R. 103.2(b)(16). If an adverse decision will be based on derogatory information of which the petitioner is unaware, the petitioner must be advised of that evidence and offered an opportunity to rebut it before the decision is rendered. 8 C.F.R. 103.2(b)(16)(i). Only if the evidence is classified under Executive Order No. 12356, 47 Fed. Reg. 14874 (April 6, 1982), may the Service decline to provide such evidence in order to protect the information from unauthorized disclosure in the interest of national security. 8 C.F.R. 103.2(b)(16)(iv).

Accordingly, the OIC must permit the petitioner to inspect the record and the adverse evidence on which his decision was based. Neither the regulations nor fundamental due process would be satisfied by anything less. In the decision, however, the OIC

admits that the record does not contain any unfavorable evidence, other than the notice of intent to deny, but that the adverse decision was premised on an unsubstantiated investigation. As in revocation proceedings, where the OIC's notice of intent to deny is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the denial of the visa petition cannot be sustained. See Matter of Arias, 9 I&N Dec. 568 (BIA 1988).

The credibility of the biological mother is at issue in the instant petition, as the OIC alleges that the biological mother sold her child and the petitioner alleges that the biological mother received no monetary consideration to give her child up for adoption. Although the burden of proof remains on the petitioner, the Service bears the burden of creating a meaningful, clear, and reliable record of an interview if statements made during an interview are going to be used to determine credibility. See Matter of S-S-, 21 I&N Dec. 121 (BIA 1995); Matter of Arias, supra. In the OIC's denial of the petition, he made a conclusory statement that "[t]he natural mother in this case made such a confession to the police." The OIC did not produce the biological mother's alleged confession or a written statement from the Vietnamese authorities that allegedly heard these confessions. In fact, the record contains absolutely no documentation in support of the OIC's allegations.

The record contains no information regarding what the biological mother confessed to, the circumstances surrounding her interview by the Vietnamese authorities, the types of questions the Vietnamese authorities asked the biological mother and the biological mother's responses. This type of information is vital in a meaningful assessment of whether the biological mother provided statements to Vietnamese authorities that would contradict statements she made to the petitioner and the petitioner's attorneys at a later date.

The OIC also fails to provide an investigative report concerning the joint investigation that his office allegedly conducted with the assistance of Vietnamese authorities, or a written statement that the findings of the investigation are protected from disclosure pursuant to 8 C.F.R. 103.2(b)(16)(iv).

Without the written confession of the biological mother, or a written statement from the Vietnamese authorities that details the confession the biological mother allegedly made, there is no basis upon which to impugn the credibility of the affidavits that counsel presents on appeal. For this reason, the decision to deny the petition based upon child-buying, as that term is defined in the regulation, cannot be affirmed.

The OIC did not raise any other objections to the approval of the

petition, and the petitioner has overcome the basis of the OIC's denial; the appeal shall be sustained.[1] It is concluded that the petitioner has 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).

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 met that burden. The appeal is sustained.

**ORDER:** The appeal is sustained. The OIC's decision dated March 21, 2001 is withdrawn and the petition is approved.

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[1] Counsel also addresses other reasons why the OIC's denial of the petition was in error; however, as the appeal will be sustained based upon this one issue, the other issues need not be addressed in this decision.