



FAZ

U.S. Department of Justice

Immigration and Naturalization Service

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

Public Part



File: [Redacted]

Office: BANGKOK, THAILAND

Date: 29 NOV 2001

IN RE: Petitioner: [Redacted]
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:

SELF-REPRESENTED

Identifying information should
prevent clearly documented
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, Director
Administrative Appeals Office

DISCUSSION: The Director, Bangkok, Thailand, denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the matter remanded to her for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on May 24 2001. The petitioner is a 32-year-old married citizen of the United States. The beneficiary is 14 months old at the present time and was born in Bangkok, Thailand on August 27, 2000. The record indicates that the petitioner and his spouse adopted the beneficiary in Thailand on May 23, 2001.

The director denied the petition after determining that the beneficiary did not meet the statutory definition of "orphan."

On appeal, the petitioner submits a statement. The petitioner asserts that the beneficiary is an illegitimate child and that he and his spouse have complied with the laws of Thailand regarding the adoption.

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.

The record of proceeding contains the petitioner's home study report, the Form I-600 petition and accompanying documentation, the director's denial letter, and evidence submitted on appeal.

In her June 5, 2001 denial of the petition, the director determined that the beneficiary was not an orphan because prior to the biological father's death, he and the biological mother consented to the adoption of the beneficiary by the petitioner and the petitioner's spouse. The director found that this evidence showed that the beneficiary was not abandoned because the definition of *abandonment by both parents* found at 8 C.F.R. 204.3(b) prohibits biological parents from relinquishing a child to a specific adoptive parent or for a specific adoption.

On appeal, the petitioner states that he does not understand why the adoption statement from the Thai authorities is insufficient to find that the beneficiary is an orphan. The petitioner further states that according to Thai law, if a child's biological parents

do not register their marriage and the child has not been registered by the biological father as a legitimate child, then the biological mother maintains the parental rights. The petitioner submits a document that he calls "Misstated Facts on the Foreign Child Adoption Works Child Study." In this document, the petitioner clarifies some apparent misunderstandings in the home study report.

The petitioner emphasizes that the beneficiary's surviving parent has abandoned the beneficiary; however, as the record is presently constituted, the evidence does not support this conclusion. Nevertheless, due to an error by the director in analyzing the facts in the present petition, the case will be remanded to the director for entry of a new decision consistent with the following discussion.

The director premised her denial on the basis that both parents did not abandon the beneficiary. According to the director, the petitioner and his spouse allegedly informed a Service officer that the biological parents agreed to give up the beneficiary for adoption by the petitioner and his spouse because the biological father knew that he would soon die from his life-threatening cancer. The director also noted in her denial letter that the record contained evidence that on April 9, 2001, both the biological mother and the biological father signed consent forms in which they willingly relinquished their parental rights for the adoption of the beneficiary by the petitioner and his spouse. The director found that this evidence established that the beneficiary was relinquished by his parents for a specific adoption, which is prohibited according to the definition of *abandonment by both parents* found in § 204.3(b).

According to section 101(b)(1)(F) of the Act, an orphan may be a child who has either been abandoned by both parents or whose surviving parent is incapable of providing him or her with proper care and has in writing irrevocably released the child for emigration and adoption. The record clearly reflects that four days prior to the filing of the petition, the biological father died, leaving the biological mother as the surviving parent. Despite this fact, however, the director concluded that the beneficiary was not an orphan because he was not abandoned by both parents.

Where it is established that the beneficiary has only one surviving parent, the definition of *abandonment by both parents* found at 8 C.F.R. 204.3(b) should not be referred to or relied upon in the adjudication of the petition. Rather the definitions of *surviving parent* and *incapable of providing proper care* are the relevant definitions in 8 C.F.R. 204.3(b). These definitions state 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*.

Neither definition cited above specifically prohibits a surviving parent from relinquishing or releasing his or her child to a specific individual in preparation for an adoption or for a specific adoption. Although the record contained statements from the biological father and the biological mother that indicated they consented to the specific adoption of the beneficiary by the petitioner and his spouse, these statements were made prior to the biological father's death. Once the death of the biological father occurred, these statements became irrelevant, as the biological mother became the surviving parent. Any evidence in the record, which shows that a surviving parent has relinquished his or her parental rights to a specific person or for a specific adoption should not bear on the director's determination of whether the child, who has only one surviving parent, may be classified as an orphan.

Although the director erred in analyzing the facts in this case, the petition may not be approved at the present time. The record of proceeding, as presently constituted, does not contain sufficient information to establish that the biological mother is unable to provide for the beneficiary's basic needs, consistent with the local standards of Bangkok, Thailand.

As previously stated, the biological father died on May 20, 2001; the beneficiary's biological mother is the sole surviving parent who, according to the record, lives in Bangkok, Thailand.

The record is devoid of sufficient evidence upon which a reasonable determination may be made regarding whether the biological mother is capable of providing proper care for the beneficiary.

On appeal, the petitioner states the following regarding the ability of the biological mother to care for the beneficiary:

Child's mother is 19 years old with one older child of 2 years of age, no skills to earn a living. Her only work experience was as a house servant for about one year. Her parents are rural laborers, the girl came to Bangkok due to economic hardship. She is not capable of providing proper care for the child in addition to the older sibling. . .

Child until two weeks of age lived with his mother in home of half-cousin of the alleged father (daughter of half-sisters of alleged fathers mother). The natural mother has had visitation privileges and has seen the child at regular intervals since two weeks of age. . .

The above statements are not sufficient evidence of the biological mother's inability to provide the beneficiary with proper care according to the local standards of Bangkok, Thailand.

First, the petitioner states that the biological mother does not have skills to earn a living, but then subsequently states that the biological mother was previously employed as a domestic. Neither the petitioner nor the biological mother explains why the biological mother is currently unable to work when she has been employed in the past.

Second, the petitioner states that the beneficiary lived with the biological mother for the first two weeks of his life, then suggests that the beneficiary stopped living with the biological mother. The petitioner does not, however, explain in detail the living situation of the beneficiary since his birth and the factors that may have caused the beneficiary to live apart from his biological mother.

Third and finally, neither the petitioner nor the biological mother provides information regarding the biological mother's annual income, the source of that income, and whether that income is sufficient to provide for the beneficiary's basic needs, consistent with the standard of living in Bangkok. The petitioner also does not explain why the biological mother is able to care for the beneficiary's older sibling, but is unable to care for the beneficiary.

Accordingly, the director's decision will be withdrawn and the case remanded to her so that she may review the record as it is presently constituted, and request any additional evidence deemed necessary to assist her in determining whether the criteria outlined in 8 C.F.R. 204.3(d)(1) have been met. Specifically, the director should provide the petitioner an opportunity to submit evidence that the biological mother is unable to provide for the beneficiary's basic needs, consistent with the local standards in Bangkok, Thailand. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Associate Commissioner for review.