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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

[redacted]

File: [redacted] Office: ST. LOUIS, MISSOURRI Date: OCT 04 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:

SELF-REPRESENTED

Public Copy

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.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The Director, St. Louis, Missouri, denied the immigrant visa petition and 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) on January 14, 2000. The petitioner is a 36-year-old married citizen of the United States. The beneficiary is 14 years old at the present time and was born in Monrovia, Liberia on May 6, 1987. The record indicates that the petitioner and her husband adopted the beneficiary in Liberia on October 30, 1996.

The director denied the petition after determining that (1) the beneficiary did not meet the statutory definition of "orphan," and (2) the petitioner and her husband had not personally seen and observed the beneficiary prior to or during the adoption proceeding.

On appeal, the petitioner submits a statement, and a letter and an affidavit from Omega Children Welfare Foundation in Liberia. The petitioner asserts that the director's decision was improper, as the beneficiary's sole surviving parent surrendered his parental rights to an authorized agency in Liberia.

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.

I. WHETHER THE BENEFICIARY MEETS THE DEFINITION OF "ORPHAN"

In his June 27, 2001 denial of the petition, the director determined that the beneficiary was not an orphan because the biological father, who is the sole surviving parent, signed a statement consenting to the adoption of the beneficiary by the petitioner and the petitioner's husband. The director found that this statement showed that the beneficiary was not abandoned because the definition of abandonment found at 8 C.F.R. 204.3(b) prohibits a biological parent from relinquishing a child to a specific adoptive parent or for a specific adoption. The director further noted that the beneficiary had been living in the same home with his biological father and the biological father's mother (the beneficiary's grandmother) since the beneficiary's birth.

On appeal, the petitioner states that the biological father, who is the sole surviving parent, permanently and unconditionally surrendered his parental rights over the beneficiary to an authorized agency in Liberia named Omega Children Welfare Foundation ("Omega"). In support of his claim that the beneficiary is an orphan, the petitioner submits a letter from Omega confirming that the biological father relinquished his parental rights to the agency, and an affidavit from the director of Omega who states that Omega gives its consent for the adoption of the beneficiary by the petitioner and the petitioner's husband. The petitioner emphasizes that the beneficiary's sole surviving parent has abandoned the beneficiary; however, despite this claim and the evidence that the petitioner submits on appeal, the beneficiary does not meet the definition of an orphan.

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.

Prior to discussing the evidence in the record and its impact on the beneficiary's eligibility for classification as an orphan, an error made by the director in his analysis of the petitioner's claim must be noted. In the denial letter, the director stated that the beneficiary was not an orphan because the beneficiary had not been abandoned as that term is defined in 8 C.F.R. 204.3(b). However, the term "abandonment" is defined in § 204.3(b) only as *abandonment by both parents*. The record clearly reflects that the beneficiary's biological mother died as the result of complications from the beneficiary's birth. Therefore, both parents could not have abandoned the beneficiary.

According to section 101(b)(1)(F) of the Act, an orphan may be a child who has either been abandoned by both parents <u>or</u> whose surviving parent is incapable of providing him or her with proper care. The director should not have looked at whether the beneficiary was abandoned by both parents, as the only relevant issue is whether the beneficiary's surviving parent is capable of providing the beneficiary with proper care. Accordingly, this decision shall look at whether evidence in the record supports a finding that the beneficiary is an orphan because his biological father is unable to provide him proper care consistent with the local standards of Liberia.

The regulation at 8 C.F.R. 204.3(b) states 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*.

The record contains a copy of the biological mother's death certificate, which shows that she died on May 6, 1987, the date of the beneficiary's birth. The beneficiary's biological father is the sole surviving parent who, according to the record, lives in Paynesville, Liberia.

On March 12, 2001, the director requested that the petitioner submit evidence to show that the beneficiary's biological father was incapable of providing the beneficiary with proper care. The director also requested evidence that the biological father has released the beneficiary for emigration and adoption. In response, the petitioner submitted an April 5, 2001 affidavit from the biological father who stated that:

> I the undersigned, Mr. [redacted], Sr. of Paynesville, Duport Road, House [redacted], behind Duport Road Clinic, Republic of Liberia, do hereby confirmed and affirmed that I willingly and whole-heartedly given my consent to Mr. [redacted] of [redacted], Boulevard St. Louise [sic], No [redacted] United States of America to be the legal father of may son, [redacted]. Because of the hardship in the Country and my poor health condition.

The above affidavit does not show that the biological father is incapable of providing the beneficiary with proper care according to the local standards of Liberia.

First, the biological father states in his affidavit that he cannot care for the beneficiary due to the "hardship in the [c]ountry." However, neither the petitioner nor the biological father explains the hardship in the country to which the biological father refers or provides documentary evidence that economic or general country conditions prevent the biological father from providing the beneficiary with proper care. For example, the record contains no information regarding the biological father'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 Liberia.

Second, the biological father also states in his affidavit that he cannot care for the beneficiary due to "my poor health condition." Neither the petitioner nor the biological father describes the health condition of the biological father, or submits a letter from the biological father's physician that describes the biological father's health condition and explains how this condition prevents the biological father from providing proper care to the beneficiary. This type of documentary information is

crucial in a determination of whether the biological father's medical condition substantially impacts on his ability to properly care for the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Third and finally, the I-600 petition indicates that the beneficiary and the biological father live within the same household along with the biological father's mother (the beneficiary's grandmother). Neither the petitioner nor the beneficiary explains how this particular living situation is evidence that the biological father cannot provide proper care for the beneficiary, particularly considering that the beneficiary has been living with his father since birth.

Accordingly, the petitioner has not established that the beneficiary is an "orphan" within the meaning of section 101(b)(1)(F) of the Act because she has not shown that the biological parent is incapable of providing proper care to the beneficiary consistent with the local standards of Liberia.

II. FAILURE OF THE PETITIONER TO SEE THE BENEFICARY PRIOR TO OR DURING THE ADOPTION PROCEEDING

The director denied the petition, in part, because the record did not contain evidence that the petitioner saw the beneficiary prior to or during the adoption proceeding. The record reflects that the petitioner and her husband adopted the beneficiary in Liberia on October 30, 1996.

Pursuant to 8 C.F.R. 204.3(d)(1)(iv)(B)(4), a petitioner must submit evidence that he or she and his or her spouse saw the orphan "prior to or during the adoption proceeding abroad." The record is devoid of any evidence that the petitioner and her husband saw the beneficiary prior to or during the adoption in Liberia, and the petitioner does not address this issue on appeal. Therefore, the director's objections have not been overcome on this issue.

As always in these 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 her burden of proving that the beneficiary's biological father is incapable of proving the beneficiary with proper care, or that she and her husband saw the beneficiary prior to or during the adoption proceedings. Accordingly, the petition cannot be approved.

ORDER: The appeal is dismissed.