



F 7

U.S. Department of Justice

Immigration and Naturalization Service

COPIES DESTROYED IN COMPLIANCE WITH EXECUTIVE ORDER 12958, APRIL 27, 2001

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

[Redacted]

File: [Redacted]

Office: ATLANTA, GA

Date: 28 APR 2002

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 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 Director of the Atlanta, Georgia district office initially approved the immigrant visa petition. Based upon a consular investigation, the director determined that the beneficiary was ineligible for the benefit sought and he revoked his approval of the petition on March 16, 1999 after proper notice. The matter is now before the Associate Commissioner for Examinations on appeal. The case will be remanded to the director for further action.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director in July of 1996. The petitioner is a 45-year-old married citizen of the United States. The beneficiary is 6 years old at the present time and was born in the Philippines on August 4, 1995.

The director revoked his approval of the petition because the petitioner failed to establish that the beneficiary met the definition of an orphan found at section 101(b)(1)(F) of the Immigration and Nationality Act (the Act). Specifically, the director found that the petitioner had not established that the beneficiary's sole parent was unable to provide for the beneficiary's proper care.

On appeal, counsel submits a statement and additional evidence.

The regulation at 8 C.F.R. 205.2(d) indicates that a petitioner must appeal a revocation of an approval within 15 days after service of the notice of revocation. The record indicates that the director mailed the revocation notice to the petitioner at her last known address on March 16, 1999. The Service received the petitioner's appeal 49 days later on May 3, 1999. Therefore, the appeal was not timely filed.

An appeal which is not filed within the time allowed must be rejected as improperly filed. However, if an untimely appeal meets the requirements of a motion to reopen or reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. 8 C.F.R. 103.3(a)(2)(v)(B).

8 C.F.R. 103.5(a) states, in pertinent part:

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A

motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner's appeal meets the requirements of a motion. Therefore, the case will be remanded back to the director to consider whether the petitioner has met her burden of proving that the beneficiary is an orphan under U.S. immigration law. The director may request any additional evidence deemed necessary to assist him with his determination. 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 appeal is rejected. The matter is remanded to the district director for treatment as a motion to reopen.