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U.S. Department of Justice
Immigration and Naturalization Service

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



File  Office: BOSTON, MA

Date: **APR 30 2002**

IN RE: Petitioner: 
Beneficiary: 

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:

SELF-REPRESENTED

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 Boston, Massachusetts district office 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) with the director on August 19, 2000.¹ The petitioner is a 66-year-old married citizen of the United States. The beneficiary is 16 years old at the present time and was born in Haiti on February 11, 1986.

The director denied 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).

On appeal, the petitioner submits a statement and requests oral argument before the Administrative Appeals Office (AAO).

Section 101(b)(1)(F) of 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 reveals the following facts about the beneficiary:

The beneficiary was born in Haiti in 1986 [REDACTED] (biological mother) [REDACTED] (biological father). Prior to the beneficiary's first birthday, the biological mother left the beneficiary in the care of the biological father and did not return. The biological father married [REDACTED] with whom he fathered two sons and continued to raise the beneficiary. Sometime prior to his death, the biological father decided that he could not support his family and the beneficiary went to live with the biological father's sister, who is the petitioner's spouse. The beneficiary lived with the petitioner's spouse in Haiti until

¹ The petitioner initially filed an I-600 petition in the beneficiary's behalf on February 24, 1999, which the director denied on July 12, 1999. The petitioner appealed the denial and the Associate Commissioner dismissed the appeal on March 20, 2000. The petitioner submitted a second I-600 petition in August of 2000 in the beneficiary's behalf.

sometime in 1988 when the petitioner's spouse came to the United States. After the petitioner's spouse left Haiti, the beneficiary was raised by her grandmother and a cousin. The biological father died in 1990.

In his August 14, 2001 Notice of Intent to Deny, the director informed the petitioner that the I-600 petition could not be approved because the evidence in the record indicated that the beneficiary had not been abandoned by both parents as that term is defined in 8 C.F.R. 204.5(b). According to the director, the beneficiary had two living parents - the biological mother, [REDACTED] the stepmother [REDACTED]. Instead of unconditionally abandoning the beneficiary to a government agency, authorized adoption agency or an orphanage, the biological mother and stepmother permitted the petitioner's spouse to take-in, raise and eventually adopt the beneficiary. The director concluded that such actions by the biological mother and stepmother did not constitute abandonment.

In response, the petitioner stated that he and his spouse have been the only individuals to care for the beneficiary, as neither the birth mother nor the stepmother has offered any assistance with the beneficiary's upbringing or communicated with the beneficiary. The petitioner argued that abandonment was not the appropriate issue in this case. According to the petitioner, the beneficiary is an orphan because she was deserted by her biological mother, and separated from her parents through the death of her biological father and the indifference of her stepmother. The petitioner also stated that he and his wife have been supporting the beneficiary for many years, are the only parents the beneficiary has ever known, and are stable members of the community.

The director denied the petition on November 5, 2001 for the reasons stated in the Notice of Intent to Deny. The director reiterated that the petitioner had not established that the beneficiary's parents (biological mother and stepmother) abandoned her.

On appeal, the petitioner requests oral argument before the AAO. The petitioner does not address the director's stated reasons for the denial of the petition.

The beneficiary cannot be considered an orphan under United States immigration law. The petitioner believes that the beneficiary is an orphan simply because she was deserted by her biological mother and stepmother, and separated from her biological father by his death. However, the terms "disappeared," "deserted," "separated" and "abandoned" are defined terms within U.S. immigration law. As shall be discussed, the parents' actions in this case do not meet any of the applicable definitions in 8 C.F.R. 204.5(b).

As previously stated, a child may be an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. It is noted that the biological father is deceased; however, the beneficiary has two parents - the biological mother and the stepmother.²

Desertion by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

The beneficiary's biological mother and stepmother cannot be said to have "deserted" her. Although the biological mother and the stepmother have forsaken the beneficiary, the beneficiary has never been and is not currently a ward of a competent authority in Haiti. Therefore, the beneficiary has not been deserted by both parents as that term is defined in the governing regulations.

Disappearance of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

The beneficiary's biological mother and stepmother cannot be said to have "disappeared," as the whereabouts of the biological mother and the stepmother are known.

According to an August 11, 1992 extract from the register of the Justice of the Peace at Delmas, the biological mother appeared before the Justice, declared that she was residing in Port-au-Prince, and gave her consent to the adoption of the beneficiary by the petitioner and the petitioner's spouse. The biological mother also executed a September 30, 1999 statement before a Notary in Haiti, in which she again declared to be a resident of Port-au-Prince and consented to the care of the beneficiary by the petitioner's spouse. Similarly, on April 21, 2000, the stepmother executed an affidavit before a Notary in Queens, New York, and declared that the petitioner and the petitioner's spouse could take full responsibility for the beneficiary. This evidence clearly shows that the whereabouts of the biological mother and the stepmother are known. Therefore, the beneficiary's parents

² The step-mother, [REDACTED] became the beneficiary's other parent upon her marriage to the biological father while the beneficiary was still under 18 years of age. Section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1).

have not disappeared as that term is defined in the governing regulations.

Loss from both parents means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

The beneficiary's biological mother and stepmother cannot be said to have been "lost." No competent authority in Haiti has determined that the beneficiary has been separated from the biological mother and the stepmother in a permanent manner due to a natural disaster, civil unrest or other calamitous event. Therefore, the beneficiary has not suffered a loss of both parents as that term is defined in the governing regulations.

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

The beneficiary's biological mother and stepmother cannot be said to have been "separated" from her. No competent authority in Haiti has involuntarily severed the biological mother's and the stepmother's parental rights for good cause in accordance with Haitian law. Therefore, the beneficiary has not been separated from both parents as that term is defined in the governing regulations.

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not

constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

The beneficiary's biological mother and stepmother cannot be said to have "abandoned" her. The definition of "abandonment" in 8 C.F.R. § 204.3(b) states expressly that:

. . . A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. . . .

As previously stated, in an August 11, 1992 extract from the register of the Justice of the Peace at Delmas, the biological mother appeared before the Justice, declared that she was residing in Port-au-Prince, and gave her consent to the adoption of the beneficiary by the petitioner and the petitioner's spouse. The extract specifically states that:

She [the biological mother] has declared to us [the Justice of the Peace] that she gives her full and complete consent to the adoption of her minor daughter . . . by the spouses [the petitioner] and his wife . . . without any reserve.

The stepmother also executed an April 21, 2000 affidavit in Queens, New York in which she declared:

If I am considered her step-parent under law, I hereby give full and complete authority and responsibility for [the beneficiary] to [the petitioner and his spouse] who have always treated her as their daughter.

The beneficiary does not qualify as an orphan on the ground that both of her parents - her biological mother and stepmother - have abandoned her. The biological mother and the stepmother intended to, and did in fact, transfer their parental rights to specific persons, who are the petitioner and his spouse. The applicable regulation requires the biological parents to forsake their parental rights, obligations, and claims to their child without intending to transfer, or without transferring their rights to any specific person(s).

Accordingly, the petitioner has not established that the beneficiary is eligible for classification as an orphan due to the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. While the petitioner requests oral argument pursuant to 8 C.F.R. 103.3(b), such a request is denied because the issues of law in this case can be adequately addressed in writing.

ORDER: The appeal is dismissed. The petition is denied.