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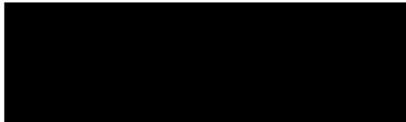
U.S. Department of Justice

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: PHILADELPHIA, PA

Date:

DEC 17 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

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 Philadelphia, Pennsylvania district office 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 The director's decision will be withdrawn and the case will be remanded to him for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director on July 15, 2002. The petitioner is a 50-year-old married citizen of the United States. The beneficiary is sixteen years old at the present time and was born in St. Andrew, Jamaica on August 5, 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 additional evidence.

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. . . .

In the I-600 petition, the petitioner claimed that the beneficiary was an orphan because she has only one surviving parent who is unable to provide for her support. However, the petitioner's home study report, which was completed on July 9, 2002, stated that the beneficiary lived with her biological father and step-mother.

The director denied the petition because it appeared that the beneficiary had acquired a step-mother.

On appeal, the petitioner states that the beneficiary's biological father never remarried after his wife (the beneficiary's biological mother) died. The petitioner states that the biological father does not have a common law wife and that the agency that prepared the home study report erred in stating that the beneficiary lived with her stepmother.

8 C.F.R. 204.3(b) states, in pertinent part:

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)

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.

Although not explicitly stated in the denial letter, it is presumed that the director denied the petition on the basis that the beneficiary was not abandoned by both parents (biological father and stepmother).

Pursuant to 8 C.F.R. 103.2(b)(8), where the evidence submitted with a petition either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service may request additional evidence. The district director requested additional information, but he did not provide the petitioner an opportunity to submit additional evidence to clarify whether the beneficiary had two parents or was the child of a surviving parent. Instead, the district director simply denied the petition even though the discrepant information should have raised underlying questions about the beneficiary's eligibility to be classified as an orphan. The director's action was fundamentally unfair to the petitioner and may have resulted in an erroneous denial of the petition.

The record contains a letter from the agency that conducted the home study, indicating that it erred in stating that the beneficiary lived with her stepmother. Furthermore, the record contains an investigative report that indicates that the beneficiary resides with her father and grandmother.

As the record is presently constituted, it appears that the beneficiary is the child of a surviving parent -- the biological father.

In all cases, it must be evident that the surviving parent is incapable of providing proper care for the child according to the local standards of the foreign-sending country¹, and has, in

¹ *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. 8 C.F.R. 204.3(b).

writing, irrevocably released the child for emigration and adoption. 8 C.F.R. 204.3(b).

The record contains a letter from the biological father dated January 18, 2002 stating that he gives the petitioner and his wife irrevocable custody of the beneficiary for adoption and emigration. The biological father also indicated in his letter that he does not have a steady job or a useful trade to rely on for an income.

Although the biological father implicitly indicated in the consent form that he was unable to support the beneficiary, the record is insufficient to establish that he cannot provide for the beneficiary according to the local standards of Jamaica.

Accordingly, this case shall be remanded back to the district director so that he can request evidence of the biological father's inability to properly care for the beneficiary. The district director should also request the beneficiary's adoption court records, as the petitioner indicated that he had adopted the beneficiary in Jamaica. After receipt and consideration of the additional evidence, the director should enter a new decision.

An adoption order and any underlying home study report may shed light on the biological father's inability to care for the beneficiary. If the adoption court order and the social worker's report verify the biological father's declaration that the biological father cannot provide for the beneficiary's care, such verification may be sufficient evidence. Matter of Rodriguez, 18 I&N Dec. 9, 10 (INS 1980). Therefore, the petitioner should endeavor to procure these documents in support of his claim that the biological father cannot provide for the beneficiary's basic needs, consistent with the local standards in Jamaica.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The case 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.