



F 1

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

[Redacted]

File: [Redacted]

Office: CLEVELAND, OHIO

Date:

NOV - 6 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 Cleveland, Ohio 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 The director's decision will be withdrawn and the petition will be approved.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director on July 18, 2001. The petitioner is a 50-year-old married citizen of the United States. The beneficiary is 2 years old at the present time and was born in the Philippines on December 10, 1999. The record indicates that the petitioner and his spouse adopted the beneficiary on November 27, 2000 pursuant to the laws of the Philippines.

The director denied the petition because the petitioner failed to establish that the beneficiary is an orphan as defined at section 101(b)(1)(F) of the Immigration and Nationality Act (the Act). Specifically, the director stated that the beneficiary's biological mother was still living and residing with the beneficiary in the Philippines. The director concluded that the biological mother, therefore, did not abandon the beneficiary.

On appeal, counsel submits a brief and affidavits from various parties, who include the biological mother. Counsel maintains that the biological mother is a sole parent and, therefore, the issue of whether the beneficiary was abandoned does not apply to the circumstances in this case.

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 the beneficiary was illegitimate and the biological mother was unable to provide for the beneficiary's care. The petitioner submitted an affidavit from the biological mother who stated that she was the mother of four illegitimate children. The biological mother further explained that she did not have a job and, therefore, she relied upon the petitioner and his spouse for financial support. The biological mother further stated that due to her circumstances of "hardship" and "poverty," she was seeking to give the beneficiary up for adoption by the

petitioner and his spouse.¹ The petitioner also submitted affidavits from the biological mother's mother, the biological mother's sister, and a neighbor of the biological mother. Each affiant attested to the biological mother's inability to provide for the beneficiary's basic needs.

The director denied the petition on October 11, 2001. Although not explicitly stated, the director appears to have denied the petition on the basis that the beneficiary was not abandoned. According to the director:

The record indicates that the child for which [sic] you have filed this application is a relative, and the child's mother is still alive and the child [is] still residing with the biological mother in the home of the biological mothers [sic] parents[sic] home. Therefore, the child does not meet the definition of [an] orphan pursuant to Section 101(b) of the Act, as amended.

On appeal, counsel notes that the biological mother is incapable of providing for the beneficiary's care because she is unemployed, has no home of her own, and has three other illegitimate children for whom she must care. Counsel maintains that the petitioner and the petitioner's spouse have been sending money to the biological mother for several years to cover her living expenses and expenses for the beneficiary, and it is irrelevant that the beneficiary has been living in the same household as the biological mother.

According to counsel, the petitioner does not need to establish that the biological mother abandoned the beneficiary because the biological mother is a sole parent. Counsel's statement has merit; the director misapplied the law to the facts in this petition.

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

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper*

¹ The petitioner's spouse is the biological mother's sister.

care as that term is defined in this section.²

Although not explicitly stated in the denial letter, the director apparently concluded that the beneficiary was illegitimate and, therefore, the child of a sole parent; however, the director denied the petition on the basis that the beneficiary was not abandoned by his biological mother because they were still residing together in the same household.

The term "abandoned" is a defined term within U.S. immigration law.³ A sole parent, who in all cases is the biological mother, does not need to abandon her child in order for the child to be eligible for classification as an orphan. A petitioner must only establish that the biological mother is incapable of providing proper care for the child according to the local standards of the foreign-sending country, and has, in writing, irrevocably released the child for emigration and adoption. 8 C.F.R. 204.3(b). A sole parent is not prohibited from relinquishing or releasing her child to the prospective adoption parent(s) for a specific adoption.

Here, the director concluded that the biological mother is a sole parent. Therefore, the only issues to decide are whether the biological mother is incapable of providing for the beneficiary's needs and whether she has, in writing, irrevocably released the beneficiary for emigration and adoption.

According to 8 C.F.R. 204.3(b), "*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 May 29, 2001 decision from the Regional Trial Court in Cebu City, Philippines regarding the beneficiary's adoption by the petitioner and his spouse. According to the decision, the court accepted into the record the biological mother's affidavit of consent to the adoption of the beneficiary because "she has no visible means of livelihood." The Trial Court's verification of the biological mother's declaration that she cannot provide for the beneficiary's care is sufficient evidence. See Matter of

² It is noted that the provisions of Public Law 104-51, which changed the definitions of "child," "parent," and "father" as used in Titles I and II of the Act, replaced the words "legitimate child" with the words "child born in wedlock," and replaced "illegitimate child" with the words "child born out of wedlock" in sections 101(b)(1)(A), 101(b)(1)(D), and 101(b)(2) of the Act. The Service has not amended the regulatory definition of *sole parent* to conform to the statutory changes.

³ The exact term found in 8 C.F.R. 204.3(b) is *Abandonment by both parents*

Rodriguez, 18 I&N Dec. 9, 10 (INS 1980). Therefore, the petitioner has established that the biological mother cannot provide proper care for the beneficiary.

The petitioner has also established that the biological mother has, in writing, irrevocably released the beneficiary for emigration and adoption. The record contains the biological mother's affidavit, which contains her irrevocable release of the beneficiary for emigration and adoption. In addition, the adoption decree from the Trial Court in the Philippines clearly sets forth that the petitioner and his spouse live in the United States and that the biological mother has agreed to the adoption. The adoption decree, therefore, is also evidence of the biological mother's written consent to the adoption and emigration of the beneficiary.

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 petition is approved.