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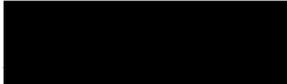
**U.S. Department of Justice  
Immigration and Naturalization Service**

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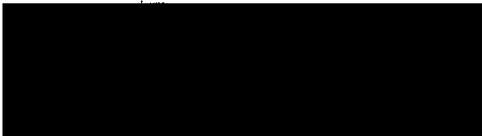
*OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536*

File:  Office: HO CHI MINH CITY, VIETNAM Date: **OCT 18 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 PETITIONER:



**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 which 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 District Director, Chicago, Illinois, initially approved the immigrant visa petition. Based upon an investigation conducted by the Officer-in-Charge (OIC), Ho Chi Minh City, Vietnam, the OIC determined that the beneficiary was not eligible for the benefit sought. Accordingly, the OIC served the petitioner with notice of his intent to revoke the petition and the petition was ultimately revoked on June 25, 2001. The Associate Commissioner for Examinations dismissed a subsequent appeal. The matter is again before the Associate Commissioner on motion to reconsider and reopen. The motion is granted, and the materials filed with the motion are made part of the record. The previous decision of the Associate Commissioner, however, will be affirmed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on December 22, 2000. The petitioner is a 45-year-old married citizen of the United States, who had one previous marriage. The beneficiary is four years old at the present time and was born in Lang Son province, Vietnam on December 2, 1997.

The OIC revoked the approval of the petition after determining that the beneficiary did not meet the statutory definition of an orphan.

On appeal, counsel asserted in part that the beneficiary is the child of a sole parent who is incapable of providing for the beneficiary's basic needs, consistent with the local standards of Vietnam.

The Associate Commissioner dismissed the appeal, reasoning that there was insufficient evidence to conclude that the beneficiary was the child of a sole parent or that both parents abandoned the beneficiary. The Associate Commissioner found that the documents submitted in support of the petition, including the decision by the welfare center to receive the child into the center, the adoption agreement and the relinquish agreement, all appear to have been fraudulently made to facilitate this adoption, and accordingly had no evidentiary weight. The Associate Commissioner concluded that there was insufficient evidence to find that the adoption of the beneficiary was valid under Vietnamese law.

On motion, counsel submits a brief and additional documentation in the form of a legal opinion of a Vietnamese lawyer. Counsel asserts that the beneficiary is a child of a sole parent, because she was born into a marriage that was subsequently annulled, rendering her illegitimate. Counsel asserts that although the beneficiary's biological father legitimated the beneficiary by signing her birth certificate, the beneficiary was not in her biological father's legal custody at the time of the

legitimation, hence, she cannot be considered to be his child within the meaning of section of 101(b)(1)(C) of the Act.

The legal opinion from the Vietnamese lawyer opines that the biological father did not have custody of the beneficiary at the time he signed the beneficiary's birth certificate. As argument, counsel states:

Since the birth father did not have legal custody of the beneficiary, his act of signing the birth certificate could not have legitimated the beneficiary under section 101(b)(2) and 101(b)(1)(C) of the Act, and therefore the beneficiary is the child of a sole parent under 8 C.F.R. 204.3(b). The beneficiary therefore qualifies as an orphan under section 101(b)(1)(F) of the Act, and should be granted a visa forthwith.

Counsel's assertion - that the beneficiary is a child of a sole parent - is not supported by the evidence.

8 C.F.R. 204.3(b) states that "*sole parent*" means the mother when it is established that child is illegitimate . . . . "

In this case, the beneficiary is not illegitimate. She was born in wedlock. Her parents' marriage was subsequently annulled. After the annulment, the beneficiary's father registered her birth and recorded his name as the beneficiary's father, thereby legitimating the beneficiary in accordance with Vietnamese law.

Counsel asserts that the beneficiary is illegitimate because she was not in her father's physical custody when he registered her birth. Counsel cites section 101(b)(1)(C) of the Act. But section 101(b)(1)(C) does not require the father to have *physical* custody of a child. What it requires is *legal* custody. The Board of Immigration Appeals has held that, in the absence of clear evidence that the relevant law provides to the contrary, the act of legitimation itself is sufficient to establish a natural father's legal custody. Matter of Rivers, 17 I&N Dec. 419 (BIA 1980).

The country of the beneficiary's birth, citizenship, and habitual residence is Vietnam. Thus, whether she is illegitimate is determined by the laws of Vietnam and not by the Act. See Matter of Rodriguez, 18 I&N Dec. 9, 10 (INS 1980) (legitimacy of alleged orphan determined by law of place of birth).

The Service queried the Law Library of Congress regarding the legitimation law of Vietnam. According to the Library's senior legal research analyst, the relevant law on family status issues

in Vietnam is the Marriage and Family Law of January 1987.<sup>1</sup> Under this law, children born out of wedlock are considered illegitimate children. However, the father or the mother can acknowledge his or her illegitimate child at the People's Committee of his or her place of residence, by registering the birth of a child born out of wedlock.

In the instant case, the beneficiary's father registered her birth and acknowledged that he was her father. This act of registering the birth and recording parentage is sufficient to legitimate a child pursuant to Vietnam's law. Thus, the beneficiary does not qualify as an orphan on the ground that the beneficiary is the child of a sole parent.

If not the child of a sole parent, a child might qualify as an orphan if he or she was abandoned by both parents. Abandonment is a defined term. 8 C.F.R. 204.3(b) state, 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). 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.

(*Emphasis added.*)

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<sup>1</sup> LUẬT HÔN NHÂN VÀ GIA ĐÌNH [Law on Marriage and the Family] 8-20 (Hanoi, Pháp Ly, 1991).

In the instant case, the beneficiary's parents have not willfully forsaken all parental rights including control and possession of the child. According to the evidence on the record, including the admissions of both counsel and the adoption facilitator, the beneficiary's mother refused to relinquish the beneficiary to the orphanage. Instead, the biological parents relinquished the beneficiary directly to the adoptive parent for a specific adoption, contrary to the definition at 8 C.F.R. 204.3(b). In review, the petitioner failed to establish that the beneficiary qualifies for classification as an orphan because she failed to establish that the beneficiary was abandoned by both parents.

On motion, counsel asserts that the Associate Commissioner erred in deciding that the beneficiary's adoption was invalid because it was granted on the basis of fraudulent documents.

The validity of the adoption decree is a matter of the laws of the residence of the beneficiary. Even if the adoption were to be deemed valid under the laws of Vietnam, the petitioner has not established the beneficiary's eligibility as an orphan under the immigration laws of the United States. Regardless, the validity of the Vietnam adoption proceedings remains subject to question due to the fraudulent documents. Since, however, it has already been determined that the beneficiary does not qualify as an orphan, this issue concerning the validity of the adoption documents is not dispositive in this case, and will not be addressed further.

The petitioner has failed to establish that the beneficiary is an orphan as defined at section 101(b)(1)(C) of the Act, as the beneficiary is not the child of a sole parent, nor was she abandoned by both parents.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The evidence of record does not establish that the beneficiary qualifies as an orphan. Thus, the petitioner has not sustained that burden of proof.

**ORDER:** The decision of the Associate Commissioner dated July 25, 2002 is affirmed.