



FIL

U.S. Department of Justice
Immigration and Naturalization Service

Deleting 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: SAN ANTONIO, TEXAS Date: SEP 12 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 San Antonio, Texas district office initially approved the immigrant visa petition. Based upon an investigation that was conducted by the Officer-in-Charge (OIC), Ciudad, Juarez, Mexico, the director found that the beneficiary was not eligible for classification as an orphan and the approval of the petition was revoked on December 4, 2000 after proper notice. The petitioner filed a late appeal and the Associate Commissioner for Examinations remanded the case back to the director to treat the appeal as a motion. The director affirmed his previous decision to revoke his approval of the petition and certified his decision to the Associate Commissioner. The director's decision will be withdrawn and the record remanded for a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director in June of 2000. The petitioner is a 38-year-old married citizen of the United States. The beneficiary is 2 years old at the present time and was born in Mexico on October 25, 1999.

The director revoked his approval of the petition because the petitioner failed to establish that the beneficiary's biological mother is unable to provide for the beneficiary's proper care, consistent with the local standards of Mexico.

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 director initially approved the immigrant petition and notified the U.S. consulate in Ciudad, Juarez, Mexico of his decision. A consular officer referred the case to the OIC in Ciudad Juarez for investigation of whether the beneficiary's sole parent was unable to provide for the beneficiary's basic needs. According to the OIC in the Notice of Intent to Revoke:

Numerous attempts to ascertain the financial and economic status of the biological mother were made by this office but to no avail. On August 17, 2000, this office requested that the adoptive parents locate the biological mother to support their contention that the child meets the definition of [o]rphan To date

no contact with the biological mother has been made.

The OIC concluded that because the record did not contain sufficient evidence of the biological mother's inability to care for the beneficiary, the petition's approval could not be upheld. He, therefore, allowed the petitioner 18 days to submit evidence to rebut his conclusion that the biological mother could properly care for the beneficiary.

In response, counsel stated that the petitioner did not object to the Service interviewing the biological mother. However, counsel stated that the petitioner was not aware of the biological mother's whereabouts. Counsel maintained that the biological mother had appeared in a Mexican court for the beneficiary's adoption by the petitioner. According to counsel, the court "would have concerned itself with . . . the economic and social conditions of the mother, the availability of health and education facilities, [and] the psychological and emotional stability of the birth mother and the adopting parents." Counsel suggested that the adoption decree, by itself, was sufficient evidence of the biological mother's inability to care for the beneficiary.

The OIC revoked the approval of the petition for the reasons stated in the Notice of Intent to Revoke. The OIC noted that the Service had been unable to speak with the biological mother in order to determine whether she was capable of providing for the beneficiary's basic needs.

The petitioner filed a late appeal. Therefore, the Administrative Appeals Office (AAO) remanded the appeal back to the director of the San Antonio district office to treat the appeal as a motion. On July 21, 2001, the director informed the petitioner that he was reopening the case based upon the AAO's decision. The director further informed the petitioner that it was still necessary for the Service to interview the biological mother about her ability to properly provide for the beneficiary's care, and the OIC gave the petitioner 30 days to provide the Service with an address and phone number of the biological mother.

In response, counsel stated that the petitioner has never met the biological mother because an intermediary (the petitioner's mother) has always been used. According to counsel, the beneficiary is the second child that the petitioner has adopted from the biological mother. Counsel maintained that the biological mother's places of residence and places of work have never been stable, and attempts to locate the biological mother through newspaper ads and a private investigator have been futile. Therefore, counsel stated that the petitioner could not comply with the Service's request for the biological mother's address and telephone number.

Counsel also noted that in October of 2000, the biological mother

wrote a letter to the petitioner's mother (the intermediary) because she became aware that Service officials wanted to speak to her. In this letter, which is included in the record, the biological mother provided the address of where she would be staying for approximately one week and stated that the residence did not have a telephone. Counsel stated that he is unaware if Service officials attempted to contact the biological mother at the address that the biological mother provided.

Counsel stated that because no one is able to locate the biological mother the Service must make a determination based upon the evidence in the record. According to counsel, the adoption decree by a Mexican judge is persuasive evidence that the biological mother cannot properly care for the beneficiary. Counsel noted that the biological mother has a history of being unable to care for her children; she has another daughter who is living with her parents, and another child whom she allowed the petitioner to adopt. Additionally, counsel stated that the biological mother does not live in a stable environment.

The director affirmed his prior decision to deny the petition in a December 28, 2001 decision on the Service motion. The director maintained that unless the biological mother could be interviewed, the Service could not find that the biological mother is incapable of providing for the beneficiary's basic needs.

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 care* as that term is defined in this section.¹

¹ 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.

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.

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

Throughout the processing of this petition, the director and the OIC have maintained that the only way to determine whether the biological mother is incapable of caring for the child is for the Service to interview the biological mother. While an interview with the biological mother would be useful in determining whether she can provide for the beneficiary's needs, that option is not available to the Service as no one is able to locate her. Therefore, the Service must rely on other evidence.

In visa proceedings, the petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. 1361. Even without interviewing the biological mother, the Service may determine whether the biological mother is capable of providing for the beneficiary's basic needs by analyzing evidence that the petitioner has already submitted to meet her burden of proof. Here, relevant evidence in the record consists of three court orders regarding the beneficiary's adoption, and the biological mother's October 30, 2000 letter to the petitioner's mother (the intermediary) about why she was seeking to give the beneficiary to the petitioner for adoption.

In his prior correspondence with the Service, counsel maintained that the court "would have concerned itself with . . . the economic and social conditions of the mother, the availability of health and education facilities, [and] the psychological and emotional stability of the birth mother and the adopting parents" when deciding whether the petitioner should adopt the beneficiary. Thus, counsel suggests that the beneficiary's adoption, by itself, is sufficient evidence of the biological mother's inability to provide for the beneficiary's proper care.

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). However, counsel's statement regarding the Mexican court's decision to grant the adoption raises questions about the factors that the court would have considered regarding the beneficiary's adoption.

In reviewing the three judicial orders² from the court in Ciudad Juarez, Mexico regarding the adoption of the beneficiary, the Service notes that none of the orders explicitly indicates that the adoption was granted based upon the biological mother's inability to provide for the beneficiary's basic needs. In her October 30, 2000 letter to the petitioner's mother (the intermediary), the biological mother stated that:

The jobs that I have had were as a maid and I lived in the place where I worked, and I was not accepted with a newborn child. To get a job that would offer me better opportunities, it would had [sic] been necessary for me to go to school, which is something I could not do if I had to work, study, and take care of my daughter at the same time.

According to the biological mother, she explained to a judge her reasons for giving the beneficiary up for adoption. While the April 26, 2000 order supports the biological mother's claim that she appeared before the court on April 11, 2000, the order only notes that the biological mother consented to the beneficiary's adoption by the petitioner.

Accordingly, the petitioner should be provided an opportunity to show that Mexican judges in adoption proceedings grant or deny adoption requests based on the economic and social conditions of the biological mother, the availability of health and education facilities, or the psychological and emotional stability of the birth mother. Evidence may include, but is not limited to, a legal opinion about Mexican adoption laws or copies of the relevant laws and regulations that govern the adoption of children in Mexico. Since the court orders are silent on the issue of the birth mother's inability to care for the child, it will not be sufficient to show that a Mexican court *may* grant adoption for that reason. It will, instead, be necessary to establish that a birth mother's inability to provide care, as a matter of law, is a required prerequisite to adoption in Mexico.

The petitioner should also be provided an opportunity to submit additional evidence he deems necessary in order to clarify the biological mother's statements in her October 30, 2000 letter in which she stated that she was unable to care for the beneficiary.

Finally, and more importantly, the record contains a September 7, 2000 letter from the petitioner to the Service in which he indicated that he and his spouse had previously adopted the beneficiary's sibling. Pursuant to section 101(b)(F)(ii) of the Act, the sibling of an orphan may also qualify as an orphan if

² The court orders are dated February 29, 2000; April 26, 2000; and May 30, 2000.

the sibling will be adopted by the same U.S. citizen parent(s) and the sibling is under the age of 18 when the orphan petition is filed.

The petitioner has not presented any information about his and his spouse's adoption of the beneficiary's sibling, including the name of the child, his date of birth and alien-registration number, or whether the beneficiary's sibling was the recipient of an approved I-600 petition as an orphan. The director should also permit the petitioner to submit this information in order to determine whether the petition merits approval pursuant to section 101(b)(1)(F)(ii) of the Act.

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.