

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIV. A.P., 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

OCT 19 2003

File: Office: TIJUANA, BAJA CALIFORNIA Date:

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)

ON BEHALF OF APPLICANT:

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge (OIC) of the Tijuana, Baja California district office denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) 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 The director's decision will be withdrawn and the petition will be approved.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 OIC. The petitioner is a 37-year-old married citizen of the United States. The beneficiary is nine months old at the present time and was born in Mexico on January 21, 2003.

The OIC issued a notice of intent to deny the petition on May 6, 2003. Counsel for the petitioner submitted a rebuttal to the notice of intent to deny. On June 19, 2003, the OIC 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 in support of the appeal.

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 issue to be addressed in this matter is whether the petitioner has sustained her burden of proof and established that the beneficiary meets the statutory definition of an orphan.

Based on an investigation conducted by employees of his office, the OIC determined that the beneficiary is the child of two biological parents. The record contains a copy of the Citizenship and Immigration Services (CIS) investigator's report.

According to the OIC's decision, the investigation allegedly uncovered the following information: the beneficiary's biological mother and father were living together as "husband and wife"; the biological mother withheld material facts concerning the biological father's whereabouts in an interview with CIS and she withheld the same from the Sonora civil court judge; and all children born in Mexico are legitimate.

According to the CIS investigation report on file, the investigator learned in a March 6, 2003 interview with the biological mother, Yadira Sanchez Galvan, that she claimed to be a single mother; she gave the name of the beneficiary's biological father and stated that she had lost contact with him. According to the same report, the investigator contacted Yadira Sanchez Galvan's landlady who said that Yadira Sanchez Galvan used to live with a man who provided for her. The investigator said that he spoke to Yadira Sanchez Galvan's neighbors who said that she had been living with a man as a married couple but that after the beneficiary's birth, they moved away. On the basis of this report, the OIC concluded that the beneficiary's biological parents had been living together as husband and wife; therefore, the beneficiary had two parents.

In his decision, the OIC relies on numerous claims that are not supported by the record.

The CIS investigative report states that the investigator verified the information pertaining to the birth of the beneficiary and that Yadira Sanchez Galvan is a single unmarried mother.

The OIC did not verify that the beneficiary's biological mother had been living with the beneficiary's biological father. More significantly, even assuming that the beneficiary's parents were once cohabitating, there is no evidence in the record that they were *legally* husband and wife. The report merely states that a landlady and neighbors indicated that Yadira Sanchez Galvan had been living with a man before the beneficiary's birth. The report does not contain any sworn statements.

The OIC's conclusions are not supported by the record and rely heavily on unconfirmed inferences. For these reasons, the OIC's decision will be withdrawn.

In the I-600 petition, the petitioner stated that the beneficiary was the child of a sole parent (the biological mother). The petitioner also claimed that the biological mother was unable to provide for the beneficiary's basic needs, consistent with the local standards of the foreign sending country (Mexico).

As the record is presently constituted, the petitioner has presented sufficient evidence to overcome the director's objections to the approval of the 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 care* as that term is defined in this section.¹

[Emphasis added.]

The country of the beneficiary's birth, citizenship and habitual residence is Mexico. Thus, whether the beneficiary is illegitimate is determined according to the law of Mexico. *Matter of Rodriguez*, 18 I&N Dec. 9, 10 (INS 1980) (legitimacy of alleged orphan determined by law of place of birth). According to the OIC, Mexico eliminated all distinctions between children born in and out of wedlock. The issue of whether the beneficiary is legitimate or illegitimate is moot. Nonetheless, the beneficiary was born to a single unmarried mother. Under section 101(b)(2) of the Act, the father of a child born out of wedlock is not the child's "parent" for purposes of a Form I-600 proceeding "if the father has disappeared or abandoned or deserted the child." Only the mother's name was listed on the beneficiary's birth records. The record, therefore, supports the inference that the father abandoned the beneficiary. The beneficiary, accordingly, is the child of a sole parent.

When a biological mother is a sole parent, a petitioner must establish that the biological mother is incapable of providing the beneficiary with proper care according to the local standards of the foreign-sending country.

The regulation at 8 C.F.R. § 204.3(b) states that:

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

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. CIS has not amended the regulatory definition of *sole parent* to conform to the statutory changes.

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.

According to the OIC's investigative report, the beneficiary's biological mother has one other child, is unemployed and is unable to care for the beneficiary's basic needs. The biological mother has declared that she is unable to provide proper care for the beneficiary. Accordingly, the petitioner has established that the beneficiary is eligible for classification as an orphan because he is the child of a sole parent, who is incapable of providing for his care and has irrevocably released him for emigration and adoption.

ORDER: The OIC's June 19, 2003 decision is withdrawn and the petition is approved.