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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
425 I Street N.W.
Washington, D.C. 20536

[Redacted]

File: [Redacted] Office: OKLAHOMA CITY, OKLAHOMA

Date: OCT 17 2003

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)

ON BEHALF OF PETITIONER:

[Redacted]

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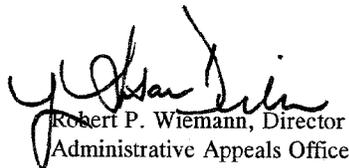
INSTRUCTIONS:

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 Director of the Oklahoma City, Oklahoma district office denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on October 11, 2001. The petitioner is a 43-year-old married naturalized citizen of the United States. The beneficiary is 16 years old at the present time and was born in Ghana on January 20, 1987. The record indicates that the petitioner and her spouse adopted the beneficiary in Ghana in April 2001.

The district director denied the petition, finding that the petitioner had failed to establish that the beneficiary is an orphan as defined in the Immigration and Nationality Act.

On appeal, counsel for the petitioner submits additional documentation and a brief.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i), 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; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence

The evidence is not sufficient to establish abandonment.

Abandonment by both parents is a defined term in the regulations. 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). 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.

On appeal, counsel for the petitioner argues that the beneficiary has been abandoned by both her parents because her father has long been absent and her mother released her for adoption.

The beneficiary cannot be considered to have been abandoned by both parents as that term is defined in 8 C.F.R. § 204.3(b) because the record does not establish that the biological parents actually forsook their parental rights to the beneficiary. The applicable regulation requires the biological parents to forsake their parental rights, obligations, and claims to their child without intending to transfer, or without transferring their rights to any specific person(s). According to the beneficiary's birth certificate, she has two biological parents. The petitioner stated that the beneficiary's father abandoned the beneficiary long ago. The district director noted that the beneficiary's biological father signed a consent to her adoption by the petitioner so his whereabouts were known. This finding is based on the original adoption decree, which indicates that both parents consented to the petitioner's adoption of the beneficiary. On appeal, counsel for the petitioner submits an amended adoption that states that the beneficiary's father had abandoned the beneficiary.

There is no documentation in the record to show that a third party (e.g., a government agency, a court of competent jurisdiction, an adoption agency or an orphanage) that was authorized under the child welfare laws of Ghana to act in such a

capacity ever had custody of the beneficiary because the biological parents relinquished or released their parental rights to such a third party. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). According to the evidence on the record, the beneficiary resides with relatives other than her biological parents. The evidence is insufficient to establish that the child has been abandoned by both parents.

As to her father, the amended adoption decree indicates that he abandoned her. This decree does not, however, establish an abandonment as defined in 8 C.F.R. § 204.3(b). The fact that her father may have been absent from her life does not necessarily establish that he has actually forsaken all his parental rights, obligations and claims with respect to the beneficiary, so that, before the adoption, he no longer had these rights and obligations under Ghana law.

Even assuming that the father has abandoned the beneficiary, the mother clearly has not done so. Her consent indicates that her own mother cared for her and the beneficiary until her mother's death. Since then, her aunt (the petitioner's mother) has done so. That another relative has taken on the support of the beneficiary and her mother simply does not establish that, as a legal matter, the beneficiary's mother has forsaken her parental rights and duties. Moreover, the mother's consent specifically consents to the beneficiary's adoption by the petitioner. "A relinquishment or release . . . for a specific adoption does not constitute abandonment." 8 C.F.R. § 204.3(b) (definition of "abandonment").

The beneficiary has not been deserted.

Desertion by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

8 C.F.R. § 204.3(b) (definition of desertion). The beneficiary's biological parents cannot be said to have "deserted" her. The beneficiary resides with a member of her extended family. The beneficiary has never been and is not currently a ward of a competent authority in Ghana. Therefore, the beneficiary has not been deserted by both parents as that term is defined in the governing regulations.

The beneficiary's parents have not disappeared.

Disappearance of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

8 C.F.R. § 204.3(b) (definition of disappearance). The beneficiary's biological parents cannot be said to have "disappeared." As to her father, the record does not include evidence that the competent authority in Ghana has formally determined that he has passed from her life, his whereabouts are unknown, and there is no reasonable hope of his reappearance. As to her mother, it is clear that her mother has not passed out of the beneficiary's life. Indeed, it appears that the beneficiary and her mother are both living with the mother's aunt.

The biological mother is not a sole parent.

As an alternative theory, counsel for the petitioner asserts that the beneficiary is the child of a sole parent because her biological father abandoned her by virtue of his absence.

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

(Emphasis added.)

It is not clear from the record whether the beneficiary was born in or out of wedlock. Even assuming that she was, it appears that Ghana's law makes no distinction between children born in and out of wedlock. Article 28(1)(b) of the 1992 Constitution of Ghana, for example, provides that all children born in Ghana have the same inheritance rights with respect to their parents, whether born in wedlock or out. The beneficiary's mother cannot be considered her "sole parent" for purposes of section 101(b)(1)(F) of the Act because the petitioner has not established that the beneficiary is illegitimate under the laws of Ghana.

Conclusion.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden; it is concluded that the petitioner has not established that the beneficiary is eligible for classification as an orphan pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F).

ORDER: The appeal is dismissed.