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FEB 11 2004

FILE: [Redacted]

Office: NEW ORLEANS, LOUISIANA Date:

IN RE: Petitioner: [Redacted]
Beneficiaries: [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]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Interim Director, New Orleans, Louisiana 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 December 14, 2001 on behalf of [REDACTED] born December 18, 1987, [REDACTED] born August 14, 1993, and [REDACTED] born December 1, 1995. The petitioner is a 40-year-old married citizen of the United States. The three beneficiaries were all born in Pakistan and are siblings.

The acting interim district director denied the petition because the petitioner failed to establish that the beneficiaries were abandoned by both parents, or otherwise meets the definition of an orphan pursuant to the Immigration and Nationality Act.

On appeal, counsel for the petitioner submits a brief..

The acting interim district director issued a request for additional evidence. The petitioner responded with additional evidence. The acting interim district director determined that the petitioner's response was insufficient to overcome the basis for denial. The acting interim district director denied the petition, finding that the petitioner had failed to prove that the beneficiaries were orphans because they have two parents (their natural father and his wife, their step-mother) who have not disappeared or abandoned, deserted, or been separated from them. The acting interim district director determined that the beneficiaries' father relinquished parental rights intending to transfer those rights directly to the petitioner and her spouse. The acting interim district director further found that the guardian certificate awarding guardianship of the beneficiaries to the petitioner is invalid because it was signed by a court lacking jurisdiction to award guardianship.

Counsel for the petitioner asserts in a brief that the interim acting district director erred in denying the petition because Citizenship and Immigration Services (CIS) offered no proof that Pakistan law recognizes the beneficiaries' father's remarriage as creating a step-parent relationship. Counsel for the petitioner further asserts that the pertinent regulations do not require the petitioner to prove the competency of the court awarding guardianship. Counsel for the petitioner argues that guardianship certificate shifted the burden of proof from the petitioner to CIS.

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

According to the evidence in the record, the beneficiaries' biological mother died on December 11, 1996 and the beneficiaries' father remarried on August 23, 1997. On October 18, 2001, the petitioner and her spouse gained guardianship and custody of the beneficiaries pursuant to an agreement between the petitioner and her spouse and the beneficiaries' biological father. The petitioner filed the instant petition on December 14, 2001.

In review, the beneficiaries acquired a stepparent when her father remarried.

Counsel for the petitioner asserts that foreign law is a matter to be proven by the party seeking to rely on it. *Matter of Soleimani*, 20 I&N Dec. 99 (BIA 1989). The petitioner asserts that CIS offered no proof that Pakistan law recognizes a stepparent relationship between the beneficiaries and their father's new wife; therefore the beneficiaries are the children of a sole surviving parent. The petitioner has the burden of proof to establish eligibility for benefits sought. Section 291 of the Act, 8 U.S.C. § 1361. The burden of proof does not shift to CIS as the petitioner claims. The petitioner is seeking to rely on foreign law for the proposition that the beneficiaries are the children of a sole parent, ergo, the petitioner has the responsibility to establish foreign law. *See also Matter of Annang*, 14 I&N Dec. 502 (BIA 1973)(the law of a foreign country is a question of fact which must be proved by the petitioner if he relies on it to establish eligibility for an immigration benefit).

The petitioner has failed to establish that the beneficiaries have been abandoned by both parents. On this issue, 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.

(Emphasis added.) The petitioner submitted documentary evidence into the record to show the relinquishment of the beneficiaries by their biological father. Such documentary evidence is an October 18, 2001 order of the Oghi Family Court that states, in pertinent part:

The petitioners . . . seek custody of minors [beneficiaries]. The minors are presently in the custody of their grandparents. The grandparents and the father of the minors appeared before the Court along with their counsel and filed written compromise stating therein that they have no objection if the custody of the minors is granted to the petitioners and they are appointed as guardians of the minors.

Based upon the evidence in the record, it is clearly established that the biological father relinquished or released his parental rights specifically to the petitioner and her spouse for eventual adoption by the petitioner and her spouse. This act, therefore, does not constitute abandonment by both parents as that term is defined in the regulations.

The beneficiaries 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 biological parent intended to, and did in fact, transfer his parental rights to specific persons, who are the petitioner and her spouse. 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).

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part:

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.

The beneficiaries' biological parents cannot be said to have "deserted" them. Although the biological father forsook the beneficiaries, 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 Pakistan 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. Therefore, the beneficiaries have not been deserted by both parents as that term is defined in the governing regulations.

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)

The beneficiaries' parents cannot be said to have "disappeared," as their whereabouts are known. Their biological mother is deceased. Their biological father and stepmother's whereabouts are known.

The petitioner stated that the beneficiaries are orphans because they have only one "sole or surviving parent."

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. . . ."

In the instant case, the beneficiaries' biological father cannot be said to be a "sole parent." The beneficiaries are not illegitimate. Both their father and mother are listed as their parents on their birth certificates.

"'Surviving parent' means the child's living parent when the child's other parent is dead" *Id.*

Here, the beneficiaries' biological mother is deceased, but their biological father remarried so the father cannot be deemed to be a "surviving parent."

The beneficiaries do not meet the statutory definition of an "orphan." Their parents have not *abandoned* them. Their father released them for adoption by specific persons, the petitioner and her husband (the beneficiaries' uncle). The beneficiaries' parents have not *deserted* them, as they have not become wards of the state. Neither parent has *disappeared*. Their whereabouts are known. Finally, the beneficiaries' father is not a *sole or surviving parent* as defined by the Act.

Even if the petitioner had established that the beneficiaries are the children of a surviving parent, she failed to establish that he is incapable of providing proper care for the beneficiaries. 8 C.F.R. § 204.3(b) states, in pertinent part:

Surviving parent means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be incapable of providing proper care as that term is defined in this section.

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.

According to the evidence on the record, the beneficiaries' father owns an auto parts store in Pakistan. *See* home study report. There is no other information in the record regarding the biological father's income or ability to provide for the beneficiaries with respect to the local standards of the foreign-sending country. Absent such evidence, the CIS is unable to determine whether the beneficiaries' biological father is incapable of providing proper care as that term is defined in the regulations.

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 beneficiaries are eligible for classification as orphans 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.