



U.S. Citizenship
and Immigration
Services

17

[REDACTED]

File: [REDACTED] Office: NEW YORK, NEW YORK

Date: OCT 20 2004

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 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

identifying data deleted to
prevent identity of unrepresented
invasion of personal privacy

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DISCUSSION: The Interim District Director of the Citizenship and Immigration Services (CIS) New York District office denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on December 31, 2002. The petitioner is a 43-year-old married citizen of the United States. The beneficiary is 6 years old at the present time and was born in Serekunda, Gambia on June 16, 1998.

The district director denied the petition on September 16, 2003 based on a determination that the petitioner failed to establish the beneficiary was an orphan. Specifically, the district director determined that the petitioner failed to show the beneficiary was illegitimate and, therefore, concluded that the beneficiary did not have a sole parent who was incapable of providing proper care and who irrevocably released the beneficiary for emigration and adoption.

The petitioner, through counsel, submits a timely appeal.

Section 101(b)(1)(F)(i) 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

Further, the regulation at 8 C.F.R. § 204.3(b) provides the following definitions:

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.

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.

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 the term is defined in this section.

According to the facts in the record, the beneficiary is the petitioner's spouse's grandson. The record contains a birth certificate for the beneficiary registered more than two years after the beneficiary's birth. This certificate lists the beneficiary's parents as [REDACTED] and [REDACTED]. The death certificate contained in the record reflects that [REDACTED], the beneficiary's birth mother, died on October 6, 2000. However, in the statement made by the [REDACTED] the beneficiary's grandmother, Ms. [REDACTED] indicates that the birth mother died "during labour bearing" the beneficiary, whose date of birth is June 16, 1998. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Such competent objective evidence should be requested of the petitioner on remand.

Further, under the laws of Gambia, the fact that the beneficiary's natural father's name appears on the beneficiary's birth certificate does not establish that the beneficiary has been legitimated. The central issue in making a determination regarding legitimation is whether the child's parents were married at the time of the child's birth.

According to an opinion obtained from the Library of Congress, under Gambian law in Section 19 of the Births, Deaths and Marriage Registration Act, "the appearance of the father's name on the birth certificate is for record purposes only." The opinion further states:

Under statutory law in Gambia, there is no incident of legitimation whether by the subsequent marriage of the parents or by the acknowledgment of paternity by the father . . . a child born out of wedlock [in Gambia] is illegitimate . . . the appearance of the names of the parents on the birth certificate of a child born out of wedlock does not legitimate such a child . . . the child remains illegitimate for all his natural life, and the inheritance and succession rights of such a child will always be through the mother. The effect of section 19 is to absolve the father of any legal obligations concerning paternity of the child.

The Library of Congress recommends:

[A]ll agencies . . . determine right from the beginning whether the parents of the child in question were married to each other at the time of the birth. If this is the case, the child is legitimate. If on the other hand, parties were not married to each other at the time of the birth of the child, registration of birth under section 19, is for all intents and purposes for record keeping only. It offers no value to the legitimacy question as the child is illegitimate in all cases. The determination of statutory legitimacy in Gambia always hinges on section 16 of the law and no other provision. Its basis is a pre-existing marriage at the time of birth.

Contrary to the determination made by the district director, we do not find the appearance of the beneficiary's natural father's name on the birth certificate to be indicative of legitimacy. However, we do not find the record contains sufficient information to determine whether the beneficiary's natural parents were married at the time of his birth. Further, the record does not indicate under which section of Gambian law the beneficiary's birth certificate was registered. Therefore, on remand, the district director must request the petitioner to provide information sufficient to establish the marital status of the beneficiary's natural parents at the time of his birth. The district director must also request the petitioner to provide evidence sufficient to establish whether the beneficiary's birth certificate was registered under section 16 or section 19 of Gambia's Births, Deaths and Marriage Registration Act.

Without such information as described above, we are unable to determine whether the beneficiary has been legitimated, and thus, whether the definitions of "sole parent" or "surviving parent" would be applicable in this case.

Moreover, we note that the record contains insufficient evidence related to the petitioner's spouse's convictions. The home study contained in the record reflects that the petitioner's spouse was charged on July 10, 1995 for the crime of Aggravated Unlicensed Operation of a Motor Vehicle in the 3rd Degree, and on July 7, 2000, for Aggravated Unlicensed Operation of a Motor Vehicle in the 1st Degree. The dispositions contained in the file reflect that the petitioner's spouse pled guilty to both charges and, in both cases, was fined. For the 2000 offense, he was also sentenced to probation for 5 years.

The regulation at 8 C.F.R. § 204.3(a)(2) provides, in pertinent part:

Petitioning for an orphan involves two distinct determinations. The first determination . . . focuses on the ability of the prospective adoptive parent to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks, is essential for the protection of the orphan.

In order to approve the petition, CIS must be satisfied that proper care will be provided to the orphan. In this instance, we find the home study preparer's brief discussion surrounding the petitioner's spouse's convictions to be inadequate and, therefore, remand this case to the district director to request additional information.¹

¹ We find this issue related to the petitioner's suitability and ability to provide a proper home environment as the petitioner's spouse makes his living as an independent rubbish removal contractor. Presumably, he needs a valid license to engage in his occupation and it is unclear whether he currently holds a valid license. The fact that both of his offenses involved driving without a license over a five-year period suggests that he may not now be in possession of a valid

Specifically, the district director should request the petitioner's spouse to submit a signed statement giving details about each incident, including an explanation as to why his driver's license was initially revoked or suspended, and whether he now has a valid license.

Accordingly, this matter will be remanded for the purpose of a new decision. The district director must afford the petitioner reasonable time to address the above deficiencies and obtain any further evidence which the district director may deem necessary. Upon receipt of all the evidence, the district director will review the entire record and render a new decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The district director's decision is withdrawn. The petition is remanded to the district director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

license. If he were still driving without a license, it would clearly affect his ability to perform his job and, therefore, calls into question the ability to provide a proper home environment for the beneficiary.