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FILE:

Office: ANCHORAGE

Date: **DEC 12 2006**

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 PETITIONER:

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, Chief
Administrative Appeals Office

DISCUSSION: The Petition to Classify Orphan as an Immediate Relative was denied by the District Director, Anchorage. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner, [REDACTED] filed a Petition to Classify Orphan as an Immediate Relative (I-600 Petition) on July 29, 2005. The District Director concluded that the beneficiary, [REDACTED] did not meet the requirements of the definition of "orphan" under section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F), finding specifically that the beneficiary was not "abandoned" by both parents. The petition was denied accordingly. *District Director Decision*, February 21, 2006.

On appeal, counsel for the petitioner asserted, *inter alia*, that "USCIS should have declared [REDACTED] an Orphan because her parents disappeared and could not be located, they deserted her, abandoned her, and she was separated from them." *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B)*, filed March 27, 2006. In response, the District Director rejected the appeal as untimely-filed, concluded that it did not meet the requirements of a motion to reopen or reconsider and forwarded the appeal to the AAO. *Response to Form I-290B*, undated. The AAO notes that the petitioner was allowed 33 days to file an appeal, and his Form I-290B was received by the district office 34 days after the date of denial. However, as day 33 fell on a Sunday, the appeal is considered timely filed. Also on appeal, counsel submitted an Appellant's Brief, dated April 21, 2006 and a Supplement to Appellant's Brief, received by the AAO on May 23, 2006. The Supplement consists of a certified copy of an Order from the Republic of the Philippines, Regional Trial Court, Fourth Judicial Region, Antipolo City, granting a "Petition for the Involuntary Commitment to the Department of Social Welfare and Development of [REDACTED] as an Abandoned, Neglected and Dependent Child." *Court Order*, dated June 19, 2001.

In addition to the above noted documents, the record includes a prior filing and decision relevant to this case. The petitioner had previously petitioned for the beneficiary as the immediate relative (adopted child) of a U.S. citizen under section 201(b)(2)(A)(i) of the Act. *Form I-130, Petition for Alien Relative*, February 24, 2003. The Acting Director, Nebraska Service Center, concluded that the evidence submitted established that the beneficiary was born on October 31, 1998, and was legally adopted by the petitioner and his wife on August 20, 2002 in the Philippines. *Acting Director's Decision on I-130*, February 18, 2005. However, for an adopted child to be classified as an "immediate relative" pursuant to section 101(b)(1) of the Act, the child must have been in the legal custody of, and resided with, the adopting parent or parents for at least two years. *Section 101(b)(1)(E)(i) of the Act*. The Acting Director found that the petitioner had failed to provide evidence of this two-year custody and residence requirement and denied the petition accordingly. The entire record, including prior evidence of adoption and additional evidence submitted on appeal, has been considered in making this decision.

The record reflects that the beneficiary was born in the Philippines in 1998 and was lawfully adopted by the petitioner and his wife in the Philippines in August 2002. *See Judgment Granting Adoption Petition, Regional Trial Court, Fourth Judicial Region, Antipolo City (Adoption Decree)*, dated August 20, 2002; *Acting Director's Decision on I-130, supra*. The record also reflects that the petitioner was initially led to believe that he was the biological father of the beneficiary, and that he raised her as his child after her biological mother gave him custody at birth. *Court Order, supra*. After a DNA test showed that he was not the biological father, he and his wife followed prescribed procedures in the Philippines in order to adopt the beneficiary.

The Adoption Decree provides, in pertinent part:

Petitioners are husband and wife. The minor child in this case was abandoned by her natural mother, and proceedings to have the said child **declared by the Court as an abandoned child** was held and a decision was rendered thereon by this court on June 19, 2001 (emphasis added).

The Court Order that is referred to in the Adoption Decree provides, in pertinent part:

For resolution before the Court is the instant Petition for the Involuntary Commitment to the Department of Social Welfare and Development of Minor [REDACTED] an Abandoned, Neglected and Dependent Child . . .

....

Efforts were exerted to contact and locate the natural mother of the child: that the child's name and circumstances were published at "REMATE," a nationwide circulated newspaper issue on November 19, December 2 and December 3, 2000; that the child's name was aired at the DWAN Newsbreak and "Balikatan" Radio Station on November 23, 24 and 25, 2000; that the spouses Renato and Casimira requested the assistance of the PNP Antipolo City to help in locating the biological mother, but despite efforts to locate the natural mother of the child, the same could not be found.

After due consideration of the evidence presented, the Court finds merit in the instant Petition . . . and therefore said minor child is free for adoption.

Wherefore [REDACTED] is hereby declared as an abandoned, neglected and dependent child.

Before making a decision on the I-600 Petition at issue in this case, the District Director issued a Notice of Intent to Deny providing the petitioner an additional 30 days to submit required evidence, including a certified copy of an "abandoned child declaration," or the Court Order, referred to in the Philippine Adoption Decree, and stating that without that declaration, "predating [REDACTED] placement in your care, Erin does not appear to meet the definition of "orphan" for immigration purposes as an abandoned child." *Notice of Intent to Deny*, December 23, 2005. Counsel for the petitioner provided the requested copy of this document as supplementary evidence on appeal, explaining that it had not been available earlier. Upon review of the Court Order and other evidence in the record, despite documentary evidence that the beneficiary was "abandoned" under the meaning given that term in the Philippines adoption process, the AAO finds that the beneficiary was not "abandoned" as that term is understood in the definition of "orphan" at section 101(b)(1)(F) of the Act.

Section 101(b)(1)(F) of the Act 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 (emphasis added).

Volume 8 of the Code of Federal Regulations (8 C.F.R.) section 204.3(b) provides 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).

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

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 record in this case indicates that the beneficiary's biological mother gave the beneficiary at birth to the petitioner to raise as his own daughter. An "abandonment" must be by both parents and cannot be a transfer of rights to a particular individual. The beneficiary is therefore not an "orphan" under the Act by virtue of abandonment by both parents.

However, the evidence indicates that the beneficiary is an "orphan" under the Act because of "desertion by both parents." Both of the beneficiary's biological parents have "willfully forsaken their child and have refused to carry out their parental rights and obligations" as neither parent has been a part of the beneficiary's life in any way since birth. The father remains unknown, and the whereabouts of the mother are unknown.

The record also indicates that in 2001 prior to the initiation of official adoption proceedings in the Philippines, and after well-documented but unsuccessful attempts to locate the beneficiary's biological mother, in accordance with the laws of the Philippines, a Regional Trial Court granted a petition for the involuntary commitment of the beneficiary to the Department of Social Welfare and Development (DSWD). Guidance on Intercountry Adoption in the Philippines notes that the government offices responsible for domestic adoptions in the Philippines are the Regional Trial Courts and the DSWD. See <http://travel.state.gov/family/>, last updated September 28, 2006. The beneficiary thus became a ward of a competent authority in accordance with the laws of the Philippines. The evidence in the record is sufficient to show that the beneficiary was deserted by both parents as that term is defined at 8 C.F.R. section 204(3)(b), *supra*. Accordingly, the AAO finds that the beneficiary meets the definition of "orphan" as set forth in section 101(b)(1)(F) of the Act.

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 met his burden in the present matter. The appeal will therefore be sustained.

ORDER: The appeal is sustained.