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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEW YORK, NY

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

JAN 09 2006

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:

SELF-REPRESENTED

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 District Director, New York, New York, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner filed a Form I-600, "Petition to Classify Orphan as an Immediate Relative" (I-600 petition) on September 9, 2004. The petitioner is a forty-four-year-old married citizen of the United States, and she is the paternal aunt of the beneficiary. The beneficiary was born in the Philippines on January 20, 2003, and she is two years old.

The district director concluded that the beneficiary's natural parents released their parental rights with the specific intent of transferring those rights to the petitioner. Accordingly, the district director found the petitioner had failed to establish that the beneficiary met the definition of "abandoned" as defined in 8 C.F.R. §204.3(b). The district director found further that the beneficiary had failed to meet the definition of "orphan" as set forth in section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F).

On appeal, the petitioner asserts that the beneficiary's biological parents "deserted" the beneficiary and released their parental rights over the beneficiary to the Philippine government agency authorized to act in the capacity of adoption (The Republic of the Philippines, Department of Social Welfare and Development (DSWD).) The petitioner asserts further that she supports the beneficiary financially and that she has complied with all pre-adoption requirements. The petitioner concludes that she has established that the beneficiary meets the definition of "orphan" for immigration purposes.

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

Volume 8 of the Code of Federal Regulations (8 C.F.R.) section 204.3(b) provides in pertinent part that:

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.

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

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*.

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.

The record contains the beneficiary's birth certificate reflecting that the beneficiary was born in the Republic of the Philippines on January 23, 2003, to Philippine citizens [REDACTED] (mother) and [REDACTED] (father). The record additionally contains a December 2, 2003, "Adoption Child Study Report" prepared by the Republic of the Philippines, Department of Social Welfare and Development (DSWD). The record also contains an April 15, 2005, DSWD Supplemental Report and a September 29, 2003, Home Study Report prepared by Family Services of Westchester in New York. Each document reflects that the beneficiary's parents were involved in an extramarital affair, that they never married, and that each parent continues to be married to another person. In *Matter of Espiritu*, 16 I&N Dec. 426 (BIA 1977), the Board of Immigration Appeals (Board) held that legitimation of a child occurs in the Philippines only through the marriage of parents who are free to marry when the child is conceived. *See also, Matter of Blancaflor*, 114 I&N Dec. 427 (BIA 1973). Based on the above information, the AAO finds that the beneficiary was born out of wedlock and is an illegitimate child, as set forth in the "sole parent" definition contained in 8 C.F.R. § 204.3(b).

In addition to the above documents, the record contains a July 16, 2003, "Deed of Voluntary Commitment" (Deed) signed by the beneficiary's biological mother, stating that she is unable to care for and support the beneficiary. The Deed unconditionally commits the beneficiary to the care and custody of the DSWD, and it authorizes the DSWD to release the beneficiary for adoption or guardianship locally or abroad without notice to her. The Deed does not contain the beneficiary's biological father's signature. However, the record contains a "Voluntary Relinquishment of Parental Rights" signed by the beneficiary's biological father on August 25, 2004, which permanently relinquishes his parental rights over the beneficiary.

The December 2, 2003, DSWD "Adoption Child Study Report" (Report) contained in the record reflects that the beneficiary has resided with her paternal aunt, [REDACTED] since birth. The Report indicates that Ms. [REDACTED] approached the DSWD regarding the present adoption referral. Based on information obtained from

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. The regulatory definition of "sole parent" contained in 8 C.F.R. § 204.3 has not been amended to conform to these changes.

interviews with Ms. [REDACTED] and the beneficiary's biological mother, the Report states that the beneficiary's biological mother gave the beneficiary to Ms. [REDACTED] immediately after her birth. The Report indicates that all of the beneficiary's expenses are paid for by her adoptive parents (the petitioners), and the Report indicates that the beneficiary is living with Ms. [REDACTED] temporarily until her intercountry adoption by the petitioners is completed. The Report states that the beneficiary's biological father is married with children and that he works for an insurance company. The Report additionally states that the beneficiary's biological mother is married with children and that she does not work. Neither of the beneficiary's biological parents' families knows about the beneficiary's birth. The Report states that the beneficiary's biological mother's husband was working in the U.S. for a two-year period when the beneficiary's biological mother became pregnant and when she gave birth. During her pregnancy, the beneficiary's biological mother decided to relinquish her child for adoption so that she and the beneficiary's biological father could keep their respective families. The Report concludes that the beneficiary cannot live with either of her biological parents because each has a respective family that has no knowledge of her. The Report subsequently recommends adoptive placement with the petitioners.

An April 15, 2005 DSWD Supplemental Report contained in the record states that the DSWD has found that:

[B]oth parents have abandoned [REDACTED] [the beneficiary] by willfully forsaking all parental rights, obligations and claims to the child, as well as control over the possession of the child, without intending to transfer, or without transferring these rights to any specific person or persons. In addition, we find that both parents are unable to provide proper care for the child's needs consistent with local standards."

The AAO notes that the "Deed of Voluntary Commitment" signed by the beneficiary's biological mother does not contain the beneficiary's biological father's signature. A review of the evidence establishes further that the beneficiary was privately placed with a paternal family member after her birth. The AAO therefore finds that the beneficiary did not become a ward of a Philippine court or governmental agency. The petitioner thus failed to establish that the beneficiary was "deserted" by her biological parents, as set forth in 8 C.F.R. § 204.3(b). The AAO finds, however, that the petitioner has established that the beneficiary's biological mother meets the definition of a "sole parent" as set forth in 8 C.F.R. § 204.3(b).

A child that is "born out of wedlock" in a country that has not eliminated all legal distinctions between "legitimate" and "illegitimate," and who has not been legitimated under the laws of the child's or the biological father's residence or domicile, has a sole parent - - his or her biological mother - - unless the child has or had a bona fide relationship with the biological father. If the child has or had a bona fide relationship with his or her biological father, the child may be considered to have a sole parent - - his or her biological mother - - only if the father has disappeared, abandoned, deserted, or in writing has irrevocably released the child for emigration and adoption. In all cases, it must be evident that the biological mother is incapable of providing proper care for the child according to the local standards of the foreign-sending country, and that she has, in writing, irrevocably released the child for emigration and adoption. *See* 8 C.F.R. § 204.3(b) (definition of "sole parent"). *See also*, Section 315 of the Immigration Reform and Control Act of 1986 (IRCA) (which defines the father of an illegitimate child as a "parent" under § 101(b)(2) of the Act) and Immigration and Naturalization Service Cable, HQ 204.21-P, 204.22-P, discussing implementation of changes to definitions of "child," "parent," and "father" under sections 101(b)(1) and (2) of the Act and their affect on orphan petitions.

The AAO finds that the petitioner has established that the beneficiary was born out of wedlock and illegitimately, and the evidence reflects that the beneficiary's biological father has, in writing, irrevocably released the beneficiary for emigration and adoption purposes. The record additionally contains the beneficiary's biological mother's "Deed of Voluntary Commitment" stating that she is unable to care for and support the beneficiary. Moreover, the record contains a DSWD finding that the beneficiary's biological mother is unable to support the beneficiary.

The AAO finds that the record contains sufficient evidence to establish that the beneficiary's biological mother does not work and that her home and expenses are paid for by her husband, who is not the beneficiary's father and who is unaware of the beneficiary's birth. The record contains no evidence to indicate that the beneficiary's biological mother's husband would accept or support the beneficiary if he knew of her existence, and the record contains no evidence to indicate that the beneficiary's biological mother would, on her own, be able to provide for the beneficiary's basic needs consistent with local standards in the Philippines. See *Matter of Del Conte*, 10 I&N Dec. 761 (BIA, District Director, 1964) (discussing Board, District Director approval of an orphan petition under similar circumstances.) The AAO finds that the totality of evidence contained in the record establishes that the beneficiary's biological mother is "incapable of providing proper care" to the beneficiary.

The AAO notes that the "sole parent" definition set forth in 8 C.F.R. § 204.3(b) does not prohibit a "sole parent" from relinquishing or releasing her child to a specific individual in preparation for an adoption or for a specific adoption. Moreover, the AAO notes that where it is established that the beneficiary has a "sole parent", the definition of "abandonment by both parents" found at 8 C.F.R. 204.3(b) should not be referred to or relied upon in the adjudication of the I-600 petition.² Accordingly, any evidence in the record which shows that the beneficiary's biological parents relinquished their parental rights to a specific person or for a specific adoption does not bear on the present determination of whether the beneficiary may be classified as an "orphan."

² 8 C.F.R. 204.3(b) provides that:

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.

The AAO finds that the petitioner has established the beneficiary is the child of a "sole parent" who is "incapable of providing proper care" to the beneficiary. The AAO finds further that the petitioner has established that the beneficiary's biological mother irrevocably released the beneficiary for emigration and adoption. United States Department of State (DOS) adoption procedure guidance found at <http://www.travel.state.gov> reflects that the DSWD and the Inter-Country Adoption Board (ICAB) are the government offices responsible for adoptions in the Philippines. DOS guidance information reflects further that in the case of inter-country adoptions, custody of the child is generally granted to the prospective adoptive parents who, once ICAB Placement Authority is issued, bring the child to their home country for final legal adoption. The record contains a December 2, 2003, DSWD Report recommending the petitioner's adoption of the beneficiary, and the record contains an August 2, 2004, ICAB letter approving the adoptive placement of the beneficiary with the petitioners and authorizing the beneficiary's travel to the United States for adoption purposes.

The AAO finds that the evidence establishes the beneficiary meets the definition of "orphan" as set forth in section 101(b)(1)(F) of the Act. The appeal will therefore be sustained.

ORDER: The appeal is sustained.