U.S. Department of Justice

Immigration and Naturalization Service

"Identifying data deleted to prevent clearly unwarranted invasion of personal privacy."

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

13 SEP 2002

File: [redacted] Office: BLOOMINGTON, MN Date:

IN RE: Petitioner:
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 APPLICANT:

[redacted]

Public Copy

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 the Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Bloomington, Minnesota district office denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director on July 30, 2001. The petitioner is a 41-year-old married citizen of the United States. The beneficiary is 11 years old at the present time and was born in the Philippines on October 15, 1990. The petitioner and his wife adopted the beneficiary in the Philippines in November 2000. The beneficiary is a godchild and a first cousin of the petitioner's wife.

The director denied the petition because the petitioner failed to establish that the beneficiary met the definition of an orphan found at section 101(b)(1)(F) of the Immigration and Nationality Act (the Act).

On appeal, counsel submits a brief.

Section 101(b)(1)(F) of the Act, 8 U.S.C. 1101(b)(1)(F), 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. (Emphasis added)

The record of proceeding contains the Form I-600 petition and accompanying documentation, the director's November 23, 2001 Notice of Intent to Deny and the petitioner's response, the director's March 11, 2002 denial notice, the petitioner's appeal dated April 4, 2002, an appeal brief, and the petitioner's motion to reopen and reconsider dated May 3, 2002.

In the November 23, 2001 Notice of Intent to Deny, the director informed the petitioner that the I-600 petition could not be approved because the petitioner failed to establish that the beneficiary was an orphan within the meaning of the Act. The director stated that the evidence in the record indicated that the beneficiary had been born in wedlock and had two living biological parents who had not abandoned her. The director found that the evidence indicated that the natural parents agreed to an adoption by the beneficiary and his wife rather than to an orphanage, governmental agency, or court of competent jurisdiction. Such an

action, the director concluded, did not constitute abandonment by both parents as that term is defined in 8 C.F.R. 204.3(b).

The director also noted that the record shows that the biological mother continues to have significant involvement with the beneficiary as shown by the fact that the beneficiary continues to live with her. He said that the beneficiary's parents are alive and that when the beneficiary was adopted, they had not disappeared.

In response to the Notice of Intent to Deny, the petitioner claimed that the beneficiary's father abandoned the beneficiary in 1999. The petitioner said that the beneficiary's father left his wife and children and now lives with another woman and their children. He said that the beneficiary's father has had no contact with the beneficiary and her mother (his wife) since 1999. The petitioner added said that he had to search for the beneficiary's father to obtain his irrevocable consent to release the beneficiary for adoption and emigration. He said that the beneficiary is now staying with an aunt, as she has no home of her own.

The director denied the petition on March 11, 2002 for the reasons stated in the Notice of Intent to Deny.

The petitioner filed a notice of appeal on March 16, 2002. He hired counsel who submitted a brief on April 4, 2002 with an updated adoption study. On appeal, counsel argued that the beneficiary meets the definition of orphan as set forth in the Act. Counsel stated that:

> The beneficiary was under the age of 16 when the petitioner filed a petition on her behalf.
>
> The petitioner and his wife jointly adopted the beneficiary in the Philippines after they personally saw the child.
>
> The petitioner and his wife have complied with pre-adoption requirements of the state of intended residence.

Counsel contends that the petitioner relied on the instructions in the INS Form I-600 for the definition of orphan. His interpretation led him to believe that since the beneficiary's father had deserted his family in December 1999, the beneficiary's mother was the sole parent. Counsel chided the Service because the regulatory definition of "sole and surviving parent" was never provided to the petitioner.

Counsel asserts that the beneficiary's parents have permanently severed their parental relationship to the beneficiary because the father has completely abandoned his family and he relinquished his

parental rights when he consented to her adoption. Counsel notes that:

> "[a]s the sole parent, [the beneficiary's mother] prepared an affidavit in which she asserts that she is incapable of providing the proper care and support for [the beneficiary]. She also severed her parental rights when she consented to [the beneficiary's] adoption.

Counsel arguments are not persuasive. Either the beneficiary qualifies as 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.

Counsel asserts that the beneficiary is an orphan because her father disappeared, abandoned and deserted her in December 1999 when he moved out of the family home and set up a new household with another woman. Counsel said that the beneficiary's father has had no contact with and quit supporting the beneficiary in December 1999.

The beneficiary cannot be considered an orphan under United States immigration law. The petitioner believes that the beneficiary is an orphan because her father disappeared and her mother states she is incapable of providing proper care for the child and consented to the adoption. However, the terms "disappeared," "abandoned," and "deserted" are defined terms within U.S. immigration law. As shall be discussed, the parents' actions in this case do not meet any of the applicable definitions in 8 C.F.R. 204.5(B).

As previously stated, a child may be an orphan because of the death or abandonment or desertion or disappearance by, or separation or loss from, both parents. It is noted that the beneficiary has two parents - the biological mother and the biological father.

> *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). . . . 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 . . . .

* * *

The beneficiary's parents cannot be said to have "abandoned" her. The definition of "abandonment" in 8 C.F.R. 204.3(b) states expressly that: "[a] relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment."

The biological parents gave their written consent to the adoption of the beneficiary by the petitioner and petitioner's spouse.

The beneficiary does not qualify as an orphan on the ground that both of her parents have abandoned her. The biological parents intended to, and did in fact, transfer their parental rights to specific persons, who are the petitioner and his 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).

> *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 beneficiary's biological parents cannot be said to have "deserted" her. Although the biological parents have forsaken the beneficiary, the beneficiary has never been and is not currently a ward of a competent authority in the Philippines. Therefore, the beneficiary has 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 CFR 204.3(b) (2001).

The beneficiary's biological parents cannot be said to have "disappeared," as their whereabouts are known.

The petitioner asserted that the beneficiary's mother was a "sole and surviving parent" because the beneficiary's father had deserted his family.

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 beneficiary's biological mother cannot be said to be a "sole parent." The beneficiary is not illegitimate. Both her father and mother are listed as her parents on her birth certificate.

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

Here, both biological parents are alive, so the beneficiary's mother cannot be deemed to be a "surviving parent."

The regulatory language makes it clear that the petitioner incorrectly interpreted the language on the INS Form I-600 and the beneficiary does not meet the statutory definition of an "orphan." Her natural parents have not *abandoned* her. They released her for adoption by specific persons, the petitioner and his wife. The beneficiary's parents have not *deserted* her, as she has not become a ward of the state. Neither natural parent has *disappeared*. Their whereabouts are known. Finally, the beneficiary's mother is not a *sole* or *surviving parent* as defined by the Act.

On May 3, 2002, counsel filed a motion to reopen and reconsider the director's decision. On motion, counsel argued that the beneficiary meets the definition of orphan as set forth in the Act. She included new evidence including an affidavit of Charito Miranda with whom the beneficiary is temporarily residing in the Philippines. [redacted] states that the beneficiary has not resided with her biological mother since March 2000 and that her biological mother has had no active role in the child's care, education, support or well-being since then. The affidavit avers that the beneficiary's father abandoned the family in December 1999. Counsel included photographs of the beneficiary with her adoptive family and of one of the biological mother's tricycles used to support her family. Counsel reiterated her arguments on appeal that the petitioner relied on the instructions on INS Form I-600 and believes that the beneficiary's biological mother is the sole parent because the father deserted his family.

As a matter of law, the beneficiary's biological parents cannot be said to have "abandoned" her. They specifically entrusted her to the petitioner for adoption. "Abandonment" is a defined term. 8 C.F.R. § 204.3(b). "A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment." Id. The beneficiary's mother is not a sole or surviving parent within the meaning of the Act.

ORDER: The director's March 11, 2002 decision is sustained and the petition is denied.