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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: ST. LOUIS, MISSOURI Date: FEB 11 2004

IN RE: Petitioner: [redacted]
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:

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The District Director, St. Louis, Missouri district office denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the case will be remanded for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on December 12, 2002. The petitioner is a 43-year-old married citizen of the United States. The beneficiary is 15-years old at the present time and was born in Haiti on March 21, 1988.

The district director denied the petition because the petitioner failed to establish that the beneficiary is an *orphan* as that term is defined in section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F). The district director determined that the petitioner failed to establish that the beneficiary had been *abandoned* as that term is defined in the Act. The district director further determined that the petitioner failed to establish that the beneficiary's father is unable to provide proper care for her. Finally, the district director found that the beneficiary is not an orphan, as that term is defined in the Act, because her natural father would gain some right, privilege or status under the Act given that the beneficiary intends to maintain contact with her natural father and provide him with financial support.

On appeal, the petitioner submits a four-page statement and additional evidence.

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: Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act . . . .

According to the evidence in the record, the beneficiary's biological mother died on December 25, 2000. The petitioner and her spouse adopted the beneficiary and her sister in Haiti on October 20, 2001. The beneficiary's natural father provided his sworn consent to the beneficiary's adoption by the petitioner and her spouse in the form of an affidavit, filed with the Civil Court in Haiti, which ultimately approved the beneficiary's adoption.

In review, the district director erred in holding the petitioner to two contradictory definitions of *orphan*. The district director found that the beneficiary was not an orphan because the evidence was insufficient to establish that the surviving parent was unable to provide for the child. The district director further found that the beneficiary had not been *abandoned by both parents*. Where it is established that the beneficiary has only one surviving parent, as in the instant case, 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 petition. Rather the definitions of *surviving parent* and *incapable of providing proper care* are the relevant definitions in 8 C.F.R. § 204.3(b).

The district director denied the petition, in part, finding that the surviving parent had not abandoned the child, in that he relinquished the child to the prospective adoptive parents or for a specific adoption. Neither definition cited above specifically prohibits a surviving parent from relinquishing or releasing his or her child to a specific individual in preparation for an adoption or for a specific adoption. Any evidence in the record, which shows that a surviving parent has relinquished his or her parental rights to a specific person or for a specific adoption should not bear on the director's determination of whether the child, who has only one surviving parent, may be classified as an orphan.

The next issue to be addressed in this proceeding is whether the petitioner established that the beneficiary's *surviving parent* is *incapable of providing proper care* for the beneficiary.

The regulation at 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*.

(Emphasis in original.) According to the evidence on the record, the beneficiary's father is incapable of providing for the beneficiary. The petitioner submitted documentary evidence into the record in the form of the natural father's sworn statement, dated July 11, 2002, that provides that:

> [the beneficiary's natural father] declare[s] that it became impossible for him to provide for the needs of his four minor children especially after the tragic death of his wife and the state of his health. Therefore, he authorizes the [petitioner and her husband], dwelling and domiciled in the United States of America . . . to adopt [the beneficiary and her sister]. Mr. also declares that he voluntarily took this decision and with no reserve.

The petitioner submitted additional documentary evidence showing that the above sworn statement was submitted to the Haitian court that granted the petitioner's request to adopt the beneficiary.

On appeal, the petitioner submitted medical documentation to establish that the beneficiary's father tested positive for HIV in September 2001.

In review, the petitioner has established that the beneficiary's father is incapable of providing proper care for the beneficiary. It must be emphasized that while 8 C.F.R. § 204.3 requires a showing that the sole parent cannot meet the beneficiary's basic needs *consistent with the local standards of the foreign-sending country*, the regulation does not limit the inquiry solely, or even chiefly, to economic or financial standards.

The next issue to be addressed in this proceeding is the district director's third basis for denying the petition, namely, that the beneficiary's father would impermissibly be accorded some right, privilege, or status under

the Act because the beneficiary intends to maintain contact with her natural father and her adoptive parents would send money to the beneficiary's natural father (the petitioner's husband's brother).

In review, the district director erred in finding that the beneficiary's natural father would gain some right, privilege or status under the Act because the beneficiary and petitioner intend to remain in contact with him. The Act expressly prohibits the natural parent from gaining some immigration-related benefit vis-à-vis an international adoption. Section 101(b)(1)(F)(i) of the Act. The Act is silent as to whether the beneficiary and petitioner may maintain contact or provide support to the natural father. This portion of the district director's decision shall be withdrawn.

While the petitioner has overcome the district director's objections to approving the petition, the case must be remanded to the district director for further action.

While the beneficiary's father has irrevocably released the beneficiary for adoption, he did not expressly state that he was also irrevocably releasing the beneficiary for emigration as required by section 101(b)(1)(F)(i) of the Act. This case will be remanded to the district director so that she can promptly request that the petitioner provide a written irrevocable release for the beneficiary's emigration from her natural father. The district director should allow the petitioner twelve weeks to submit this documentation. After receipt and consideration of the additional evidence, the director should enter a new decision.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The case is remanded to the district director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO.