U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: JACKSONVILLE, FLORIDA Date: MAR 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:

[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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge (OIC) for Services of the Jacksonville, Florida District Office denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the OIC on May 28, 2003. The petitioner is a 40-year-old married citizen of the United States. The beneficiary is ten years old at the present time and was born in Haiti on September 14, 1993.

The OIC denied the petition, finding that 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), 8 U.S.C. § 1101(b)(1)(F) because the petitioner had not established that the beneficiary had been abandoned by both parents.

On appeal, counsel for the petitioner resubmits evidence previously submitted to Citizenship and Immigration Services (CIS).

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 . . . .

In the I-600 petition, the petitioner claimed that the beneficiary was an orphan because she has no parents. The beneficiary is the petitioner's wife's niece. The petitioner submitted the following evidence:

- The beneficiary's birth certificate.
- The beneficiary's biological mother's irrevocable release of the beneficiary for emigration and adoption dated October 2, 2002.
- A favorable home study report dated April 26, 2002.
- The beneficiary's adoption decree dated October 2, 2002.
- The beneficiary's biological parents signed the post-adoption release for the beneficiary's emigration and adoption dated April 21, 2003.
- A Port-au-Prince civil court's "finding of abandonment" dated October 21, 2003.
- The beneficiary's biological father's affidavit of indigence dated October 21, 2003.

According to the evidence on the record, the beneficiary was born out of wedlock. (*See* copy and translation of the beneficiary's birth certificate in file).

The beneficiary is not the child of a sole or surviving parent.

As previously stated, section 101(b)(1)(F) of the Act defines an orphan, in pertinent part, as a child whose sole or

surviving parent is incapable of providing him or her with proper care and has in writing irrevocably released the child for emigration and adoption.

Even though a mother may be a single parent, she may not meet the definition of either a *sole parent* or a *surviving parent* as those terms are defined in 8 C.F.R. § 204.3(b).

> *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.
>
> *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.

(Emphasis added.) The petitioner indicated that the beneficiary's biological mother abandoned the beneficiary after she signed an irrevocable release authorizing the beneficiary's emigration and adoption by the petitioner and his wife and after the beneficiary's adoption by the petitioner and his wife.

In review, the beneficiary is not the child of a *sole parent* or a *surviving parent* as those terms are defined in the regulation at 8 C.F.R. § 204.3(b). There is no evidence in the record indicating that one of the beneficiary's parents is dead. The evidence indicates that the beneficiary's father maintained parental ties and obligations to the beneficiary. According to the home study report, the beneficiary was living with her biological father in Haiti as of April 2002.

Under the Civil Code of Haiti, as amended by the Presidential Decree of January 27, 1959, children born out of wedlock[1] in Haiti subsequent to January 27, 1959, and acknowledged by their natural father are deemed to be legitimate children under section 101(b)(1)(A) of the Act. *See Matter of Richard*, 18 I&N Dec. 208 (BIA 1982), *See also Matter of Cherismo*, 19 I&N Dec. 25 (BIA 1984).

According to the beneficiary's birth certificate, the beneficiary's biological father appeared before an officer of the Civil Status of Port-Au-Prince on January 6, 1994 to report the beneficiary's illegitimate birth. In an adoption decree, the court noted that both of the beneficiary's parents consented to her adoption by the petitioner and his wife. Both of the beneficiary's biological parents signed a statement following the adoption, "acting individually and also as father and mother of [the beneficiary] . . . [to] renounce . . . all rights, pretensions and obligations" that they had as the beneficiary's parents.

In review, the petitioner has not shown that the beneficiary is illegitimate. The beneficiary's biological father has been identified in the record and has acknowledged the beneficiary to be his daughter.

The petitioner asserts that the beneficiary's father became the sole parent when the beneficiary's mother disappeared. As the beneficiary is not illegitimate, the father cannot be the sole parent within the meaning of the definition at 8 C.F.R. § 204.3(b).

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[1] Except for the offspring of adulterous or incestuous relations.

The beneficiary has not been abandoned by both parents.

In a Notice of Intent to Deny dated July 29, 2003, the OIC quoted section 101(b)(1)(F) of the Act as follows: "a child . . . is an orphan because of the death or disappearance of, abandonment or desertion by, or separation nor loss from, both parents . . . ." The OIC further noted that the term abandonment is defined at 8 C.F.R. § 204.3(b) as follows:

> *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 for a specific adoption does not constitute abandonment . . . .

The evidence in the record indicates that the beneficiary's biological parents consented to the beneficiary's adoption by the petitioner and his wife. (See adoption decree dated October 2, 2002). The evidence is clear that the beneficiary's parents released the beneficiary for a specific adoption; ergo, the beneficiary cannot be deemed to have been abandoned by both parents.

The beneficiary's parents have not deserted the beneficiary.

The beneficiary has not been deserted.

> *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.

8 C.F.R. § 204.3(b) (definition of desertion). The beneficiary's biological parents cannot be said to have "deserted" her. The evidence is insufficient to establish that the beneficiary has ever been a ward of a competent authority in Haiti. Although the petitioner submitted a document titled "finding of abandonment" that states that the beneficiary's mother unaccountably passed out of the beneficiary's life after she released the child for emigration and adoption in October 2002, there is conflicting evidence in the file. According to evidence submitted by the petitioner, both of the beneficiary's biological parents signed an acknowledgement of their irrevocable release for the beneficiary's emigration and adoption dated April 21, 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary's parents have not disappeared.

> *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 C.F.R. § 204.3(b) (definition of disappearance). The beneficiary's biological parents cannot be said to have "disappeared." As to her father, it is clear that he has not passed out of the beneficiary's life. Indeed, it appears that the beneficiary still resides with her biological father. With respect to her mother, as noted above, there is inconsistent evidence of record marking her "disappearance" from the beneficiary's life. Neither parent may be said to have disappeared.

Beyond the OIC's decision, the petitioner stated that he was unable to see the beneficiary before he adopted her.

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 . . . .

(Emphasis added). Although the petitioner has a plausible excuse for not seeing the beneficiary prior to the adoption, the petition cannot be approved unless the petitioner personally saw and observed the child prior to or during the adoption proceedings.

Further, the home study failed to meet all the regulatory requirements. The home study preparer failed to note whether she asked each prospective adoptive parent and adult household member[2] about any criminal arrests and/or convictions, as required. It is not enough to perform a local criminal record check. She failed to note whether she asked each prospective parent and adult household member if they had ever been rejected for adoption or received an unfavorable home study. Since the appeal will be dismissed for the reasons stated above, this issue will not be analyzed further.

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 not met that burden; it is concluded that the petitioner has not established that the beneficiary is eligible for classification as an orphan pursuant to section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F).

ORDER: The appeal is dismissed.

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[2] According to the petitioner's federal tax returns, he and his wife claimed his mother-in-law as a dependent, which indicates that she resides with the petitioner.