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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: DALLAS, TEXAS Date: NOV 26 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]

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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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Interim District Director (District Director) of the Citizenship and Immigration Services (CIS) Dallas, Texas, 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 The district director's decision will be withdrawn and the case will be remanded to the district director for further consideration and entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on January 8, 2003. The petitioner is a 45-year-old married citizen of the United States. The beneficiary is 2 years old at the present time and was born in Tepic, Nayarit, Mexico, on February 5, 2002.

The district director denied the petition on May 14, 2004. After noting the petitioner's spouse's criminal history and lack of evidence of any rehabilitation, the district director was not satisfied that proper care would be provided to the beneficiary. The district director further determined that the petitioner failed to establish the beneficiary's mother is a sole or surviving parent. Finally, the district director determined that the record lacked evidence to establish the petitioner and her spouse saw the child prior to or during the adoption proceeding abroad.

The first issue to be discussed is the district director's determination that the record lacks evidence that the beneficiary's biological mother is incapable of providing for the beneficiary's care or that the biological mother irrevocably released the child for emigration and adoption.

Contrary to the district director's findings, the record, as constituted at the time of the district director's decision, contained a written statement, with accompanying translation, signed by the beneficiary's biological mother. In the written statement, the biological mother states that she, "irrevocably consents that [the beneficiary be] adopted by [the petitioner and her spouse to] emigrate [sic] to the United States." We find this statement to be sufficient evidence to establish the biological mother irrevocably released the beneficiary, in writing, for emigration and adoption.

The record also contained sufficient evidence to establish the biological mother is not capable of providing care to the beneficiary. Such evidence consists of the mother's statement, witness statements, and the adoption decree. In the decree granting adoption, the Court took particular notice that:

> [T]he biological mother cannot take care of [the beneficiary], she lacks the necessary resources to feed her, provide her with medical care, education and recreation, and all a child requires . . . .

Further, the record contained sufficient information to establish that the petitioner and spouse saw the beneficiary during the adoption proceeding abroad. In the adoption decree, the Court states, [t]he capacity and identification of the petitioners is proven by the fact that they appeared on their own rights." This statement clearly establishes the petitioner and her spouse were present at the time of the adoption proceedings.

However, though we find the beneficiary's biological mother has irrevocably released the beneficiary, is incapable of providing proper care, and that the petitioner and spouse saw the beneficiary prior to or during

the adoption proceedings abroad, the record does not establish that the definition of "sole parent" can be applied to the beneficiary's biological mother.

The record contains the beneficiary's birth certificate. The birth certificate does not state the name of the beneficiary's father; an indication that the beneficiary was born out of wedlock.

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. 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.

The country of the beneficiary's birth, citizenship and habitual residence is Mexico. Thus, whether the beneficiary is illegitimate is determined according to the law of Mexico. *Matter of Rodriguez*, 18 I&N Dec. 9, 10 (INS 1980) (legitimacy of alleged orphan determined by law of place of birth). The record, however, contains no evidence to establish whether Mexico makes any distinctions between children born in and out of wedlock.

On appeal, counsel submits no additional evidence to establish the beneficiary's status under the laws of Mexico. Counsel argues, however, that the issues related to the beneficiary's classification as an orphan were inappropriately raised for the first time in the district director's denial. We agree with counsel that the district director's inclusion of issues in the denial, without prior notice in either an intent to deny, or a request for evidence, did not provide the petitioner with adequate notice. Accordingly, the case must be remanded to the district director for evidence to establish whether the laws of Mexico distinguish between children born in and out of wedlock.

The next issue to be determined is whether proper care will be provided to the beneficiary.

The regulation at 8 C.F.R. § 204.3(e)(2)(iii)(B) states, in pertinent part:

> *Information concerning history of abuse and/or violence.* If the petitioner and/or spouse, if married, disclose(s) any history of abuse and/or violence as set forth in paragraph (e)(2)(iii)(A) of this section, or if, in the absence of such disclosure, the home study preparer becomes aware of any of the foregoing, the home study report must contain an evaluation of the suitability of the home for adoptive placement of an orphan in light of this history. This evaluation must include information concerning all arrests or convictions or history of substance abuse, sexual or child abuse, and/or domestic violence and the date of each occurrence. A certified copy of the documentation showing the final disposition of each incident, which resulted in arrest, indictment, conviction, and/or any other judicial or administrative action, must accompany the home study. Additionally, the

> prospective adoptive parent must submit a signed statement giving details including mitigating circumstances, if any, about each incident. The home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

Further, the regulation at 8 C.F.R. § 204.3(e)(2)(iii)(C) provides that:

> If a prospective adoptive parent has a history of substance abuse, sexual or child abuse, and/or domestic violence, the home study prepare may, nevertheless, make a favorable finding if the prospective adoptive parent has demonstrated appropriate rehabilitation. In such a case, *a discussion of such rehabilitation which demonstrates that the prospective adoptive parent is and will be able to provide proper care for the orphan must be included in the home study.* Evidence of rehabilitation may include an evaluation of the seriousness of the arrest(s), conviction(s), or history of abuse, the number of such incidents, the length of time since the last incident, and any type of counseling or rehabilitation programs which have been successfully completed. Evidence of rehabilitation may also be provided by an appropriate licensed professional, such as a psychiatrist, clinical psychologist, or clinical social worker. The home study report must include all facts and circumstances which the home study preparer has considered, as well as the preparer's reasons for a favorable decision regarding the prospective adoptive parent.

[Emphasis added.]

In response to the notice of intent to deny, counsel argued that the district director dismissed the home study preparer's "well founded study and conclusion" and substituted her opinion for that of the home study preparer. On appeal, counsel argues, "there is not a scintilla of evidence showing that the petitioner's spouse" has a history of substance abuse, and as such, "there is not a need for rehabilitation." [1] We do not find the record supports counsel's arguments.

The record reflects the following criminal history for the petitioner's spouse:

On May 11, 1996, he was arrested for public lewdness. On November 22, 1996, the petitioner's spouse was found guilty of the charge of public lewdness and ordered to 60 days confinement in the Dallas County jail and ordered to pay a fine of $500. Additionally, he was additionally sentenced to 12 months probation. [2] The record reflects that the petitioner's spouse was discharged from community supervision on November 22, 1997.

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[1] The medical evaluation contained in the record carries little evidentiary value. The evaluation, submitted by Dr. Louis Nardizzi, as evidence that petitioner's spouse does not have a "trace of an alcoholic constitution" is based upon a single, routine blood test and is not indicative of whether the petitioner's spouse has a history of alcohol abuse. There is no evidence that Dr. Nardizzi, who is also a Ph.D., interviewed the petitioner's spouse as part of his determination that the petitioner's spouse is not an alcoholic.

[2] Criminal Court for Dallas County, Texas, cause number MA9676432A.

On February 27, 2000, he was arrested for driving while intoxicated. On June 19, 2001, he was found guilty and sentenced to 30 days imprisonment to begin on July 13, 2001. Additionally, the petitioner's spouse was placed on community supervision for a period of twelve months beginning on August 9, 2000, ordered to perform 40 hours of community service, attend a victim impact panel, and successfully complete a state approved DWI program.[3] Contrary, to the district director's statement in the notice of intent to deny that she received "the release of probation for each arrest," the record does not contain any evidence that the petitioner's spouse completed any of the required terms of probation or that he has been discharged from probation for this offense.

On January 14, 2001, he was arrested for theft. On June 19, 2001, he was found guilty and ordered to pay a fine and placed on 6 months supervised probation.[4] The record reflects that on January 23, 2002, the petitioner's spouse was discharged from probation for this conviction.

Though counsel and the home study preparer indicate that all charges were "probated and eventually dismissed," we do not find this to be an accurate statement. In each case, the petitioner's spouse was found guilty. Though the record reflects that the spouse was discharged or dismissed from probation,[5] such a discharge is not tantamount to a dismissal of the charges. The petitioner's spouse was still convicted, despite having successfully completing probation.

As it relates to the petitioner and her spouses' criminal history, the home study states the following:

> **References and Immigration Clearances**
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> When asked directly [the petitioner] stated she has no history of criminal convictions, substance abuse, child sexual or physical abuse or domestic violence. She has never been arrested.
>
> [The petitioner's spouse] has been arrested on a DWI charge, a theft charge, and a charge of public lewdness. Concerning the theft charge, he returned a child's scooter to a store for an exchange, was not feeling well that day and inadvertently left with both scooters. So he was charged with theft. The public lewdness incident happened in November 1997 and involved an undercover policeman. [The petitioner's spouse] felt he had been tricked and that it was a big misunderstanding. He pleaded not guilty. He was given probation without any other consequences. All of these three charges were misdemeanors, were probated and were eventually dismissed. All dismissal papers are

[3] Criminal Court for Dallas County, Texas, cause number 0047669F.
[4] Criminal Court for Dallas County, Texas, cause number MB0148589F.
[5] Even were we persuaded that completion of probation rendered a charge or guilty finding "dismissed,"as noted above, the record does not contain any evidence that the petitioner's spouse successfully complied with or completed probation as ordered for his driving while intoxicated conviction.

> on file. They were isolated and unfortunate incidences which were never repeated. [The petitioner's spouse] does not drink at all.
>
> When asked directly, [the petitioner's spouse] said he does not have a history of substance abuse, child sexual abuse or physical abuse or domestic violence.

Counsel implies that because the home study preparer concluded the petitioner's spouse "does not have a history of substance abuse, sexual or child abuse or domestic violence" and "enthusiastically" approved the petitioner and her spouse as adoptive parents, that CIS cannot make the determination that the petitioner's spouse is an unfit father. We disagree with counsel's argument for several reasons. First, CIS is not bound by a preparer's findings, regardless of whether the parents were "enthusiastically" recommended. Second, it is not sufficient for the home study preparer to state that the petitioner's spouse does not have a history of abuse, when the record clearly shows a conviction for driving while intoxicated. At the least, the preparer must discuss the incident and the petitioner's spouse's history of alcohol use. CIS is not "making the [sic] spouse an addict," but is simply requiring the home study preparer to conduct the home study report in accordance with the regulations.

In this instance, as it relates to the petitioner's spouse's history with alcohol, the home study preparer states, "[the petitioner's spouse] does not drink at all,"[6] a fact clearly contradicted by other evidence in the record. Not only is this statement directly contradicted by the evidence in the record related to the petitioner's spouse's conviction for driving while intoxicated, but also by the letter submitted by the petitioner. In this letter the petitioner states:

> I must say however that my husband does not drink alcoholic beverages except sometimes on the weekend and always at home, with me and our friends.

The home study preparer's failure to explain the reasoning for her approval is especially critical in this case, given that statements made by the home study preparer in the home study are directly contradicted by other evidence contained in the record. The home study preparer offers no explanation as to why she recommended the petitioner and her spouse as adoptive parents, taking into consideration the complete record of the applicant's spouse's criminal past and history with alcohol, other than to say that the arrests were "isolated and unfortunate."

Additionally, though not noted by the district director in his denial, the home study does not comply with the requirements of 8 C.F.R. § 204.3(e)(2)(iii)(A)(2) which states, in pertinent part:

> *Inquiring about abuse and violence.* The home study preparer must ask each prospective adoptive parent whether he or she has a history of *substance abuse, sexual or child abuse, or domestic violence*, even if it did not result in an arrest or conviction. The home study

[6] We are not persuaded by counsel's interpretation of the home study preparer's statement or by the medical opinion submitted. For counsel to state that the phrase "does not drink at all" means there is no "alcohol problem" is patently absurd. Regardless, it is the responsibility of the home study preparer, not counsel, to interpret her words.

> preparer must include each prospective adoptive parent's response to the questions regarding abuse and violence.

[Emphasis added.]

The record reflects that the home study preparer asked the petitioner and her spouse whether they have a history of "substance abuse, *child sexual* or physical abuse or domestic violence." The questions asked by the home study preparer do not comport with the requirements of the regulations. The home study preparer's combining of the words "child sexual," resulted in the failure to properly ask the petitioner and her spouse whether they have a history of child abuse that is not sexual, or a history of sexual abuse that does not relate to a child.

As none of these deficiencies were noted by the district director either in the notice of intent to deny or the denial, the case must be remanded to the district director. Accordingly, the district director should request the evidence indicated above related to the legitimation laws of Mexico. The district director must also request an updated home study. Specifically, the district director should request the home study preparer to discuss the petitioner's spouse's use of alcohol. If the petitioner's spouse's answers reveal he has a history of abuse, the home study preparer must discuss any rehabilitation and/or counseling undertaken which demonstrates the petitioner's spouse is and will be able to provide proper care to the beneficiary. In either case, the home study report must include all facts and circumstances which the home study preparer has considered, and must include her reasons for making a favorable decision, despite the petitioner's spouse's criminal history. Further, the home study preparer must ask the petitioner and her spouse the specific questions as required by 8 C.F.R. § 204.3(e)(2)(iii)(A)(*2*).

Finally, the district director should request evidence from the petitioner's spouse that he completed his required 40 hours of community service, attended a victim impact panel, and successfully completed a state approved DWI program. Such evidence should include evidence that the petitioner's spouse been discharged from probation for the DWI offense. After receipt and consideration of the additional evidence, the director should enter a new decision.

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.

ORDER: The district 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 for review.