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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

JAN 31 2005

File: [redacted] Office: ST. PAUL, MINNESOTA 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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting District Director of the Citizenship and Immigration Services (CIS) St. Paul, Minnesota, 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) on March 19, 2004. The petitioner is a 35-year old married citizen of the United States. The beneficiary is 2 years old at the present time and was born in Guadalajara, Mexico on July 16, 2002.

The district director denied the petition on May 12, 2004, finding that the petitioner had failed to establish that the beneficiary is an orphan as defined in the Immigration and Nationality Act.

On appeal, counsel for the petitioner submits a timely brief with additional documentation.

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 . . . .

The regulation at 8 C.F.R. § 204.3(b) provides the following definitions:

> *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.
>
> *Desertion by both parents* means that both 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.*

[Emphasis added.]

The record contains a copy of the beneficiary's birth certificate, which lists her mother as and her father

The record also contains affidavits executed by the beneficiary's biological mother, biological father, and grandmother on March 9, 2004. Each affidavit indicates the intent of the beneficiary's biological parents to release custody of the beneficiary, "to the custody of [the petitioner] and her husband, so they may adopt [the beneficiary] and care for her."

In her decision, the acting district director noted that the beneficiary has two living parents who released custody of the beneficiary directly to the petitioner. Accordingly, the acting district director determined that the beneficiary did not "qualify as an orphan child under the Act because of the death or disappearance of, abandonment or desertion by, or separation or less from her biological parents."

On appeal, counsel for the petitioner argues that the beneficiary was abandoned "at birth to her maternal grandmother Counsel further argues the beneficiary's birth certificate was registered by Maria Concepcion Gomez Ornelas and that she continues to retain legal custody of the beneficiary.

We do not find that the record supports counsel's assertions. First, though the birth certificate indicates that was a witness to the registration of the beneficiary's birth, it was actually registered by the beneficiary's biological parents.[1] Second, though counsel claims that continues to retain legal custody" of the beneficiary, there is no evidence in the record which demonstrates that she has been appointed guardian of the beneficiary or any other such document which would establish her legal custody of the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel admits that "the affidavits specifically release the beneficiary for adoption to" the petitioner and her spouse. However, counsel contends that as the beneficiary is "clearly not in the custody of her biological parents," and that the "biological parents did not arrange the adoption," the beneficiary was abandoned by her biological parents at birth.

We do not find merit in counsel's argument. The fact that the beneficiary's biological parents executed the affidavits relinquishing their custody clearly demonstrates that they still had custody of the beneficiary at that time. Regardless of whether they "arrange[d]" the adoption, the biological parents specifically indicate their intent to release their rights to the beneficiary directly to the petitioner and her husband. In order to meet the definition of abandonment, 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).

On appeal, counsel indicates her intent to "locate the biological parents again to have them execute new affidavits stating that they abandoned the beneficiary at birth and are releasing the beneficiary for adoption to any persons who can care for the child." We do not find this to be a feasible option with respect to the instant

---

[1] We note that the acting district director's decision also indicates that Maria Concepcion Gomez Ornelas registered the birth of the child. A review of the birth certificate does not support this finding.

petition, as a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Even if we could accept such a material change to the petition, the new affidavits would still not enable the beneficiary to be considered as abandoned by her parents. Just as a relinquishment or release by the beneficiary's biological parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment, the same is true if the parents release the child to for custodial care in anticipation of, or preparation for, adoption. Unless the parents abandon the child to a third party who is authorized under the child welfare laws of the foreign-sending country to act in a custodial capacity, such as a government agency, a court of competent jurisdiction, an adoption agency, or an orphanage, the beneficiary cannot be considered to have been abandoned by both parents as that term is defined in the regulation.

Counsel further argues that the beneficiary has been deserted by both parents. In support of this assertion counsel states:

> The beneficiary was deserted at birth to her maternal grandmother. The grandmother registered the birth and has been caring for the beneficiary's physical and emotional needs since the desertion by her parents. Neither biological parent has ever cared for the beneficiary. In fact, it took several months to locate the biological parents [sic] whereabouts in Mexico. The biological parents have willfully forsaken their child and have refused to carry out their parental rights and obligations.

As noted earlier, counsel's assertions are not considered evidence. Moreover, the record shows that the beneficiary resides with her maternal grandmother. Clearly, therefore, the beneficiary has not become "a ward of a competent authority in accordance with the laws of the foreign- sending country." Accordingly, the beneficiary cannot be considered to have been "deserted by both parents" as that term is defined by regulation.

Finally, counsel argues that CIS regulations violate the due process clause of the 5th amendment. Counsel argues:

> Many adoptions in the United States are now "open" adoptions, where the biological parent or parents release their child for adoption to an identified person, sometimes a family member. [The petitioner] would be permitted to adopt a child in the United States, whose biological parent specifically releases a child to her for adoption. However, under the regulations for adopting a child not born in the United States created by the United States Congress, biological parents are not permitted to release their child for adoption to a specific person. This violates the due process clause of the Fifth Amendment because there is no equality of law in allowing Ms o have an open adoption here in the United States, but not afford the same due process in having an open adoption of a child not born in the United States.

Counsel does not cite to any case law to support her claim of a Constitutional violation.[2] Regardless, counsel's due process argument fails because it rests on an invalid premise. Counsel argues that the "biological parents [of

---

[2] It must be noted that "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications

children born outside the United States] are not permitted to release their child for adoption to a specific person," thereby precluding the petitioner's ability to "have an open adoption here in the United States." Contrary to counsel's assertion, however, the regulation at 8 C.F.R. § 204.2(d)(2)(vii) provides:

> *Primary evidence for an adopted child or son or daughter.* A petition may be submitted on behalf of an adopted child or son or daughter by a United States citizen or lawful permanent resident if the adoption took place before the beneficiary's sixteenth birthday, and if the child has been in the legal custody of the adoptive parent or parents and has resided with the adopting parent or parents for at least two years. A copy of the adoption decree, issued by the civil authorities, must accompany the petition.

The regulations clearly allow for the adoption of children not born in the United States and do not impose any restriction on "open adoptions" or the release of the child for adoption to a specific person. It appears that counsel is confusing the definition of a child who is an orphan with that of a child who has been adopted. While it is true that a child cannot be considered an *orphan* if he or she has been directly released by the biological parents to a specific party for adoption, the same is not true for an *adopted* child.[3] In this instance, the petitioner filed a petition to classify the beneficiary as an orphan, not as an adopted child. Accordingly, the petitioner is required to establish that the beneficiary meets the statutory and regulation definitions in order to qualify as an orphan.

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 Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F).

ORDER: The appeal is dismissed.

---

must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive rather than the judiciary . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to the changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews v. Diaz,* 426 U.S. 67 (1976). Further, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy,* 342 U.S.. *Accord, e.g., Kleindienst v. Mandel,* 408 U.S., *Fong Yue Ting v. United States,* 149 U.S. 698. Counsel makes no argument related to the standard of review which should be applied in this instance.

[3] *See* Section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1).