U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

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DEC 30 2004

File: [redacted] Office: ATLANTA, GEORGIA 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 District Director, of the Atlanta, Georgia, Citizenship and Immigration Services (CIS) district office denied the Petition to Classify Orphan as an Immediate Relative. 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 The district director's decision will be withdrawn and the case will be remanded to the district director for further consideration and entry of a new decision.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, through counsel of record, filed the petition on December 24, 2002. The address listed for the petitioner at the time of filing was

On April 12, 2004, the district director issued a notice of intent to deny to the petitioner at his address of record. The notice of intent to deny was returned to the district director as undeliverable by the postal service and included no forwarding address.

On September 1, 2004, the district director issued a denial to the applicant's address of record, based on the petitioner's failure to respond to the notice of intent to deny. The denial was also returned to the district director as undeliverable.

However, though we note the petitioner's failure to notify CIS of his change of address, such failure does not relieve district director of his responsibility to notify the petitioner's counsel of any action in the petitioner's case.

The regulation at 8 C.F.R. § 292.5(a) provides:

Representative Capacity. Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act; such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

Though the record contains a certified mail receipt with counsel's address, as well as the indication that counsel was "carbon copied" on the denial, we can find no evidence that the district director provided counsel with the notice of intent to deny as required by regulation.

This finding is confirmed by counsel's statement on appeal. On the Form I-290B, counsel states:

[The petitioner] and our office never received the April 12, 2004 request for additional information. We were only given notice of the failure to respond to the April 12, 2004 request for additional information upon the receipt of the USCIS decision dated September 1, 2004. As of this date, our office has not seen the content and the information requested from the April 12, 2004 letter. If we had notice of this request for additional information dated April 12, 2004, our office would have supplied the requested information. Accordingly, [the petitioner] respectfully requests that his appeal be granted so that he finally be united with his adopted daughter, [the beneficiary], in the United States.

Though counsel requests that the "appeal be granted" and that the petitioner be "united with his adopted daughter," such a request cannot be accommodated as the record remains absent evidence of eligibility as noted by the district director in the notice of intent to deny. However, as counsel was not properly notified of the notice of intent to deny, the case shall be remanded to the district director to reissue the notice to counsel and to the petitioner at his new address of record. After receipt and consideration of the additional evidence, the district director shall enter a new decision.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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