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

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MAR 0 3 2005

File: [redacted] Office: ATLANTA, GEORGIA Date:

IN RE: Petitioner: [redacted]
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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the District Director of the Citizenship and Immigration Services (CIS), Atlanta, Georgia. The Administrative Appeals Office (AAO) remanded a subsequent appeal to the district director for further action. The matter is now before the AAO after being certified to the AAO by the district director. The appeal will be dismissed.

On February 17, 2004, the district director denied the petition after finding that the petitioner failed to respond to the district director's notice of intent to deny the petition.

In a decision dated November 5, 2004, the AAO determined that the petitioner had responded to the district director's notice of intent to deny the petition prior to the issuance of the denial and remanded the case to the district director for review and consideration of the additional evidence and entry of a new decision.

On December 2, 2004, after reviewing the additional evidence, the district director denied the petition and certified the case to the AAO.

The issue to be determined is whether the beneficiary qualifies as an orphan under Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i). 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; 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.*

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.

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 is 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.

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.

[Emphasis added.]

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on October 9, 2002. The petitioner is a 48-year-old married citizen of the United States. The beneficiary was nine years old at the time of filing and was born in Yanshan, China on April 21, 1993. The petitioner indicated on the petition that the beneficiary had only one sole or surviving parent and that the beneficiary had not been adopted abroad by the petitioner and his spouse.

The petitioner submitted a copy of the beneficiary's notarial certificate that lists her mother as Shi Shumei and her father as Wang Shousong.

To support the petitioner's claim that the beneficiary has only one parent who is the sole or surviving parent, the petitioner submits a copy of a notice in the *Shicheng Daily* newspaper that describes the beneficiary's mother as a missing person and requests information from any person with knowledge of her whereabouts.

As evidence that the beneficiary's father is incapable of providing proper care to the beneficiary, the petitioner submitted a medical certificate indicating the beneficiary's father was diagnosed as being Schizophrenic. The petitioner also submits a letter from the beneficiary's father who states that he suffers from schizophrenia and has not been able to work. He further states:

> I ran around here and there, sometimes well, sometimes not. I had fought with neighbors and beat my wife and child at home, and sometimes my child was almost beaten to death. Since my wife fled home, my daughter [the beneficiary] dared not go back home any more, and neighbors took care of her. I am willing to give up my custody of my daughter [the beneficiary] and let her uncle [the petitioner] be her guardian.

We do not find this evidence supports the contention that the beneficiary is an orphan for whom the sole or surviving parent is incapable of providing proper care. First, there is no evidence that the beneficiary's mother is deceased. Accordingly, the definition of *surviving parent* is not applicable. Second, the definition of *sole parent* only applies to a child's *mother*, and only 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, 8 U.S.C. § 1101(b)(2). The petitioner's claim that the beneficiary's *father* is the *sole parent*, is not in accord with the regulatory definition, which applies only to mothers.

After the district director's initial decision, the petitioner attempts to change the beneficiary's eligibility as an orphan due to a sole or surviving parent to that of a child who is an orphan because of the disappearance of, abandonment or desertion by, or separation or loss from, both parents. Specifically, the petitioner submitted a copy of a notice in the *Cangzhou Daily* newspaper that describes the beneficiary's father as a missing person. The notice indicates that that the beneficiary's father left home on January 10, 2003. A letter from counsel states that the beneficiary remained in the custody of his father until he left the home on January 10, 2003.

In his decision, the district director determined that the petitioner failed to present evidence that the beneficiary's parents "disappeared" as no competent authority made the beneficiary a ward of the state or shown that a reasonable effort was made to locate the beneficiary's parents. The district director noted "only adoptions fully completed in China are permitted," and indicated that "it was not possible to obtain guardianship of a Chinese child for adoption in the United States." The district director then determined that the beneficiary had not been adopted in accordance with the laws of China in order to bring the beneficiary to the United States. Finally, the district director determined that a home study had not been submitted within one year of the filing of the petition.

On certification, counsel for the petitioner asserts that the beneficiary's family "exercised substantial effort to locate her biological parents," and that the beneficiary's adoption "was completed locally." To support his assertion, counsel submits a document from the Ministry of Civil Affair, Hebei Province Civil Affair Office which states:

> All the records in our possession confirm that reasonable effort was made to locate the biological parents of [redacted] Furthermore, per court order, this child was clearly adopted by her uncle, [the petitioner and his wife]. Therefore, this agency will not need to make this child a word [sic] of the state due to disappearance of her parents. We therefore respectfully agreed that [the beneficiary's] adoption be permitted and finalized in the United States by [the petitioner and his spouse].

Counsel also submits a copy of a document from the Yanshan People's Court, Hebei Province that states:

> It is ordered that [the petitioner and his spouse] adopt [the beneficiary]. Reasonable effort and diligent search was done to locate the biological parents. Therefore, nature [sic] birth parents rights are terminated per this order. The child is adopted by [the petitioner and his spouse].

We are not persuaded by counsel's argument that the beneficiary qualifies as an orphan due to the disappearance of both of her parents. As noted previously, with the original filing the petitioner claimed the

beneficiary was an orphan due to the fact that her sole parent could not provide proper care. The new evidence pertaining to the beneficiary's father disappearance is a material change to the facts as presented at the time the petitioner was originally filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *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).

On certification, counsel also claims that the beneficiary has now been adopted, a change from the initial filing when the petitioner claimed the beneficiary was not adopted and would be brought to the United States for adoption. Notwithstanding this material change in facts, we do not find the documents submitted are sufficient to show that the adoption was completed in accordance with the laws of the foreign sending country.

According to the United States Department of State:[1]

> CHINA ADOPTION AUTHORITY:
> The government office responsible for adoptions in China is the Ministry of Civil Affairs, specifically the [Chinese Center for Adoption Affairs] CCAA.
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> CHINA ADOPTION PROCEDURES:
> To finalize the adoption, the prospective adoptive parent(s) need to travel to China to complete the process . . . After indicating [their] acceptance of the child, [the prospective adoptive parents] will then receive a formal notice from the CCAA to proceed to China. When the CCAA issues an approval notice ("Notice of Coming to China for Adoption"), this notice will bear the "chops," or red-inked seals of the CCAA . . . With approval notice in hand, prospective parents may then proceed directly to the city in China where the Civil Affairs Bureau with jurisdiction over the appropriate Children's Welfare Institute is located. Thereafter, a series of interviews of the prospective adoptive parent(s) will occur; a contract will be signed with the Children's Welfare Institute; the contract will be registered with the Civil Affairs Bureau; and a notarized adoption decree will be issued.
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> * * *
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> Prospective adoptive parents will be requested to sign an adoption agreement/contract with the welfare institute, then register the adoption at the provincial Civil Affairs Bureau, pay requisite Chinese fees and obtain a Chinese passport and exit permit for the child. The adoption process also includes signing an agreement with the person or institution putting up the child for adoption, registering in person with the Chinese Civil Affairs Bureau and carrying out the notarized procedures at the designated Chinese notarial office. When the notarial office in the child's place of residence approves the adoption, that office issues a notarized certificate of adoption, a notarized birth certificate and either notarized death certificate(s) for the child's biological parent(s) or a statement of abandonment from the welfare institute.

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[1] General information on international adoptions as well as country-specific information may be found at the Department of State's website at www.state.gov (January 31, 2005).

The record lacks credible evidence from the appropriate Chinese authorities to establish the validity of the adoption. Specifically, the petitioner has not presented a notarized adoption decree, evidence of registration of the adoption with the Civil Affairs Bureau, or a passport of exit permit for the beneficiary. We note that there is no evidence the petitioner and his spouse have even traveled to China and personally seen the beneficiary.

In immigration proceedings, the law of a foreign country is a question of fact that must be proven by the petitioner if he relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). In particular, a petitioner must show that a foreign adoption is valid under the law of the foreign country. *Mila v. INS*, 678 F.2d 123 (10th Cir. 1982) cert. denied 459 U.S. 1104; *Matter of Khatoon*, 19 I&N Dec. 153 (BIA 1984); *Matter of Mendoza, 18 I&N Dec. 66 (BIA 1981).* As previously noted, the petitioner carries the burden of proving that the adoption satisfies all foreign legal requirements. *Mila v. INS.* In the present case, the petitioner has not satisfied this burden.

The remaining issue is whether the petitioner has submitted a home study as required by 8 C.F.R. § 204.3(e). These requirements of what information must be contained in a home study include personal interviews, assessments of the petitioner's capability to parent the orphan, the petitioner's physical, mental and emotional capabilities, the petitioner's finances, history of abuse and violence, and living accommodations. The regulation also requires the home study to be conducted by a home study preparer as defined by regulation.

The regulation at 8 C.F.R. § 204.3(b) defines the term *home study preparer* as:

> any party licensed or otherwise authorized under the law of the State of the orphan's proposed residence to conduct the research and preparation for a home study, including the required personal interview(s). This term includes a public agency with authority under that State's law in adoption matters, public or private adoption agencies licensed or otherwise authorized by the laws of that State to place children for adoption, and organizations or individuals licensed or otherwise authorized to conduct the research and preparation for a home study, including the required personal interview(s), under the laws of the State of the orphan's proposed residence. In the case of an orphan whose adoption has been finalized abroad, the home study preparer includes any party licensed or otherwise authorized to conduct home studies under the law of any State of the United States, or any party licensed or otherwise authorized by the foreign country's adoption authorities to conduct home studies under the laws of the foreign country.

As it relates to the required home study, on certification, counsel indicates that we should "refer to the file on record to locate the home study report." Though the record does contain a document from the Georgia Department of Human Resources, entitled "Background Information for Non-State Agency Child," this document has not been prepared by a party licensed to research and prepare a home study and does not contain any of the necessary assessments of the petitioner and his spouse that are required by 8 C.F.R. § 204.3(b).

In his decision, the district director cited the regulation pertinent to an advanced processing application and noted that the petitioner "failed to submit the home study within one year of the filing of the petition." Though we agree that the petitioner failed to submit a home study, because the petitioner filed Form I-600 and not Form I-600A, the pertinent regulations do not impose a one-year deadline for the filing of a home study in this instance.

The regulation at 8 C.F.R. § 204.3(d)(3) states:

> A petition filed concurrently with the advanced processing application must be submitted on Form I-600, completed and signed in accordance with the form's instructions. (Under this concurrent procedure, Form I-600 serves as both the Forms I-600A and I-600, and the prospective adoptive parents should not file a separate Form I-600A). The following supporting documentation must accompany a petition filed concurrently with the application under this provision:
>
> (i) The supporting documentation for an advanced processing application required in paragraph (c) of this section; and
> (ii) The supporting documentation for an orphan petition required in paragraph (d)(1) of this section, except for paragraph (d)(1)(i) of this section.

Though the regulations do not impose a timeline for the filing of a home study petition when the I-600 and I-600A are filed concurrently, they do still require that a home study be filed before the petition may be approved. The record does not contain a valid home study.

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.