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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: Office: HO CHI MINH CITY, VIETNAM Date: SEP 14 2009

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)

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Ho Chi Minh City field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The field office director's decision will be withdrawn and the matter remanded for continued processing.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(b)(1)(F). The district director denied the petition on the basis of her determination that the petitioner had failed to establish that the beneficiary qualified for classification as an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act.

Section 101(b)(1)(F)(i) of the Act defines an 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) of this title, 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; *Provided*, That the Attorney General [now Secretary of Homeland Security] is satisfied that proper care will be furnished the child if admitted to the United States[.]

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

> *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.

* * *

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

* * *

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

* * *

Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the *foreign sending country.*

* * *

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.

The regulation at 8 C.F.R. § 204.3(d) states, in pertinent part, the following:

(d) *Supporting documentation for a petition for an identified orphan.*

(1)(iii)(C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption; and

> (iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country . . .

The regulation at 8 C.F.R. § 204.3(k)(1) states, in pertinent part, the following:

> An I-604 investigation must be completed in every orphan case. The investigation must be completed by a consular officer except when the petition is properly filed at a Service office overseas, in which case it must be completed by a Service officer. An I-604 investigation shall be completed before a petition is adjudicated abroad. When a petition is adjudicated by a stateside Service office, the I-604 investigation is normally completed after the case has been forwarded to visa-issuing post abroad. However, in a case where the director of a stateside Service office adjudicating the petition has articulable concerns that can only be resolved through the I-604 investigation, he or she shall request the investigation prior to adjudication. In any case in which there are significant differences between the facts presented in the approved advanced processing application and/or orphan petition and the facts uncovered by the I-604 investigation, the overseas site may consult directly with the appropriate Service office. In any instance where an I-604 investigation reveals negative information sufficient to sustain a denial or revocation, the investigation report, supporting documentation, and petition shall be forwarded to the appropriate Service office for action. Depending on the circumstances surrounding the case, the I-604 investigation shall include, but shall not necessarily be limited to, document checks, telephonic checks, interview(s) with the natural parent(s), and/or a field investigation.

The petitioner is a fifty-eight-year-old citizen of the United States. The beneficiary was born in Vietnam on February 7, 1999. The beneficiary's birthfather died on September 5, 2006; her birthmother is her sole surviving parent. The petitioner filed Form I-600A, Application for Advance Processing of Orphan Petition, on October 9, 2007. The Form I-600A was approved on December 19, 2007. After a beneficiary was identified and referred by an adoption agency in Vietnam and accepted by the petitioner, the petitioner filed the Form I-600, Petition to Classify Orphan as an Immediate Relative, on August 18, 2008. As required, U.S. Citizenship and Immigration Services (USCIS) in Ho Chi Minh City, Vietnam, referred the case to the Consular Section of the U.S. Embassy in Hanoi for an I-604 consular field investigation.

The evidence of record indicates that the beneficiary's birthmother agreed to relinquish the beneficiary to the Centre for Merits and Disadvantaged People of Quang Binh (hereinafter "the orphanage") on August 8, 2007, and consented to her adoption by foreign or domestic parents. The beneficiary was admitted to the orphanage on November 1, 2007, and commune representatives formally recognized the transfer on November 22, 2007. On January 25, 2008 the orphanage director confirmed that the orphanage had formally announced the availability of the beneficiary for domestic adoption, but that no Vietnamese citizens had come forth. The

Vietnam Department of International Adoption (hereinafter "DIA") formally issued a referral on June 8, 2008. The beneficiary indicated her willingness to be adopted on July 15, 2008. The petitioner filed the Form I-600 on August 18, 2008.

The field office director issued a notice of intent to deny (NOID) the petition on November 14, 2008, and notified the petitioner of several findings of its October 8, 2008 field investigation. In particular, the field office director noted that although the beneficiary's birth mother sent the beneficiary to live at the Centre for Merits and Disadvantaged People of Quang Binh (hereinafter "the orphanage") in November 2007, the beneficiary left the orphanage after approximately one month, and resumed living with her birthmother. Although the beneficiary's birthmother had released her to the orphanage in writing, the orphanage granted permission for the beneficiary to return to her birthmother's residence after it was decided that it was not prudent for the beneficiary to enroll in a new school during the middle of the school year. The beneficiary's birth mother receives a monthly disbursement from the orphanage, which she would not receive if the beneficiary were not up for adoption. The field office director notified the petitioner that the record did not establish that the beneficiary had been abandoned, as that term is defined at 8 C.F.R. § 204.3(b). The field office director also challenged the veracity of the relinquishment documents that were submitted by the beneficiary's birthmother. As developed by the field office director in her discussion, "[u]pon review of the sworn statements obtained by the US Embassy staff, the birth mother and [orphanage] director did not have mutual intentions and understanding when the birth mother signed the documents."

In response to the NOID, counsel submitted a videotape of a December 12, 2008 interview between the beneficiary's birthmother and a staffmember of the petitioner's adoption services provider. A transcript and English translation of the interview was also provided. In this interview, the beneficiary's birth mother reiterated that she had relinquished her daughter to the orphanage voluntarily, and that the decision to do so had not been forced upon her by anyone. She also stated that "[w]hen I give my child to adoption, all rights belong to the adoptive mother, if my child will not come back to visit me, it is fine because this depends on the adoptive mother's right." She also stated that "I do not have any hesitance or query at all, because I understand that after giving the child to adoption, the rights belong to the adoptive parents."

The field office director denied the petition on April 29, 2009, on the basis of her determination that the petitioner had failed to establish that the beneficiary meets the statutory definition of an orphan. Specifically, the field office director found that the petitioner had failed to establish that the beneficiary had been abandoned; that the foreign adoption took place in accordance with the laws of the foreign-sending country; and that the petitioner had failed to demonstrate that the beneficiary's birthmother is incapable of providing proper care.

At the outset of this decision, the AAO finds that the field office director erred in considering the issue of whether the beneficiary had been abandoned by both parents. Although the field office director used the phrase "abandoned by her birth parent," rather than "by both parents," she cited to, and based her analysis on, the definition of "abandonment by both parents" contained at 8 C.F.R. § 204.3(b).

The statutory definition of an orphan at section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i), which was set forth in full previously, specifically defines, in relevant part, an orphan as a child:

> 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 [emphasis added]. . . .

Where it is established that the beneficiary has only one surviving parent, the definition of "abandonment by both parents" found at 8 C.F.R. § 204.3(b) should not be referred to or relied upon in the adjudication of the I-600 petition. Rather the definitions of "surviving parent" and "incapable of providing proper care" are the relevant definitions in 8 C.F.R. § 204.3(b). Congress's use of the word "or," rather than the word "and," to separate these requirements in the statute indicates clearly that both requirements need not be met.

Statutory interpretation begins with the language of the statute itself. We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Accordingly, the AAO withdraws the entire portion of the field office director's decision in which she discussed whether the petitioner has satisfied the "abandonment by both parents" standard.[1] Again, where it is established that the beneficiary has only one surviving parent, the definition of "abandonment by both parents" found at 8 C.F.R. § 204.3(b) is not relevant. Such is the case here, and the definition of "abandonment by both parents" has no bearing on this case. That the field office director used the phrase "abandoned by her birth parent," does not change the AAO's analysis, as she cited to, and based her analysis on, the definition of "abandonment by both parents" found at 8 C.F.R. § 204.3(b). A child whose sole surviving parent is unable to provide proper care does not have to have been abandoned in order to qualify as an orphan.

Having made that determination, the AAO turns to the remaining grounds of the field office director's denial of the petition: (1) that the adoption is not in accordance with the laws of Vietnam; and (2) that the record of proceeding does not establish that the surviving parent is incapable of providing proper care.

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[1] That discussion is located at pages six and seven of the field office director's April 29, 2009 decision, and is labeled "I. Abandonment."

Whether the adoption is in accordance with the laws of the foreign-sending country

The field office director determined that, based upon facts uncovered during the field investigation, the petitioner's adoption of the beneficiary was not in accordance with the laws of Vietnam. The AAO disagrees. In her April 29, 2009 denial, the field office director looked to the Vietnamese Ministry of Justice's Decree 08-2006: *Guiding the Implementation of a Number of Provisions of Child Adoption involving Foreign Elements*, which allows for direct adoptions by foreign parents in cases involving children with special needs. The field office director noted that the adoption of the beneficiary was presented to the Vietnamese Department of International Adoption (DIA) as an orphan who was residing in an orphanage. However, as noted by the field office director, the beneficiary was in her birthmother's custody except for a period of one month in November 2007. She went on to state the following:

> At the request of USCIS, the petitioner submitted a letter from the DIA dated March 11, 2009 wherefore the DIA acknowledges that the removal of the beneficiary from the orphanage violates local adoption laws. The living situation of the child has not changed as the beneficiary continues to be in her birth mother's custody. DIA then provides a general statement that a "special needs" child may be adopted from the birth family to the adoptive family under Vietnam laws. **While DIA has re-stated the legal provision, it did <u>not</u> explicitly** re-categorize and therefore recertify the present adoption as a "special needs" case. According to Decrees 68 and 69, to be certified as a "special needs case," the foreign families must present specific documents with their dossier *prior* to the issuance of the referral, including a written certification by competent medical establishments according to regulations of the Health Ministry documenting that the child has a "dangerous disease." There is no evidence in the record to indicate that such written verification of "dangerous disease" was certified by [a] competent medical authority or presented to DIA prior to the referral of this child to the petitioner on June 8, 2008.
>
> Instead, the DIA letter only requests consideration but offers "no imposing opinion. If the US CIS agrees to approve [the beneficiary] to be adopted by [the petitioner], the Adoption Department also agrees." Thus, DIA has made their final authorization of this specific intercountry adoption contingent on USCIS's approval for the petition. As such, DIA has not explicitly certified that the present direct adoption comports with Vietnamese intercountry adoption law.

The field office director also found the record devoid of corroborating evidence that the beneficiary is infected with Hepatitis B, as claimed.

As was noted previously, the field office director should not have addressed the issue of whether the beneficiary had been abandoned; that was not the appropriate standard under which to

analyze this case. However, the field office director did enter into such an analysis, and found that the beneficiary had not been abandoned. The field office director found that, as such, the type of adoption being contemplated in this case was actually a direct adoption.[2] Looking to Vietnamese law, the field office director stated that "direct adoptions to foreign parents are not permitted unless the child is a 'special needs' child," and found the record of proceeding insufficient to establish that the beneficiary had any such special needs.

I. Direct Adoption

The AAO will first address the issue of whether the petitioner has established that a direct adoption of the beneficiary would be permitted under the laws of Vietnam. In her denial, the field office director looked to the Government of Vietnam Ministry of Justice's Decree 08-2006: *Guiding the Implementation of a Number of Provisions of Child Adoption involving Foreign Elements*. Article II, Section 2.3 of that decree states, in pertinent part, the following:

> 2. Children to be adopted
>
> Under Article 36 of Decree No. 68/2002/ND-CP (amended and supplemented), children who may be adopted include:
>
> * * *
>
> 2.3 For handicapped or disabled children, children being victims of toxic chemicals, children affected by HIV/AIDS, children suffering from other dangerous diseases (used to live in nurturing establishments or with families) who are receiving medical treatment in a foreign country, if there are foreigners or overseas Vietnamese applying to adopt them, their adoption shall be considered and settled by overseas Vietnamese diplomatic missions or consulates as for children who have no domestic residence status.[3]

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[2] The AAO notes that the United States does not permit direct adoptions in adoptions adjudicated under the "abandonment" standard. *See* 8 C.F.R. § 204.3(b), which specifically states that a biological parent cannot intend to transfer, or transfer, parental rights, obligations, and claims to the child, as well as all control over and possession of the child, to any specific person. However, as discussed previously, the "abandonment" standard is not at issue in this case. No language in the definitions of "surviving parent" or "incapable of providing proper care" prohibits a surviving parent from relinquishing or releasing her child to a specific individual in preparation for an adoption. Thus, if Vietnamese law allows for a direct adoption in the instant case, United States law would also allow for it.

[3] *See* http://vbqppl2.moj.gov.vn/law/vi/2001_to_2010/2006/200612/200612080002_en/law document_view (accessed August 25, 2009).

It is not clear to the AAO that this provision stands for the proposition stated by the field office director. According to the field office director, this provision permits direct adoptions by foreign parents in situations where the child has special needs. Instead, taking particular note of the fact that this provision specifically states that such adoptions will be adjudicated by "overseas Vietnamese diplomatic missions or consulates," it appears to the AAO that this provision pertains to adoptions involving children who are receiving medical treatment in a foreign country, which is not the case here. Nevertheless, the AAO does agree with the field office director that Vietnam law appears to allow for direct adoptions by foreigners in cases involving children with special needs. Article II, Section 2.2 of Decree 08/2006 states the following:

> 2.2. Children living with families may be adopted by foreigners if they fall in the case specified in Clause 3, Article 36 of Decree No. 68/2002/ND-CP (amended and supplemented).

Such "specified cases" are found at Decree 68/2002/ND-CP, issued July 10, 2002: *Detailing the Implementation of a Number of Articles of the Marriage and Family Law on the Marriage and Family Relations Involving Foreign Elements*,[4] which states, in pertinent part, the following:

> Article 36. Vietnamese children to be adopted
>
> * * *
>
> 2. Vietnamese children to be adopted shall include:
>
> a.) Children who are living in nurturing establishments [i.e., orphanages] lawfully set up in Vietnam.
>
> b.) Children who are living in families if they are orphans, disabled or relatives of the child adopters.[5]

As Article 26, Section 2(b) of Decree 68/2002/ND-CP indicates that Vietnam permits direct adoptions if the child is "disabled," it appears as though Vietnam allows for the direct adoption of children with special needs. This conclusion is bolstered by the Ministry of Justice – Adoption Department's statement in its March 11, 2009, which stated that "[f]or the child who has special needs or in the special situation as above, according to Vietnam's Law, the child can be relinquished directly from the birth family to the adoptive family." The next step is to consider whether this is in fact a "special needs case."

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[4] The AAO notes that this decree is referenced several times in Decree 08-2006.

[5] *See* http://www.business.gov.vn/assets/A7DF5CD2-BB35-4B58-80A6-61C94CD3B47C.pdf (accessed August 25, 2009).

The field office director noted in her denial that, pursuant to Decrees 68 and 69, in order to qualify as a special needs case (and therefore to qualify for a direct adoption), the foreign adopter must present specific documents with the dossier prior to issuance of the referral, including a written certification by a competent medical establishment, pursuant to the Vietnamese Health Ministry, documenting that the beneficiary has a dangerous disease. The field office director noted that such documentation was not part of the record and that since the Ministry of Justice – Adoption Department's letters "did not explicitly re-categorize and therefore recertify the present adoption as a 'special needs' case," a direct adoption was not eligible to take place under the laws of Vietnam.

The record contains three documents issued by the Ministry of Justice – Adoption Department. The first document, dated June 8, 2008, is the referral. That document, which introduced the petitioner to the beneficiary, stated the following:

> **Health Status: Hepatitis B (HBsAG)**
>
> [emphasis in original].

The second document, dated February 19, 2009, and specifically addressed to "US CIS Adoptions," states the following:

> [the petitioner] would like to adopt the identified child named [the beneficiary], born on 7th February 1999, bearing Hepatitis B virus, residing at. . . .
>
> [T]he Adoption Department – Ministry of Justice would like to request the US CIS Adoptions to review and approve [the] I-600 petition for the above case so that the child can reunite with the adoptive mother soon.

These two documents state clearly that the beneficiary is infected with Hepatitis B. On appeal, counsel submits a December 11, 2008 document from the Ministry of Health, Central Pediatric Hospital, which also confirms the beneficiary's diagnosis of Hepatitis B.[6] The AAO finds that, in the aggregate, the letters from the Ministry of Justice – Adoption Department that reference the beneficiary's diagnosis, the lab results from the Ministry of Health, and the testimony of record establish, to the satisfaction of the AAO, that the beneficiary is infected with Hepatitis B, and that she therefore has special needs. The AAO also takes note of the Ministry of Justice – Adoption Department's statement in its March 11, 2009 letter that "[f]or the child who has special needs or in the special situation as above, according to Vietnam's Law, the child can be relinquished directly from the birth family to the adoptive family." The evidence of record indicates that the Ministry of Justice – Adoption Department is satisfied that this adoption is in

[6] On appeal, counsel states that these results were delivered, in error, to the U.S. Consulate in Hanoi on March 27, 2009 by a member of the adoption service provider's staff, rather than to the U.S. Consulate in Ho Chi Minh City.

accordance with the laws of Vietnam (and in fact wishes for it to proceed), and the field office director cited no reason for questioning the veracity of the documents from the Ministry of Justice – Adoption Department. The evidence of record indicates that Vietnam will permit a direct adoption of the beneficiary by the petitioner.

II. Non-directed Adoption

Given the AAO's finding that the laws of Vietnam will allow for a direct adoption of the beneficiary by the petitioner, that the beneficiary is eligible for a direct adoption, and that the Ministry of Justice – Adoption Department wishes for the adoption to proceed, there is no purpose in discussing whether any other type of adoption would be in accordance with the laws of Vietnam. Accordingly, the AAO need not address how the beneficiary's resumption of residence with her birthmother would impact a non-directed adoption.

III. Conclusion

The AAO finds that the petitioner's adoption of the beneficiary is in accordance with the laws of Vietnam. That portion of the director's decision finding otherwise is withdrawn.

Whether the surviving parent is incapable of providing the proper care

The second issue before the AAO is whether evidence of record establishes that the beneficiary's surviving parent, her birthmother, is incapable of providing the proper care. In her April 29, 2009 denial, the field office director noted that the I-604 investigation had found that the beneficiary's birth mother is in fact capable of providing the proper care. According to the field office director, the field investigation found that the beneficiary lived in a furnished house that is large by local standards, and that they own a television and a telephone. The field office director noted that although the beneficiary's birthmother does not own the home (it is owned by the deceased birthfather's mother), the family lives there rent-free. The field office director noted that the investigation found the beneficiary to be educated, well-fed and properly clothed. Moreover, the investigation found that although the beneficiary has a severe Hepatitis B infection, she is receiving adequate medical attention, and has been able to receive treatment from a private doctor when the birthmother felt the medicine from the government medical officials was not effective.

On appeal, counsel contends that the field office director erred in arriving at her conclusion. Counsel contends that the field office director's "leaves out key facts." Counsel states that the beneficiary's birth mother has no income and no employment, and that her only source of income is the money she receives from the orphanage. Counsel argues the following:

> Any person without any income is going to have a very difficult time living according to local standards no matter how low the standards unless they receive

> charity. In this case the birth mother receives the charity of her mother-in-law which can be stopped at any point in time . . . In this case, the birth mother is incapable of providing proper care since she owns no property, has no income and relies totally on charity to survive. . . .

While the AAO is not persuaded by counsel's arguments, which are not supported by any documentary evidence, it does find convincing the February 19, 2009 and March 11, 2009 statements by the Ministry of Justice – Adoption Department, both of which were issued several months after the field investigation and are therefore the most current documents in the file regarding the birthmother's ability to provide proper care. The Ministry of Justice – Adoption Department stated the following on February 19, 2009:

> [T]he mother is in extremely difficult position that she cannot afford to bring up the child.

On March 11, 2009, the Ministry of Justice – Adoption Department stated the following:

> [T]his child was relinquished by the birth mother to the [orphanage] because of extremely difficult situation that the mother cannot afford to bring up the child. . . .
>
> [F]or the interests of a child having disease, fatherless and mother is in capable of nurturing. . . .

As was noted previously, 8 C.F.R. § 204.3(b) defines "competent authority" as "a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption." In Vietnam, the Ministry of Justice – Adoption Department is a government agency with the jurisdiction and authority to make decisions in matters of child welfare, including adoption. As such, the record contains evidence from a "competent authority" that the sole parent is "incapable of providing proper care." *See, e.g., Matter of Rodriguez,* 18 I & N Dec. 9 at 11 (BIA 1980) (concluding that the beneficiary is an orphan, where, *inter alia,* the beneficiary's mother, a sole parent, "has declared and a social welfare agency study in Peru has verified that she is unable to provide proper care for the beneficiary").

In addressing these findings of the Ministry of Justice – Adoption Department, the field office director stated the following:

> The Vietnamese adoption records indicate that the birth mother is poor an unable to care for her ill children. However, field verifications show that she <u>is</u> capable of providing care.

The AAO notes that the field office made these findings on April 29, 2009, more than six months after the October 8, 2008 I-604 field investigation. However, the Ministry of Justice – Adoption

Department made two separate findings of the birthmother's inability to provide proper care to the beneficiary during this time period, both of which are more current than the findings from October 2008. The record of proceeding, as it currently stands, does not contain sufficient evidence to rebut the two separate findings of the Ministry of Justice – Adoption Department, which indicate changed circumstances since the October 8, 2008 field investigation.[7]

The record of proceeding, as it currently stands, establishes that the beneficiary's surviving parent is incapable of providing proper care. The AAO, therefore, withdraws the field office director's decision finding otherwise. Upon receipt of additional evidence or further investigation, the field office may wish to revisit this issue, but the most recent evidence in the current record of proceeding establishes that the beneficiary's birthmother is incapable of providing proper care.

Whether the surviving parent has irrevocably released the beneficiary for emigration and adoption

Beyond the field office director's decision, the AAO notes that although the field office director cited to 8 C.F.R. § 204.3(d)(1)(iii)(C), she did not address it directly as it relates to irrevocable release. The regulation at 8 C.F.R. § 204.3(d)(1)(iii)(C), which mandates that in cases involving surviving parents, the petitioner must submit evidence that the surviving parent has irrevocably released the orphan for emigration and adoption. Section 101(b)(1)(F) of the Act requires further that the irrevocable release by the surviving parent be executed in writing.

The AAO includes this discussion because, although the field office director erred in conducting an analysis as to whether the beneficiary had been abandoned by both parents, cases analyzed under the "surviving parent" criterion do contain the similar, though not synonymous, requirement that the petitioner demonstrate that the surviving parent has irrevocably released the beneficiary for emigration and adoption, in writing. That requirement, however, does not carry the more stringent requirement, for abandonment, that such release "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," which the field office director appears to have applied to this case. Again, the terms "abandonment" (and its definition at 8 C.F.R. § 204.3) and "irrevocably released" are not interchangeable and, again, the definition of "abandonment" has no relevance to this case.

The AAO finds that the current record of proceeding contains ample evidence that the surviving parent has irrevocably released the beneficiary for emigration and adoption, in writing. In arriving at this conclusion, the AAO looks primarily to her June 15, 2009 affidavit, which was

[7] The AAO notes again that the field office director cited no concerns regarding the veracity of the documents from the DIA.

submitted on appeal. It looks also to the Ministry of Justice – Adoption Department's February 19 and March 11, 2009 letters. These documents establish that the surviving parent has irrevocably released the beneficiary for emigration and adoption.

Further processing of this petition

In accordance with the previous discussion, the AAO will withdraw the field office director's April 29, 2009 decision. Although the AAO is withdrawing the field office director's decision, the petition may not be approved. As noted by the field office director in her denial,

> In the event the petitioner submits an appeal of this denial and is able to overcome the grounds for denial, the petition cannot be approved until the petitioner is notified that the child has been found to meet the definition of an orphan and thereafter would actually adopt the child according to the law of Vietnam. . . .

The field office director did not address all regulatory requirements for an identified orphan at 8 C.F.R. § 204.3(d). For example, the record does not indicate whether an actual adoption has occurred in Vietnam. The AAO notes that the petitioner did not answer question 19A on the Form I-600, which asked whether she intends to adopt the beneficiary in the United States. The AAO presumes she does intend to adopt the beneficiary in the United States, as she answered question 19B in the affirmative, but the field office director must address the matter nonetheless.

Conclusion

The AAO withdraws the field office director's April 29, 2009 decision. The field office director should not have considered the issue of whether the beneficiary had been "abandoned" by her surviving parent, as that consideration has no relevance to this case.

The AAO also withdraws the field office director's determination that the petitioner failed to establish that the adoption is pursuant to the laws of Vietnam, as the record indicates not only that the adoption would be pursuant to the laws of Vietnam, but also that the Vietnamese government is desirous of the adoption taking place.[8]

The AAO also withdraws the field office director's determination that the petitioner failed to establish that the surviving parent is incapable of providing proper care to the beneficiary, as the most recent evidence in the file indicated that she was incapable of doing so.

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[8] Again, the AAO notes the Ministry of Justice – Adoption Department's February 11, 2009 statement that it "would like to request the US CIS Adoptions to review and approve the I-600 petition."

Beyond the decision of the field office director, the AAO finds the record of proceeding sufficient to establish that the surviving parent has irrevocably released the beneficiary for emigration and adoption.

Rather than approving the petition, the AAO remands the petition to the field office director for continued processing. The field office director may afford the petitioner reasonable time to provide evidence pertinent to the resolution of any remaining issues. The field office director shall then render a new decision based on the evidence of record as it relates to the relevant statutory and regulatory requirements for eligibility.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The field office director's April 29, 2009 decision is withdrawn. The petition is remanded to the field office director for continued processing and eventual entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.