U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 0 5 2013 OFFICE: NATIONAL BENEFIT CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO**. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, National Benefit Center (the director) denied the Form I-600, Petition to Classify Orphan as an Immediate Relative (Form I-600) and the Administrative Appeals Office (AAO) dismissed the matter on appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion to reopen will be granted. The AAO's prior decision, dated April 26, 2012, is affirmed. The underlying petition will remain denied.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i), which defines an orphan, in pertinent part, as:

> a child, under the age of sixteen at the time a petition is filed in his behalf . . . 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[.]

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

> *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.
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> *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.
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> *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.
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> *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 surrending 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.

The director denied the Form I-600 on November 9, 2011 on the basis that the petitioner had failed to establish that the beneficiary's biological mother was incapable of providing proper care to the beneficiary, consistent with the local standards in the Philippines, or that the beneficiary otherwise met the definition of an orphan. The AAO concurred in a decision dated April 26, 2012, determining that the petitioner had failed to establish that the beneficiary's biological mother was incapable of providing proper care to the beneficiary consistent with the local standards in the Philippines, and determining further that the petitioner failed to establish that her new husband was not a stepfather to the beneficiary for immigration purposes. The appeal was denied accordingly.

On motion, the petitioner asserts that the combined evidence in the record establishes that, at the time of, and subsequent to the beneficiary's adoption, the beneficiary's biological mother was incapable of providing proper care to the beneficiary consistent with local standards in the Philippines. The petitioner indicates further that Philippine law does not allow a spouse who marries a person with a child to automatically become a stepparent. Rather, the spouse must adopt the child in order to be considered a parent under Philippine law. In support of the assertions, the petitioner refers to Family Code adoption provisions in the Philippines. In addition, the petitioner indicates that the AAO should also have found that the beneficiary qualifies as an orphan due to *abandonment by both parents,* because the beneficiary was permanently separated from his biological father based on his father's death in 1994, and was permanently separated from his biological mother when she moved to Taiwan in 1996 and stopped supporting him. To support this assertion, the petitioner submits her June 2012 affidavit.

The petitioner contends on motion that the AAO erred in not finding that the beneficiary qualified as an orphan due to *abandonment by both parents,* because evidence establishes that the beneficiary was permanently separated from his biological father due to death, and from his biological mother when she moved to Taiwan in 1996 and stopped supporting him. The petitioner refers to no precedent decisions or Service policy to support her assertions. Moreover, the AAO notes that the definition contained in 8 C.F.R. 204.3(b) for *abandonment by both parents* clearly refers to two living parents. Where the beneficiary has one deceased parent, the *surviving parent* definition contained in 8 C.F.R. 204.3(b) is the relevant provision for Form I-600 eligibility purposes.

Referring to Articles 183 and 184(3)(c) of the Family Code of the Philippines, the petitioner asserts that:

> An individual who marries another individual with a child does not automatically become the stepparent of the child, but must undergo the process of adoption in order to formally adopt the child as his or her own.

Article 183 of the Family Code of the Philippines provides that:

> A person of age and in possession of full civil capacity and legal rights may adopt, provided he is in a position to support and care for his children, legitimate or illegitimate, in keeping with the means of the family. Only minors may be adopted, except in the cases when the adoption of a person of majority age is allowed in this Title. In addition, the adopter must be at least sixteen years older than the person to be adopted, unless the adopter is the parent by nature of the adopted, or is the spouse of the legitimate parent of the person to be adopted.

Article 184(3)(c) of the Family Code provides that a foreigner "who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter" may adopt.

The Family Code provisions referred to by the petitioner are general adoption laws, and do not state that an adoption must occur in order for a stepparent to have legal rights in the Philippines. Article 338(3) of the Civil Code of the Philippines (Republic Act No. 386) states that a "step-child" may be adopted by the "step-father or step-mother."

The regulation provides, in part, at 8 CFR § 204.3(b) that in order to qualify as a *surviving parent* for immigration purposes, the beneficiary cannot have acquired another parent within the meaning of section 101(b)(2) of the Act. Based on the evidence in the record, the petitioner has failed to establish that the biological mother's new husband did not become a stepparent when he and the beneficiary's biological mother married in 1999 prior to the filing of the Form I-600.

The petitioner also asserts on motion that at the time of the beneficiary's adoption, and thereafter, the beneficiary's biological mother was incapable of providing proper care to the beneficiary, consistent with the local standards in the Philippines.

The petitioner asserts in her affidavit that the beneficiary's biological mother lived and worked in Taiwan between October 1996 and 1998, and between 2002 and 2005; the biological mother did not live with, or provide financial support to the beneficiary after 1996; and the biological mother married a citizen of Taiwan, , in January 1999, but did not provide any support to the beneficiary.

In ascertaining the evidentiary weight of affidavits, the Service must determine the basis for the affiant's knowledge of the information to which she or he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The AAO finds that the petitioner's affidavit has diminished evidentiary weight.

The record fails to demonstrate that the petitioner has personal knowledge of the biological mother's residence in Taiwan, or of her financial or other circumstances in the Philippines. In addition, documentary evidence contained the record materially contradicts statements made by the petitioner with regard to the biological mother's residence in Taiwan, and her husband's Taiwanese citizenship. The marriage certificate contained in the record reflects that the beneficiary's biological mother married in the Philippines on January 14, 1999. The certificate reflects that

is a citizen of the Philippines, that he was born to parents from the Philippines, and that his residence is in the Philippines. The marriage certificate reflects further that at the time of her marriage, the beneficiary's biological mother's residence was at: " , Maricle Subd., Angeles City" in the Philippines. The record lacks documentary evidence to corroborate assertions that the beneficiary's biological mother lived in Taiwan, or that she has lived at any other address in the Philippines. Furthermore, it is noted that the petitioner states on the February 1997, Form I-130, Petition for Alien Relative filed on behalf of the beneficiary that the beneficiary resides at " Angeles City, Philippines." She also states on the Form I-600s filed on the beneficiary's behalf in December 2003 that the beneficiary resides at " Angeles City, Phil."

In visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon review of the entire record, the AAO finds that the petitioner has failed to overcome its prior determinations. Accordingly, the petitioner has failed to establish that the beneficiary meets the definition of an "orphan," as defined at section 101(b)(1)(F)(i) of the Act.

ORDER: The motion is granted. The AAO's prior decision, dated April 26, 2012, is affirmed. The underlying petition remains denied.