

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

F2

[Redacted]

DATE: **JUL 25 2012** OFFICE: NATIONAL BENEFITS CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

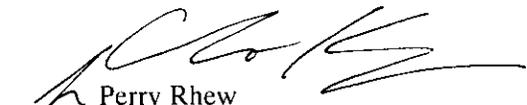
ON BEHALF OF PETITIONER:
[Redacted]

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 in accordance with the instructions on 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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The San Diego, California District Director initially approved the Petition to Classify Orphan as an Immediate Relative (Form I-600), but ultimately revoked the petition's approval after proper notice. The petitioner appealed that decision to the Administrative Appeals Office ("AAO"); however, because the appeal was untimely filed the AAO remanded the matter to the San Diego, California District Director to treat the appeal as a motion. Upon remand, the Director of the National Benefits Center ("the director")¹ issued Notices of Intent to Revoke (NOIR) the petition and ultimately revoked approval of the petition. The matter is again before the AAO on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

Applicable Law

Regarding the revocation of approved visa petitions, section 205 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1155, states, in pertinent part:

The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition[.]

The regulation at 8 C.F.R. § 205.2 governs the procedures for revoking approved visa petitions on notice, and states, in pertinent part:

(a) *General.* Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in 205.1 when the necessity for the revocation comes to the attention of this Service.

(b) *Notice of intent.* Revocation of the approval of a petition or self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.

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

(i) 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[.]

¹ As of April 1, 2010, U.S. Citizenship and Immigration Services (USCIS) centralized the filing and adjudication of orphan petitions at the National Benefits Center.

(ii) subject to the same provisos as in clause (i), a child who: (I) is a natural sibling of a child described in clause(i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative[.]

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. . . .

* * *

Desertion by both parents means that the 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.

* * *

Loss from both parents means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

* * *

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

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. . . .

Facts and Procedural History

The petitioner is a 50-year-old U.S. citizen who adopted the beneficiary in the Philippines in 2004 along with her younger siblings. The petitioner filed the Form I-600 with USCIS on February 9, 2006 and in 2008 the San Diego, California District Director initially approved the petition, which was forwarded to the U.S. Consulate in Japan. U.S. consular personnel subsequently returned the approved Form I-600 to USCIS after determining that the beneficiary was ineligible for orphan classification. USCIS subsequently revoked approval of the petition after proper notice, determining that, because the beneficiary was the legitimate child of her biological father and both biological parents relinquished their parental rights directly to the petitioner, the beneficiary was not an orphan due to the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents.

On appeal, counsel contends that the beneficiary meets the definition of an orphan as the child of a *sole parent*, as that term is defined at 8 C.F.R. § 204.3(b), because she was not legitimated by her biological father, never acquired him as a parent and because her biological mother is incapable of providing proper care to the beneficiary. Counsel claims that even if the beneficiary was legitimated under Philippine law through the marriage of her parents, she was not legitimated under U.S. law because she was not in her biological father's legal custody upon her parents' marriage, as required by section 101(b)(1)(C) of the Act. Counsel states further that the biological father cannot be considered a "parent" under section 101(b)(2) of the Act due to his abandonment of the beneficiary upon her birth.

Analysis

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, we find that the evidence in the record does not demonstrate the beneficiary's eligibility to be classified as an orphan.

Counsel states that the beneficiary was born out-of-wedlock and that a marriage between the biological parents took place after the beneficiary's birth. A copy of the beneficiary's original birth certificate² in the record indicates that the biological parents were married on May 11, 1986, more than two years prior to the beneficiary's birth on June 21, 1988. However, according to a January 7, 2009 letter that U.S. consular personnel wrote to the petitioner, the Philippine National Statistics Office (PNSO) recorded the biological parents' marriage date as June 9, 1989, which contradicts the beneficiary's original birth certificate. The petitioner has not submitted a copy of the biological parents' marriage certificate to establish the actual date of the marriage. Nevertheless, whether the marriage took place either prior to or after the beneficiary's birth, she is ineligible for classification as an orphan.

² The record also contains a second birth certificate that was issued after the beneficiary's adoption by the petitioner, which lists the petitioner and his wife as the beneficiary's biological parents.

The beneficiary is the legitimate daughter of her biological father either through her birth in wedlock, as noted on her original birth certificate, or after her birth upon her biological parents' subsequent marriage. *Family Code of the Philippines (Executive Order No. 209)*, Title VI, Chapter 4, Art. 178. Counsel claims that even if the beneficiary was legitimated under Philippine law, she was never legitimated under U.S. law because section 101(b)(1)(C) of the Act requires a child to be in the father's legal custody at the time of legitimation.³ In *Matter of Rivers*, 17 I&N Dec. 419 (BIA 1980), the Board of Immigration Appeals (BIA) held that the natural father of a child will be presumed to have had legal custody of that child at the time of legitimation, in the absence of affirmative evidence indicating otherwise. Counsel has presented no evidence that at the time of his marriage to the biological mother, the biological father did not have legal custody of the beneficiary. Counsel claims that the biological father did not have legal custody of the beneficiary because he abandoned her at birth and never resided with her. Counsel fails to acknowledge, however, that legal custody for immigration purposes is not equivalent to physical custody or joint residence. See e.g. 8 C.F.R. § 204.2(d)(2)(vii) (distinguishing between legal custody and residence for adopted children).

Counsel's alternative argument is that the biological father cannot be considered the beneficiary's parent under section 101(b)(2) of the Act because he abandoned her shortly after her birth. Section 101(b)(2) of the Act, 8 U.S.C. § 1101(b)(2), states, in pertinent part:

The term "parent", "father", or "mother" means a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in (1) above, except that, for purposes of paragraph (1)(F) . . . in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term "parent" does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

Although counsel states that the beneficiary's biological father abandoned her, he remains her *parent* as that term is defined at section 101(b)(2) of the Act. For orphan petitions filed under section 101(b)(1)(F) or (1)(G) of the Act, when a biological father has disappeared, abandoned or deserted a child, or has irrevocably in writing released a child for adoption, that father ceases to be the child's parent when: (1) the child was born out of wedlock as described at section 101(b)(1)(D) of the Act; and (2) the child was not legitimated under section 101(b)(1)(C) of the Act. As stated earlier, the evidence demonstrates that the beneficiary was legitimated under section 101(b)(1)(C) of the Act, and she therefore cannot demonstrate that her biological father ceased being her parent

³ Section 101(b)(1)(C) of the Act defines the term *child* as:

[A] child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation[.]

because he abandoned her. Accordingly, the record demonstrates that the beneficiary has two living parents and is the legitimate child of her biological father.

The beneficiary cannot be classified as an orphan as the child of a *sole parent* as that term is defined at 8 C.F.R. § 204.3(b) because she is not illegitimate and has two living parents. The record also fails to demonstrate that the beneficiary meets any of the remaining definitions of an orphan at section 101(b)(1)(F)(i) of the Act. As previously noted, the beneficiary's biological parents are alive and, according to the Form I-600 at Parts 21 and 24, the beneficiary was in the custody of and living with her biological mother when the petition was filed in 2006, nearly two years after the adoption was finalized. Thus, the beneficiary is not an orphan because of the death or disappearance of, desertion or abandonment by, or separation or loss from both of her parents.

Conclusion

Counsel states that the director's decision was arbitrary and capricious, and he misapplied the relevant statutory provisions. Counsel also states that the decision was contrary to the weight of the evidence. However, our *de novo* review of the record demonstrates that, based upon the evidence before him, the director had good and sufficient cause to revoke approval of the petition. The record as presently constituted lacks sufficient evidence to establish that the beneficiary meets the definition of an orphan at section 101(b)(1)(F)(i) of the Act. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed. Approval of the petition remains revoked.