



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



Public Copy

File: [Redacted] Office: New York Date: [Redacted]

NOV 9 2000

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

Application: 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)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF APPLICANT: [Redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Mary C. Mulrean, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The visa petition to classify the beneficiary as an immediate relative was denied by the District Director, New York, New York. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner for Examinations will be affirmed.

The Petition to Classify Orphan as an Immediate Relative (Form I-600) was properly filed on April 1, 1998. The petitioner is a 53 year-old unmarried citizen of the United States. The beneficiary, who at this time is 18 years old, was born in Maniche, Haiti, on August 20, 1982. The beneficiary's biological father, [REDACTED] and biological mother, [REDACTED] are still living. The district director denied the petition after determining that the beneficiary does not meet the statutory definition of "orphan" because the beneficiary's parents had given their consent to the adoption and therefore, have not abandoned her.

On appeal, counsel argued that the district director had ignored documentation within the record, and that the beneficiary meets the definition of an orphan pursuant to the immigration laws. Counsel also argued that the beneficiary had been abandoned by both of her parents and, in the alternative, is a child whose sole parent, the biological mother, was incapable of providing proper support and irrevocably released the beneficiary for adoption. Counsel submitted additional evidence for consideration.

The Associate Commissioner for Examinations dismissed the appeal, reasoning that the petitioner had submitted insufficient evidence to establish that the beneficiary was abandoned by her parents and had not established that the beneficiary has a sole parent. Beyond the director's decision, the Associate Commissioner noted that the adoption within Haiti was a proxy adoption and therefore not valid for immigration purposes, that there was no evidence of the petitioner's U.S. citizenship, and that the record did not contain evidence of compliance with state preadoption requirements or a current homestudy.

On motion, counsel argues that the beneficiary was not directly relinquished to the petitioner, but was abandoned in 1988 when her mother left her in the care of a third party. Counsel also argues that "the abandonment of the child by her father can be inferred" from the fact that the child was born out of wedlock and from the attestation of a third party who claims the father did not provide for the child. In the alternative, counsel argues, the beneficiary is a child whose sole parent, the mother, was incapable of providing proper care and irrevocably released the child for adoption. The petitioner also provides a copy of her naturalization certificate and her passport.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(12)(F), 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...

Counsel asserts that the district director erroneously found that the child does not qualify as an orphan because the parents consented to the adoption.

The regulation at 8 C.F.R. 204.3(b) states:

*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.

The petitioner submitted an extract from the minutes of the Clerk of the Court of the Peace of Cayes dated September 19, 1990. According to this extract, the beneficiary's biological mother and biological father provided their consent to the adoption of the beneficiary by the petitioner. The above regulations state that a

relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Accordingly, the petitioner has not established that the beneficiary was abandoned by her parents within the meaning of 8 C.F.R. 204.3(b). For this reason, the petition may not be approved.

Counsel argues that the beneficiary's parents abandoned her in 1988, when her mother gave her to [REDACTED] for placement within the household of a third party, [REDACTED]. As stated previously, 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. Although counsel claims that the beneficiary was abandoned to [REDACTED], and [REDACTED] has submitted an affidavit indicating that she consented to the adoption, the record of proceeding, as it is presently constituted, does not contain evidence that [REDACTED] has custody of the beneficiary or that she is authorized under the child welfare laws of Haiti to consent to the beneficiary's adoption.

On motion, counsel claims that the beneficiary was abandoned to [REDACTED] in 1988 with no expectation that she would be adopted. Counsel argues that since the parents did not relinquish the child to a third party for custodial care in anticipation of, or preparation for adoption, the beneficiary has been abandoned by her parents in 1988 within the meaning of 8 C.F.R. 204.3(b). However, as stated above, the adoption decree indicates that the beneficiary's parents relinquished her directly to the petitioner. While the child may have been in the care of [REDACTED] it appears that the parents have retained legal custody of the child and only relinquished her to the petitioner. The petitioner has not established on motion that the beneficiary has been abandoned.

Counsel argued on appeal, and argues again on motion, that the beneficiary may be considered to be a child whose sole parent, the biological mother, was incapable of providing proper care and irrevocably released the child for adoption.

8 C.F.R. 204.3(b) further states that:

*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 if 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.

The Presidential Decree of January 27, 1959, abolished all legal distinctions for Haitian children whether born in or out of wedlock except for the offspring of adulterous or incestuous relations. In Matter of Richard, 18 I&N Dec. 208 (BIA 1982), the Board recognized the effect of the decree and held that persons born out of wedlock in Haiti subsequent to January 27, 1959, and acknowledged by their natural father are deemed legitimate children under section 101(b)(1)(A) of the Act. See Matter of Cherismo, 19 I&N Dec. 25 (BIA 1984).

As noted above, on September 19, 1990, the biological father appeared before the Clerk of the Court of the Peace of Cayes, declared himself to be the father of the beneficiary, and gave his consent to the beneficiary's adoption. Counsel argues that the biological father's consent to the adoption constitutes his abandonment of the child and renders the biological mother the sole parent. However, as stated above, the sole parent definition does not apply to children born in countries which make no distinction between children born in or out of wedlock.

In this case, the petitioner has not shown that the beneficiary is illegitimate. The beneficiary's biological father has been identified in the record. The record does not establish that the biological father had disappeared, abandoned or deserted the child. In fact, the biological father appeared before the Haitian court in his capacity as father of the child in order to agree to the adoption.

The Associate Commissioner stated that counsel argued on appeal that the biological father's consent to the adoption constitutes his abandonment of the child and renders the biological mother the sole parent. On motion, counsel denies having made this specific argument, claiming that "this statement confuses the issue of abandonment." It is noted that counsel had argued on appeal that the father irrevocably released the child by consenting to the adoption, and is "not to be regarded as a parent of the child." Accordingly, counsel argues, the child is to be regarded as having a sole parent: the mother.

On motion, counsel notes that in 1995 Congress amended the definition of a "child" within section 101(b) of the Immigration and Nationality Act to reference children born "in wedlock" and

"out of wedlock" rather than children who are "legitimate" or "illegitimate." Counsel argues that the Service's regulatory definition of a sole parent is void because it still refers to "legitimate" and "illegitimate" children and is therefore inconsistent with the Act. However, the record still does not establish that the beneficiary is the child of a sole parent.

The record does not demonstrate that the father has severed all parental ties, rights, duties and obligations to the beneficiary. As stated above, the beneficiary's father asserted his rights as father of the beneficiary when he agreed to her adoption.

Further, the record does not establish that the father released the beneficiary for adoption and emigration such that the beneficiary's mother could be considered a sole parent. The beneficiary's father released the beneficiary for adoption at the same time that the beneficiary's mother agreed to the adoption. Since the beneficiary's parents simultaneously consented to "renounce this child and accept...the said adoption," the mother has never been the sole parent in custody of the child.

In this case, the petitioner has not shown that the beneficiary is illegitimate. The beneficiary's biological father has been identified in the record and has acknowledged the beneficiary to be his daughter. The record does not establish that the biological father had disappeared, abandoned or deserted the child. Accordingly, the petitioner has not established that the beneficiary has a sole parent.

Beyond the decision of the district director, the Associate Commissioner found that the adoption decree shows that it was a proxy adoption where the petitioner was represented by her attorney, [REDACTED] for the adoption of the beneficiary, [REDACTED]

[REDACTED] The aforementioned regulation states specifically that if the married petitioner and spouse or the unmarried petitioner did not personally see and observe the child prior to or during the adoption proceedings abroad, the petitioner must submit a statement by an official of the state in which the child will reside that readoption is permissible in that state, in addition to evidence of compliance with the preadoption requirements, if any, of that state.

On motion, the petitioner submits a copy of her passport showing entries into Haiti in April of 1988 and January of 1989, and a personal statement in which she claims that she visited the beneficiary in 1988 and 1989 prior to the adoption proceedings. Accordingly, the petitioner has submitted sufficient evidence to establish that she personally saw and observed the child prior to the adoption proceedings abroad, and has overcome this portion of the Associate Commissioner's decision.

Finally, the record does not contain a current homestudy. On motion counsel notes that the Associate Commissioner had found the homestudy was not contained in the record, but does not submit a current homestudy. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, *supra* at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, *supra* at 110.

The burden of proof is on the petitioner to establish the beneficiary's eligibility for classification as an orphan. Matter of Annang, 14 I&N Dec. 502 (BIA 1973); Matter of Brantigan, 11 I&N 493 (BIA 1966); Matter of Yee, 11 I&N Dec. 27 (BIA 1964); Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the district director will not be disturbed.

**ORDER:** The decision of the Associate Commissioner dated May 17, 2000, is affirmed.