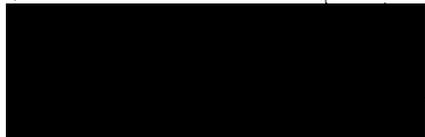




U.S. Department of Justice
Immigration and Naturalization Service

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



File: [Redacted] Office: New York Date: OCT 31 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)

IN BEHALF OF APPLICANT: [Redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Terrence M. O'Reilly, 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. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The Petition to Classify Orphan as an Immediate Relative (Form I-600) was properly filed on June 19, 1998. The petitioner is a 57 year-old married citizen of the United States, who had one previous marriage. The beneficiary, who at this time is nine years old, was born in Port-au-Prince, Haiti, on December 7, 1990. The beneficiary's biological father, [REDACTED] and biological mother, [REDACTED] are still living. The record contains an English translation of an adoption certificate which indicates that the beneficiary was adopted in Haiti on May 17, 1994. The district director denied the petition after determining that the beneficiary does not meet the statutory definition of "orphan" since she has two living, legal parents who have not abandoned her.

On appeal, counsel argues that since the natural father has irrevocably released the beneficiary for emigration and adoption, the natural mother is a sole parent as defined by the statute.

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

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

According to the English translation of the beneficiary's birth certificate, on August 3, 1992, the beneficiary's biological father appeared before the Municipal Magistrate of Southern Port-Au-Prince, and declared himself to be the biological father of the beneficiary. Further, on February 18, 1993, the English translation of the extract from the minutes of the Clerk of the Court, Eastern Port-Au-Prince, states that the biological father appeared before the Judge of Eastern Port-Au-Prince, declared himself to be the father of the beneficiary, and gave his consent to the beneficiary's adoption.

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.

Counsel argues that the beneficiary's biological father's consent to the emigration and adoption of the beneficiary 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. Therefore, the beneficiary has two living, legal parents.

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 English translation of the extract from the minutes of the Clerk of the Court, Eastern Port-Au-Prince, dated February 18, 1993 states that 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.

Further, 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. The record indicates that the petitioner placed the beneficiary in the care of [REDACTED] since 1993. The record of proceeding as it is presently constituted does not contain authorization that [REDACTED] can act in such a capacity under the child welfare laws of Haiti. Absent documentary evidence that [REDACTED] can act in such a capacity under the child welfare laws of Haiti, the beneficiary cannot be considered to be abandoned. Consequently, the petitioner has not established that the beneficiary is an "orphan" within the meaning of section 101(b)(1)(F) of the Act.

Beyond the decision of the district director, the petition cannot be approved for other reasons. The record of proceeding does not contain proof of termination of the petitioner's spouse's first marriage, the beneficiary's birth certificate, and the English translation of the petitioner's divorce decree. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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 appeal is dismissed.