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U.S. Department of Justice
Immigration and Naturalization Service

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

Date:

AUG 3 2001



Public Copy

File:



Office: BALTIMORE DISTRICT OFFICE

IN RE: Petitioner:
Beneficiary:



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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Roserly
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The District Director, Baltimore, Maryland, denied the immigrant visa petition to classify the beneficiary as an immediate relative. The matter is now before the Associate Commissioner for Examinations on appeal. The petition will be remanded to the director for entry of a new decision consistent with the foregoing.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the Service on April 21, 1999. Currently, the petitioner is a 41-year-old married citizen of the United States and the beneficiary is a 3-year-old citizen of Peru. The record reflects that the petitioner and his spouse adopted the beneficiary in Peru in November of 2000.

The director denied the petition because (1) the petitioner failed to submit a birth certificate for the beneficiary, (2) the petitioner failed to submit evidence of his and his wife's adoption of the beneficiary, and (3) the petitioner failed to show that the beneficiary met the definition of an orphan.

On appeal, the petitioner submits the adoption decree of the beneficiary with an English translation.

Pursuant to 8 C.F.R. 103.3(a)(2)(i), an affected party has 30 days after service of a decision to file an appeal with the office that made the unfavorable decision. The record reflects that on September 21, 2000, the director sent his decision to the petitioner at the petitioner's address of record. The director received the petitioner's appeal 144 days later on February 21, 2001. Thus, the appeal was untimely filed.

The regulation at 8 C.F.R. 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. 103.2(a)(2)(v)(B)(2), however, states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

8 C.F.R. 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceedings, supported by affidavits or other documentary evidence. 8 C.F.R. 103.5(a)(3) requires that a motion to reconsider state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On appeal, the petitioner submits a copy of the beneficiary's

adoption decree with an English translation. As the date of the adoption (November of 2000) occurred subsequent to the denial of the petition, the petitioner presents new facts that the director should consider on motion to reopen. Therefore, we are remanding this case to the director to treat the appeal as a motion.

We note that the record reflects that a copy of the beneficiary's birth certificate with a certified English translation was in the Service's possession at the time the petition was denied even though the petition was denied, in part, due to the lack of the beneficiary's birth certificate. We also note that on appeal, the petitioner submits an English translation of the adoption decree; however, this translation is not certified as required by 8 C.F.R. 204.1(f)(3), which states that "foreign language documents must be accompanied by an English translation which has been certified by a competent translator."

The director may request any additional evidence deemed necessary to assist him with the determination. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The petition is remanded to the director for entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.