U.S. Department of Justice

Immigration and Naturalization Service

F1 Public Copy

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

[redacted]

File: [redacted] Office: PHILADELPHIA, PA Date: 05 DEC 2001

IN RE: Petitioner:
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:

SELF-REPRESENTED

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Philadelphia, Pennsylvania, denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a 52-year-old married citizen of the United States. The beneficiary is 16 years old at the present time and was born in Kagoshima City, Japan on December 7, 1984. The record indicates that the petitioner and his spouse have not adopted the beneficiary.

The director denied the petition after determining that the petitioner filed the petition after the beneficiary reached the age of sixteen. The director further noted that even if the petition were filed prior to the beneficiary's sixteenth birthday, the petition could not be approved because the beneficiary did not meet the statutory definition of "orphan."

On appeal, the petitioner submits a statement and additional evidence. The petitioner asserts that he did not file the petition late and he requests that the Administrative Appeals Office review the merits of the petition according to the spirit of the law rather than reviewing it to the letter of the law.

I. FILING DATE OF THE PETITION

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 filing date of the petition is the issue that is in dispute between the petitioner and the director. According to the director, the Service considers the petition to have been received on December 11, 2000. The beneficiary attained the age of sixteen on December 7, 2000, approximately 4 days prior to the filing of the petition; therefore, the petition was not filed at the time the beneficiary was under the age of sixteen, as the statute requires. The director, therefore, denied the petition.

The petitioner claims that he filed the I-600 petition with the Vermont Service Center prior to the beneficiary's sixteenth birthday. The petitioner states that even though the filing of

the petition with the Service Center was incorrect, he should not be penalized for this error, as the instructions to the Form I-600 did not clearly distinguish between a district office and a Service Center. As presently constituted, the record does not support the petitioner's statements that the petition was timely filed pursuant to instructions on the I-600 petition and 8 C.F.R. 204.1(d)(1) and (2), and (e)(1).

The record contains a copy of the envelope for the I-600 petition filing that the petitioner originally sent to the Vermont Service Center. The copy shows that the Service Center date-stamped the Form I-600 as received on December 4, 2000. The Vermont Service Center returned the I-600 petition filing to the petitioner on December 11, 2000, instructing him to resubmit the package to the Philadelphia District Office. The Philadelphia District Office received the I-600 petition filing on December 22, 2000.

8 C.F.R. 204.1 states, in pertinent part:

> (d) *Proper filing*. A petition shall be considered properly filed if:
>
> (1) It is signed by the petitioner, and
>
> (2) A fee has been received by the Service office or United States Consular office having jurisdiction. * * *
>
> (e) *Jurisdiction*.
>
> (1) *Petitioner or self-petitioner residing in the United States*. The petition or self-petition must be filed with the Service office having jurisdiction over the place where the petitioner or self-petitioner is residing. * * *

According to the record, the petitioner did not properly file the I-600 petition until the Philadelphia District Office received it on December 22, 2000, even though the petitioner initially filed the petition with the Vermont Service Center. Although the petitioner maintains that the instructions to the Form I-600 were not clear, both the instructions to the form and the regulation at 8 C.F.R. 204.1(e) specifically state that the petition must be filed with the Service office having jurisdiction over the petitioner's place of residence. A Service office is a District Office, not a Service Center. Thus, as the Philadelphia District Office did not receive the I-600 petition filing until 15 days after the beneficiary's sixteenth birthday, which occurred on December 7, 2000, the petition was not timely filed.

The petitioner has failed, therefore, to overcome the director's objection to the approval of the petition based upon this one

issue. Nevertheless, even if the petitioner had persuasively established that he filed the I-600 petition prior to the beneficiary's sixteenth birthday, the petition could not be approved for the additional reason that the director raised in the denial letter.

II. DEFINITION OF ORPHAN

The director stated in the denial letter that even if the petition had been properly filed, the petition could not be approved because the beneficiary did not meet the definition of an orphan.

The petitioner claimed in the petition filing that the beneficiary is the child of a sole parent (the biological mother), who is incapable of providing the beneficiary with proper care according to the laws of Japan. On March 7, 2001, the director requested that the petitioner provide additional information regarding the petitioner's claim that the biological mother was a sole parent because the evidence that the petitioner had already submitted indicated that the beneficiary's parents were married at the time of the beneficiary's birth.

In response to the director's request for additional information, the petitioner stated that he had already submitted evidence to show that the biological mother was divorced from the biological father, which made the biological mother the "single lawful parent" of the beneficiary.

The director denied the petition on April 18, 2001, stating that there was no evidence to conclude that the beneficiary was illegitimate and, therefore, the son of a sole parent, as the term *sole parent* is defined in 8 C.F.R. 204.3(b).

On appeal, the petitioner makes several statements concerning this issue. First, the petitioner states that the biological father was always a nominal father to the beneficiary. Second, the petitioner claims that the biological father relinquished his parental rights over the beneficiary when the beneficiary was seven years old. Third, the petitioner states that the biological mother is the "single legal holder of parental rights" over the beneficiary according to Japanese law. Fourth and finally, the petitioner states that the biological mother is incapable of providing the beneficiary proper care according to the laws of Japan. The petitioner explains that the biological mother's salary is less than the salary of an average Japanese national, the beneficiary receives public assistance due to his mother's small income, and the annual tuition and living expenses for the beneficiary's brother takes away funds that could go towards caring for the beneficiary.

The petitioner maintains that the biological mother is a sole parent; however, while the evidence in the record indicates that

the biological parent is a single mother, it does not establish that she is a *sole parent*, as that term is defined in the regulation.

As previously stated, section 101(b)(1)(F) of the Act defines an orphan as a child whose sole or surviving parent is incapable of providing him or her with proper care and has in writing irrevocably released the child for emigration and adoption.

Even though a mother may be a single parent, she may not meet the definition of either a *sole parent* or a *surviving parent* as those terms are defined in 8 C.F.R. 204.3(b).

> *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.
>
> *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. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.
> (Emphasis added.)

The petitioner does not claim that the biological mother is a surviving parent; the biological father is still alive. The petitioner claims that the biological mother is a sole parent. However, according to the regulation cited above, only a mother of an illegitimate child who has not acquired another parent can be classified as a sole parent.

An illegitimate child is a child who is born at a time when his parents, though alive, are not married to each other. Black's Law Dictionary (Fifth Edition, West Publishing Company, 1979). According to the record, the beneficiary's mother and father were married at the time the beneficiary was born. Therefore, the beneficiary is not an illegitimate child even though his biological father and biological mother divorced and the biological father never took an interest in his upbringing. The

regulation clearly stipulates that a sole parent can only be a mother of an illegitimate child, not simply a mother who is raising her child(ren) alone. As the petitioner is unable to establish that the biological mother is a sole parent, the petitioner is also unable to establish that the beneficiary is an orphan.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.