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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

Identity [illegible] to prevent clearly [illegible] invasion of personal privacy

[redacted]

File: [redacted] Office: SAN ANTONIO, TX Date: 2 8 [illegible]

IN RE: Petitioner: [redacted]
Beneficiary:

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

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, San Antonio, Texas, denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the matter remanded to him for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on March 30, 2000. The petitioner is a 44-year-old married citizen of the United States. The beneficiary is 17 years old at the present time and was born in Bharuch, Gujarat, India on August 27, 1984. The record indicates that the petitioner and his spouse have not yet adopted the beneficiary.

The director denied the petition after determining that the beneficiary did not meet the statutory definition of "orphan."

On appeal, counsel submits a brief. Counsel asserts that the director erred in denying the petition based upon a misapplication of the governing regulations.

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 record of proceeding contains the petitioner's home study report, the Form I-600 petition and accompanying documentation, the director's March 31, 2000 request for additional evidence, counsel's April 6, 2000 response to the director's request, the director's March 29, 2001 denial letter, and evidence submitted on appeal.

On March 31, 2000, the director requested that the petitioner submit additional information from the "surviving parent." The director asked the surviving parent to provide specific information regarding whether he placed the beneficiary up for adoption. The director also noted that the petitioner should read the definition *of abandonment by both parents* found in 8 C.F.R 204.3(b) and Matter of Del Conte, 10 I&N Dec. 761, (DD 1964) before preparing a response.

In response to the director's request for additional information, counsel stated that the petitioner had previously submitted an affidavit from the beneficiary's father who stated that he was incapable of providing proper care for the beneficiary based upon

his medical condition. Counsel further noted that the petitioner also previously submitted a notarized relinquishment of parental rights from the father, as well as a letter from the hostel where the beneficiary was currently residing. Counsel noted that as the surviving parent, the biological father had sufficiently established that he was unable to provide proper care for the beneficiary as the regulation at §204.3(b) required.

On March 29, 2001, the director denied the petition. In the denial letter, the director referred to the biological father's affidavit, in which he stated that that he "willingly giving [sic] consent to emigration and adoption of my children [redacted] and [redacted] by the petitioner and the petitioner's wife. The director found that this statement showed that the beneficiary was not abandoned because the definition of *abandonment by both parents* found at 8 C.F.R. 204.3(b) prohibits biological parents from relinquishing a child to a specific adoptive parent or for a specific adoption.

On appeal, counsel notes that the director erred in applying the law to the facts in this case:

> The regulations clearly distinguish between situations where the child is an orphan because both parents have abandoned or deserted the child, or died, and a situation where one parent is alive and is incapable of providing support. In the latter case, abandonment is not even an applicable definition and is not involved in the analysis. If there is one surviving parent, the *only* requirements as set forth in the statute and regulations, are that the surviving parent be incapable of providing proper care and irrevocably in writing release the child for adoption. . .

Counsel maintains that the evidence shows that the biological father is unable to provide for the beneficiary's basic needs. As the record is presently constituted, the evidence does support this conclusion. Nevertheless, due to an error by the director in analyzing the facts in the present petition, the case will be remanded to the director for entry of a new decision consistent with the following discussion.

According to section 101(b)(1)(F) of the Act, an orphan may be a child who has either been abandoned by both parents <u>or</u> whose surviving parent is incapable of providing him or her with proper care and has in writing irrevocably released the child for emigration and adoption. The record clearly reflects that prior to the filing of the petition, the biological mother died, leaving the biological father as the surviving parent. Despite this fact, however, the director concluded that the beneficiary was not an orphan because he was not abandoned by both parents. The director cited the definition of *abandonment by both parents* found in 8 C.F.R. 204.3(b), as the basis for his denial.

Where it is established that the beneficiary has only one surviving parent, the definition of *abandonment by both parents* found at 8 C.F.R. 204.3(b) should not be referred to or relied upon in the adjudication of the petition. Rather the definitions *of surviving parent* and *incapable of providing proper care* are the relevant definitions in 8 C.F.R. 204.3(b). These definitions state that:

> *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.
>
> *Incapable of providing proper care* means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the *foreign sending country*.

Neither definition cited above specifically prohibits a surviving parent from relinquishing or releasing his or her child to a specific individual in preparation for an adoption or for a specific adoption. Therefore, evidence in the record, which shows that a surviving parent has relinquished his or her parental rights to a specific person or for a specific adoption should not bear on the director's determination of whether the child, who has only one surviving parent, may be classified as an orphan.

Accordingly, even though counsel is correct in stating that the director erroneously based his denial on the petitioner's failure to show that the beneficiary was abandoned by both parents, the petition may not be approved at the present time.

8 C.F.R. 204.3(d)(1)(iii)(C) states that if the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, a petitioner must present evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption. Additionally, § 204.3(d)(1)(iv) requires the adoptive parents to submit evidence of adoption abroad or evidence that they have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country.

The record contains sufficient evidence that the biological father, due to his medical condition, is incapable of providing proper care to the beneficiary and that he has released the beneficiary for emigration and adoption. No evidence, however, has been presented to establish that the petitioner and his spouse have, or a person or entity working on their behalf has, custody of the beneficiary for emigration and adoption in accordance with the laws of India (the foreign-sending country).

According to the United States Department of State:[1]

> Hindus may adopt a child pursuant to the Hindu Adoptions and Maintenance Act LXXVIII of 1956.
>
> Indian law has no provisions for foreigners to adopt Indian children, but under the Guardian and Wards Act of 1890, foreigners may petition an Indian District Court for legal custody of a child to be taken abroad for adoption. Following a 1984 Indian Supreme Court decision, non-Indians are required to work through an adoption agency in their home country that is licensed in accordance with local law and appears on a list of agencies approved by the Indian government. Only an Indian agency recognized and listed by the Indian Government may make children available for adoption by foreigners.

The record contains a copy of a Certificate of Judge, the contents of which indicate that the biological father appeared before the judge to terminate his parental rights. The Certificate does not indicate that the petitioner and his spouse have, or a person or entity working on their behalf has, custody of the beneficiary. There is also no evidence that this Certificate was issued as a result of a petition before the Indian District Court for legal custody of the beneficiary in order for the petitioner and his spouse to take the beneficiary to the United States for adoption.

Accordingly, the director's decision will be withdrawn and the case remanded to him so that he may review the record as it is presently constituted and request any additional evidence deemed necessary to assist him in determining whether the criteria outlined in 8 C.F.R. 204.3(d)(1) have been met. Specifically, the director should provide the petitioner an opportunity to submit evidence that the petitioner and his spouse have, or a person or entity working on their behalf has, custody of the beneficiary for emigration and adoption in accordance with the laws of India. The director may request any additional evidence deemed necessary to assist him with his 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.

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[1] General information on international adoptions as well as country-specific information may be found at the Department of State's website at www.state.gov. At the home page click to "Children's Services."