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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

Date: NOV 29 2001

[redacted]

File: [redacted] Office: HO CHI MINH CITY, VIETNAM

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)

IN BEHALF OF APPLICANT:

[redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge (OIC), Ho Chi Minh City, denied the visa petition to classify the beneficiary as an immediate relative, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the OIC on January 12, 2001. The petitioner is a 45-year-old married citizen of the United States. The beneficiary is one year old at the present time and was born in Ho Chi Minh City, Vietnam on September 5, 2000. The record reflects that the petitioner completed the Vietnamese adoption procedures on January 10, 2001.

The OIC denied the petition after determining that the adoption was invalid, as it was "fraudulently conducted by and documented in the name of a woman other than the true mother." Through an investigation, the OIC determined that the official adoption papers had been executed in the name of the birth mother's sister. Accordingly, the OIC determined that there was no valid adoption and that the beneficiary did not qualify under the definition of "child" at section 101(b)(1)(F) of the Immigration and Nationality Act (the Act). The OIC also determined that the beneficiary's biological mother sold the beneficiary to a Vietnamese adoption facilitator, Asian Orphans of Hope, in violation of 8 C.F.R. 204.3(i).

On appeal, counsel submits a brief and additional evidence. The petitioner does not contest the OIC's finding that the adoption documents were executed in the name of the birth mother's sister. However, counsel asserts that there was no fraud and that the adoption remains valid under Vietnamese law. Regarding the alleged "baby buying," counsel asserts in part that the OIC's decision was improper as it was not based on evidence contained in the record of proceeding.

In pertinent part, section 101(b)(1)(F) of the Act defines an orphan 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; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption

> proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence . . . .

The first issue in this matter is whether the overseas adoption is valid for immigration purposes.

As required by 8 C.F.R. 204.3(d)(1)(iv), the petitioner submitted evidence of the adoption process. These documents included the beneficiary's birth certificate, an Application for Voluntary Hand-Over of Child to Foreigners, a health certificate, an Application for Certification of No Marriage Registration, a Decision on Adoption, and the Proces-Verbal on Adoption, which documents the finalized adoption and the exchange of the child. After the OIC initiated the investigation, the petitioner also submitted an Application for Certification as Biological Mother, whereby the local People's Committee certified that [redacted] also known as Chi" was the birthmother of the beneficiary. This document appears to have been submitted by the petitioner in an attempt to establish that the birth mother and her sister are the same person. All of the relevant adoption documents name [redacted] as the natural mother of the beneficiary. All of the documents were signed by an individual using the name of "Loan" or [redacted] As conceded by the petitioner, the birth mother of the beneficiary is [redacted]

In the notice of intent to deny, the OIC described the investigation which revealed the misrepresentation of the birth mother's identity. According to the OIC, a Foreign Service National investigator, under the supervision of a Service officer, interviewed the birth mother's neighbors, sister, and other relatives. The investigation revealed that [redacted] the natural mother of the beneficiary . . . . Various relatives and neighbors attested to this fact when interviewed by INS staff in addition to [redacted] Loan herself. Furthermore, it has been determined that [redacted] Chi, the sister of [redacted] Loan, is the beneficiary's mother." The OIC stated that when the investigator visited the residence of [redacted] Loan, she "freely admitted that her sister [redacted] Chi is the beneficiary's natural mother, and confirmed that she has not given birth in the past four years." The OIC gave the petitioner two extensions, for a total of ninety days, to respond to the notice of intent to deny.

In response, the petitioner conceded that the birth mother had used the identity of her sister to register the birth and to effect the adoption. Counsel asserted that, under United States law, the beneficiary continued to qualify for orphan classification under section 101(b)(1)(F) of the Act, as the

beneficiary had been abandoned by his "sole parent" who is incapable of providing the proper care and who has irrevocably released the child for adoption and emigration. Counsel also claimed that "[t]here is no further requirement in the law that the name of the person who signed the Vietnamese adoption papers be the exact same name as that of the sole parent." As an example, counsel pointed to the adoptions that occur through orphanages, which act as a third-party intermediary between the birth mother and the adoptive parents. In support of these claims, the petitioner submitted a number of sworn affidavits and other documentary evidence. The evidence included a statement from the birth mother, who explained that she had lost her identification card and borrowed her younger sister's identification in order to facilitate the adoption.

The OIC denied the petition on June 5, 2001. The OIC rejected counsel's comparison of the adoption to those adoptions that occur through intermediaries, such as orphanages. The OIC observed that "[t]he applicable requirement for a legal adoption according to both U.S. and Vietnamese laws and regulations is that the party with legal custody of the child sign all adoption documents, including the final relinquishment decree." The OIC emphasized that, for purposes of United States immigration law, the sole parent must sign the relinquishment documents. In the present case, the OIC determined that the "sister of the natural mother committed fraud by registering the birth of the Beneficiary as her natural child."

On appeal, counsel asserts that the birth mother signed the necessary adoption documents and contests the claim that the birthmother committed fraud. Counsel claims that the OIC did not meet the "burden of proving that the birthmother did intend to deceive someone and that a legal injury resulted." Citing an unpublished decision of the Board of Immigration Appeals, counsel further asserts that the birthmother's misrepresentation is not material to the present petition and that it should not result in the denial of the petition. The petitioner also submitted a memorandum from a Vietnamese law firm, copies of various articles of Vietnamese family law, and a copy of "Resolution No. 35/20000/QHIO of June 9, 2000 on the Implementation of the Marriage and Family Law."

Regarding the question of Vietnamese law on adoption, the petitioner submits a legal opinion from the law firm of Vilaf-Hong Duc, of Ho Chi Minh City, Vietnam. The memorandum does not cite or quote the applicable foreign law but merely states that "[w]e have examined a copy of the Decision and of the documents listed in the Schedule hereto (the "Documents") and all Vietnamese laws and regulations which we considered necessary . . . ." Based on the affidavit of the birthmother, the legal opinion accepts the assertion that the birthmother personally signed the adoption documents in the name of her sister, rather than presuming that

the documents were signed by the birth mother's sister. Regarding the possibility of correcting the adoption, the opinion states:

> Vietnamese law does not contemplate the procedures for correction of a birthmother's name and her relevant information in an adoption. The legal consequences for using another's identity in adoption procedures is unclear. In that context, we have been verbally advised by relevant government authorities that an effort to redo the adoption papers to correct the birth mother's information is frivolous and may take probably one year or longer, if possible at all.

More importantly, regarding the overall validity of the adoption under Vietnamese law, the opinion speculates that the legal consequences are "unclear" and "uncertain":

> Vietnamese law requires that the Adopted Child's birth parents, guardian or the person who rears the Adopted Child consent to the Adoption. There is no further guidance on this issue. The legal consequence of a lack of consent or false consent is unclear. The People's Committee may reverse an adoption upon a request by the persons who were deprived of the right to consent. Its interpretation in the case that the real birth mother executed the documents using another's identity is uncertain.

Upon careful review of the evidence and the foreign law, the Vietnamese adoption documents are found to be void under Vietnamese law, facially void, and void for the purpose of United States immigration law. To be recognized for immigration purposes, an adoption occurring abroad must conform with and be recognized by the applicable law of the jurisdiction where it occurred. Matter of Khatoon, 19 I&N Dec. 153 (BIA 1984); Matter of Mendoza, 18 I&N Dec. 66 (BIA 1981). If a foreign country has a legal procedure for adoption, the petitioner must prove that the adoption met those requirements. Mila v. INS, 678 F.2d 123 (10th Cir. 1982), cert. denied 459 U.S. 1104 (1983).

First and fundamentally, the petitioner has not met her burden of establishing that the adoption is valid under Vietnamese law. In her brief, counsel challenges the OIC's decision by observing that "the OIC fails to cite the law or regulation" in support of his conclusion that Vietnamese law requires "that the name of the person who signed the Vietnamese adoption papers be the exact same name of the adoption papers." On appeal, it must be noted that both counsel and the petitioner's Vietnamese attorney fail to cite any Vietnamese law or regulation in support of their claim that the adoption is valid. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA

1980). Instead, the petitioner has submitted a memorandum on Vietnamese law which states that the legal consequences of the birthmother's misrepresentation are "uncertain" and "unclear." Such conclusions fall far short of establishing that the adoption is valid under Vietnamese law. In immigration proceedings, the law of a foreign country is a question of fact which must be proven by the petitioner if she relies on it to establish eligibility for an immigration benefit. Matter of Annang, 14 I&N Dec. 502 (BIA 1973). As previously noted, the petitioner carries the burden of proving that the adoption satisfies all foreign legal requirements. Mila v. INS, supra. In the present case, the petitioner has not satisfied this burden.

In addition, the adoption documents are found to be invalid on their face, as they were not executed in the name of the beneficiary's natural mother. Based on the submitted adoption documents, the Service cannot determine whether the birth mother gave her consent to the adoption. Contrary to counsel's claims, the Service is unable to conclude that the birth mother personally signed the adoption documents. In his decision, the OIC noted that the investigation revealed that the adoption documents had been "executed by someone other than the natural mother." The OIC also stated that "[w]hen INS staff asked [the birth mother's sister] why she had registered herself as the beneficiary's natural mother, she stated she had done so at the request of her sister Chi." Furthermore, it is noted that the local People's Committee certified that the adoption documents were signed by [redacted] Loan, the birth mother's sister.

On appeal, counsel asserts that the birth mother signed the required legal documents, and that the use of her sister's identity does not affect the validity of the adoption. In support of this claim, counsel misquotes the OIC's decision. In her appellate brief, counsel quoted the OIC's decision as stating:

> INS staff was then directed to Chi's residence where they met with a woman whom neighbors identified as [redacted] Chi. [Sentence deleted in counsel's brief.] This woman told INS staff that she is the natural mother of [redacted] (the beneficiary) and that she had relinquished her son for adoption by foreigners without compensation.

Counsel fails to include the critical second sentence of the quoted paragraph: "This woman initially stated that her name is [redacted] Chi however she recanted during the course of the interview, claiming that she is actually [redacted] Loan." Based on the misquoted passage, counsel claims that "the OIC has never challenged the accuracy of this statement or otherwise questioned the fact that Ms. Chi is the birthmother of the Beneficiary." Counsel continues to assert that the birth mother was physically present at the adoption and signed all of the documents pertaining

to her abandonment of the beneficiary. In support of this claim, the petitioner submits unsubstantiated affidavits and a series of photographs of the adoption ceremony, which are devoid of any information which would establish the identity of the present parties. The petitioner also submitted a "Certificate of DNA Examination," which concludes that [redacted] Chi, [redacted] Loan, and the beneficiary "have a consanguineous relationship (with a degree of accuracy is 99.84% [sic])." Contrary to counsel's claims, the document does not establish that [redacted] Chi is the birth mother of the beneficiary, but rather that the three are of the same lineage or related by blood.

The submitted evidence does not establish that the birth mother signed the legal documents related to the adoption. The submitted evidence leads the Service to conclude that the adoption documents were either forged in the name of the birth mother's sister or signed by the sister herself. Regardless of either conclusion, the signatures do not have legal effect for purpose of this immigration proceeding as they do not represent the legal name or mark of the beneficiary's birth mother. As noted by both the OIC and the petitioner's Vietnamese attorney, Vietnamese law requires the consent of the adopted child's parents, guardian, or the person who rears the child. Based on the signed documents, the Service cannot determine whether the birth mother gave her consent to the adoption. Generally, a party faces a significant credibility problem if he or she would rely on a forged or false signature to establish the identity of the signor. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, a review of the basic legal requirements for this visa petition discredits counsel's claim that the misrepresentation of the birth mother's identity is not relevant to the current proceeding. For United States immigration purposes, the false identity of the birth mother prevents the Service from making critical determinations regarding the eligibility of the beneficiary under section 101(b)(1)(F) of the Act.

First, based on the submitted documents, the Service cannot determine whether the birth mother is the sole parent. Pursuant to section 101(b)(1)(F) of the Act, the petitioner must establish that the beneficiary "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." On the Form I-600, the petitioner indicated that the beneficiary is an orphan because he "has only one parent who is the sole or

surviving parent." In order to establish that the birth mother is the sole parent of the beneficiary, the petitioner submitted a document titled "Application for Certification of No Marriage Registration," which was executed in the name of the birth mother's sister. Based on this application, the Chairman of the People's Committee in Ho Chi Minh City, Vietnam, certified that the applicant had never registered to marry in that locality. However, after the OIC's investigation revealed the birth mother's misrepresentation, the petitioner submitted an affidavit from the birth mother which revealed that she has been married for ten years and that she is separated from her husband. Although the birth mother stated that she was married without a marriage certificate, that her "current husband is not the [beneficiary's] father," and that she does not remember the natural father's family name or his "native place," no evidence was submitted to establish these claims. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Instead, the evidence indicates that the beneficiary was born in wedlock and that the birth mother is not the sole parent, contrary to the definition of orphan at section 101(b)(1)(F) of the Act. But for the misrepresentation of the birth mother's name on the documents, the registration of the beneficiary's birth and the filing of the adoption documents might have revealed that the birth mother was not the sole parent.

Furthermore, the Service is unable to determine whether the birth mother irrevocably released the beneficiary for emigration and adoption based on the submitted documents. As previously stated, section 101(b)(1)(F) of the Act requires that the petitioner establish that the sole parent "is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption." In support of this claim, the petitioner submitted a copy of the "Application for Voluntary Hand-Over of Child to Foreigners," which again was executed in the name of the birth mother's sister. Through this document, the signor certified that the beneficiary is the son of an unknown father and states: "I strongly declare that the hand-over of my son is my voluntary act and that no one, except for myself, shall have the right to make any complaint against such hand-over of my son to [the petitioner] for adoption . . . ." The People's Committee certified that the document was signed by [redacted] Loan, the birth mother's sister. As the document was signed in a false name, the document may not be accepted as evidence that the birth mother has irrevocably released the beneficiary for emigration and adoption. The birth mother's post-adoption affidavit and statements will not serve to establish that the birth mother released the beneficiary for adoption and emigration. Primary evidence of the birth mother's release of the beneficiary would be the actual legal documents of the foreign adoption. The Service will not accept secondary evidence as a substitute for

primary evidence that was either forged in the name of the birth mother's sister or signed by the sister herself. The non-existence or other unavailability of the required evidence creates a presumption of ineligibility. 8 C.F.R. 103.2(b)(2).

The petitioner has failed to sustain her burden of proving that the beneficiary qualifies as an orphan under section 203(b)(1)(F) of the Act, as the petitioner has not established that the adoption satisfies the legal requirements of the foreign sending country. Furthermore, contrary to the requirements of the Act, the petitioner has not established that the birth mother was a sole parent or that she had irrevocably relinquished the child for emigration and adoption. For these reasons, the petition may not be approved.

The remaining issue is whether the evidence contained in the record of proceeding supports the OIC's conclusion that the beneficiary's biological mother was paid to give her child up for adoption.

8 C.F.R. 204.3 states:

> (i) *Child-buying as a ground for denial*. An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.

In his decision, the OIC found that the petitioner's adoption facilitator, Asian Orphans for Hope ("AOH"), had procured the beneficiary for adoption on behalf of the petitioner through a cash payment to the beneficiary's biological mother. The OIC based his finding on an investigation conducted by employees of his office in conjunction with Vietnamese authorities. The investigation allegedly revealed that AOH procured the beneficiary in exchange for a cash payment. The OIC stated that in the course of the investigation, a neighbor of the birth mother informed a Service staff member that the birth mother had received $500 for her child. According to the decision, the investigator was then introduced to the agent who had procured the beneficiary. The decision does not provide any evidence of the implied connection between the agent and either AOH or the petitioner. The OIC also stated that a Service investigator witnessed Pham Vu Dong, the AOH facilitator in the petitioner's case, confess to Vietnamese

authorities that AOH engaged in the business of buying babies for international adoptions. The subject, Pham Vu Dong, signed a confession and confirmed that "money was paid for all such procurements." The OIC concluded that "[t]he evidence of baby buying by AOH in general and in this particular case is credible and reliable." The record does not contain any investigative reports, witness statements, or the signed confession that was allegedly made by Pham Vu Dong.

On appeal, counsel states that the petitioner was not provided a full and fair disclosure of the adverse evidence upon which the OIC relied in reaching his decision. Counsel maintains that the decision only set forth the OIC's conclusions and did not identify the evidence on which these conclusions were based. Counsel asserts that:

> Here, the OIC has presented no evidence that any contact with AOH induced the birthmother to do something that she would not have done otherwise; namely, place her child for adoption. The OIC's reliance for the first time in the Decision on Mr. Vu Dong's confession (withheld from the Petitioner) and from a neighbor, who does not even identify the beneficiary, without more can not possibly form the basis of a substantive denial of Petitioner's petition. The OIC fails to connect Mr. Vu Dong or any wrongdoing to either the birthmother or the Petitioner. The OIC's actions clearly violate both INS regulations and Petitioner's right to due process.

The petitioner submits several affidavits to rebut the OIC's allegations that the beneficiary's biological mother sold her child to Asian Orphans of Hope. One of the affiants is the biological mother, who states that she has "never received any money from these foreigners or AOH." Another affiant is the founder and operator of Asian Orphans of Hope, who states that "[a]t no time did I or, to the best of my knowledge, anyone else involved in this case ever offer any money to the birthmother of [the beneficiary] for the child, or to her as an inducement to release the child." Other affiants include, but are not limited to, the sister of the biological mother, the mother of the biological mother, the roommate of the biological mother, the petitioner and her husband, other adoptive parents, and various other individuals who were involved in the adoption.

Counsel's assertion is persuasive. Upon review, the record of proceeding contains a cable indicating the approval of the petitioner's Form I-600A advance processing application, the Form I-600A, a copy of the petitioner's home study report, the Form I-600 petition and accompanying documentation, the OIC's notice of intent to deny, and the subsequent denial. The record does not contain copies of any investigative report, sworn witness

statements, or any other evidence that would support the OIC's decision. Denial of this petition cannot be based upon the serious allegations of the OIC without evidence offered in support of those conclusions. Just as the unproven assertions of counsel are not evidence, neither are the unsupported conclusions of the OIC. Cf. Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.

In accordance with Service regulations, a petitioner must be permitted to inspect the record of proceeding which constitutes the basis of an adverse decision. 8 C.F.R. 103.2(b)(16). If an adverse decision will be based on derogatory information of which the petitioner is unaware, the petitioner must be advised of that evidence and offered an opportunity to rebut it before the decision is rendered. 8 C.F.R. 103.2(b)(16)(i). Only if the evidence is classified under Executive Order No. 12356, 47 Fed. Reg. 14874 (April 6, 1982), may the Service decline to provide such evidence in order to protect the information from unauthorized disclosure in the interest of national security. 8 C.F.R. 103.2(b)(16)(iv).

Accordingly, the OIC must permit the petitioner to inspect the record and the adverse evidence on which his decision was based. Neither the regulations nor fundamental fairness would be satisfied by anything less. As in revocation proceedings, where the OIC's notice of intent to deny is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the denial of the visa petition cannot be sustained. See Matter of Arias, 19 I&N Dec. 568 (BIA 1988). Although the burden of proof remains on the petitioner, the Service bears the burden of creating a meaningful, clear, and reliable record of an interview if statements made during an interview are going to be used to determine credibility. See Matter of S-S-, 21 I&N Dec. 121 (BIA 1995); Matter of Arias, supra.

Without an investigative report, witness statements, the alleged confession of the AOH facilitator, or a written statement from the Vietnamese authorities regarding this specific case, there is no basis upon which to impugn the credibility of the affidavits that counsel presents on appeal. For this reason, the decision to deny the petition based upon child-buying, as that term is defined in the regulation, cannot be affirmed.

The OIC's decision as it relates to the allegations of child buying will be withdrawn. However, the OIC's findings regarding the misrepresentation of the birth mother's identity and the invalid adoption proceedings in Vietnam will be upheld. For this reason, the petition may not be approved.

The petitioner has not established that the beneficiary is eligible for classification as an orphan pursuant to section

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

In visa petition 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. The appeal will be dismissed.

ORDER: The appeal is dismissed.