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: NOV 29 2001

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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]

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 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 sustained and the petition will be approved.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the OIC on March 21, 2001. The petitioner is a 37-year-old married citizen of the United States. The beneficiary is 1 year old at the present time and was born in Ho Chi Minh City, Vietnam on August 25, 2000. The record reflects that the petitioner adopted the beneficiary on March 19, 2001 in Vietnam.

The OIC denied the petition pursuant to 8 C.F.R. 204.3(i) after determining that the beneficiary's biological mother sold the beneficiary to an adoption facilitator, Asian Orphans of Hope (AOH), located in Vietnam.

On appeal, counsel submits a brief and additional evidence. In part, counsel asserts that the OIC's decision is contrary to the facts and to the law and must be reversed. Counsel further asserts that the OIC's decision was improper as it was not based on evidence contained in the record of proceeding.

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.

8 C.F.R. 204.3(i) 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.

The sole issue in this matter 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. The OIC provided no other basis for denying the petition.

On April 3, 2001, the OIC issued a Notice of Intent to Deny, which informed the petitioner in general terms that the office had conducted an investigation of the adoption and the "practices and methods utilized by Asian Orphans of Hope," the adoption facilitator. The OIC stated that "[t]he agents who procured the infant in the subject adoption have been detained for questioning by Vietnamese authorities." The OIC continued to state that:

> During questioning the chief agent admitted that he and his siblings were engaged in the business of buying babies for adoption by Americans and other foreigners. He stated that they approached women at their homes and at hospitals in poor neighborhoods with offers of cash for their babies. He added that higher prices were offered for more attractive babies. The chief agent confessed that every case for which Asian Orphans of Hope, operated by himself and his family, had procured an infant for adoption involved outright purchase of the child.

The OIC further noted in his Notice of Intent to Deny that members of his staff and Vietnamese authorities interviewed the beneficiary's biological mother. According to the OIC, the biological mother stated during her interview that she never received money in exchange for her child; however, she claimed that she was approached by the petitioner, who asked her to give the beneficiary up for adoption for a better life in the United States. The OIC stated in the Notice of Intent to Deny that the biological mother provided inconsistent statements and was, therefore, not credible. He found the statements of the petitioner credible; nevertheless, the OIC intended to deny the petition because "Asian Orphans of Hope and its staff have been engaged exclusively in the purchase and trafficking of babies as an established practice."

Through counsel, the petitioner submitted a response to the Notice of Intent to Deny on April 27, 2001. Counsel asserted that the OIC failed to advise the petitioner of the derogatory evidence upon which the Notice was based, particularly the OIC's conclusion that the beneficiary in the instant case was "bought" by Asian Orphans of Hope. Counsel submitted an affidavit from Don Phan, the proprietor of Asian Orphans of Hope. Don Phan testified that the "Vietnamese authorities have never detained

and/or interrogated me for my activities related to my business." Dong Phan further stated in his affidavit that Pham Vu Dong, an employee of Asian Orphans of Hope, was interviewed by Vietnamese authorities on only one occasion, but no Service personnel were present.

On May 15, 2001, the OIC denied the petition. After repeating the allegations made in the Notice of Intent to Deny, the OIC responded to counsel's claim that the Notice of Intent to Deny was not sufficiently detailed and specific to enable a rebuttal because the petitioner was not made aware of the derogatory evidence:

> Our INS investigator witnessed Pham Vu Dong confess that AOH procured babies for foreign adoption with inducements of cash payments in exchange for babies. Pham Vu Dong stated that AOH was not a charitable organization as claimed in its license to operate in Vietnam, that AOH is in the business of procuring babies for foreign adoption, and that money was paid for all such procurements. The INS investigator witnessed Pam Vu Dong sign a confession attesting to all of the above.

The OIC concluded that the petition must be denied because:

> The evidence of baby buying by AOH in general and in this particular case is credible and reliable. Otherwise this office would not deny the petition. Denial of an orphan petition is done only after very thorough and careful investigation, examination and deliberation, as it is an extremely painful result for all concerned.

On appeal, counsel asserts that the OIC's decision is contrary to the facts and to the law and must be reversed. Counsel reiterates many of the statements he made in response to the Notice of Intent to Deny. Counsel further maintains that despite the OIC's position that the evidence of baby buying in this case is both credible and reliable, the OIC has still not provided the written statements or written confessions of the Asian Orphans of Hope employees:

> The probative value of confessions before Vietnamese authorities, which do not operate under the rule of law, must also be questioned. Merely asserting that statements from Vietnamese officials and alleged confessions before them are credible and reliable are not a substitute for verifiable evidence. Petitioner, on the other side, has provided affidavits and statements from a number of persons who challenge INS's conclusions. Unlike INS HCMC's allegations, these

affidavits and statements are part of the record. Consequently, INS has not carried its burden of proof.

Counsel submits several affidavits to rebut the OIC's allegations that the beneficiary's biological mother is one of the individuals who sold her child to Asian Orphans of Hope. The first two affidavits are from the petitioner and her husband who affirm their trust in the proprietor of Asian Orphans of Hope. Another affidavit is from a lawyer in Vietnam who attests to the living conditions of the biological mother and her inability to provide proper care for the beneficiary.

Counsel maintains that the OIC denied the petition on an unsupported finding that the biological mother of the beneficiary received payment as part of a child-buying operation. Counsel's assertion is persuasive.

As noted by the OIC in his decision, the record of proceeding contains a cable indicating the approval of the petitioner's Form I-600A advance processing application, 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 petitioner's evidence in rebuttal to the OIC's Notice.

The OIC stated in his denial that the evidence of the biological mother's complicity in selling the beneficiary to Asian Orphans of Hope was "credible and reliable." Although the OIC described the information to which the chief proprietor of Asian Orphans of Hope (Don Phan) allegedly testified, the OIC has never provided the petitioner with Don Phan's critical statement to Vietnamese authorities. Similarly, the OIC described the "confession" of Pham Vu Dong, an employee of Asian Orphans of Hope; however, the OIC has never provided a copy of the signed confession to the petitioner.

The OIC makes serious allegations of impropriety on the part of Asian Orphans of Hope 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, 19 I&N Dec. 533, 534 note (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

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).

The lack of signed statements from Don Phan and Pham Vu Dong in the record regarding the testimony they allegedly gave to Vietnamese authorities does not lead to the conclusion that the evidence of the biological mother's complicity in selling the beneficiary is either credible or reliable. Without the critical statements of Don Phan and Pham Vu Dong as part of record, the petitioner cannot determine whether the OIC's description of Don Phan's and Pam Vu Dong's statements are accurate and, therefore reliable and credible. Although the OIC stated that the "confessions" were made in front of Vietnamese authorities and Service personnel, the OIC did not identify how he became aware of the detailed statements; he does not identify whether he read the confessions from a written investigation report or whether an individual simply told him about the confessions.

The biological mother did not credibly testify that she received payment from Asian Orphans of Hope to give the beneficiary up for adoption; the OIC did not provide an investigative report describing the purported statements of Don Phan and Pam Vu Dong. The OIC merely relied on the alleged statements of Don Phan, Pham Vu Dong, and other "natural mothers" in support of the broad allegation that "Asian Orphans of Hope and its staff have been engaged exclusively in the purchase and trafficking of babies as an established practice." The record does not support the sweeping conclusion of the OIC. As stated at 8 C.F.R. 103.2(b)(16)(ii), "[a] determination of statutory ineligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner," unless such information is protected from disclosure in the interest of national security. Here, the record does not support the OIC's conclusions. 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 Service cannot and will not condone any practice which would suggest that the parties are engaged in purchasing children or inducing birthmothers to give up children for adoption through monetary payments. In the present case, however, the OIC has not established that the petitioner, or any person or entity working on her behalf, has given money or other consideration either directly or indirectly to the child's mother, agent, other individual, or entity as payment for the child or as an inducement to release the child. 8 C.F.R. 204.3(i).

The OIC did not raise any other objections to the approval of the petition. Since the petitioner has overcome the basis of the OIC's denial, the appeal will be sustained. It is concluded that the petitioner has 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 met that burden. The appeal is sustained.

ORDER: The appeal is sustained. The OIC's decision dated May 15, 2001 is withdrawn and the petition is approved.