F1

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

identification data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: HO CHI MINH CITY, VIETNAM Date: MAY 06 2002

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 Officer-in-Charge (OIC), [redacted] 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 November 20, 2000. The petitioner is a 57-year-old divorced citizen of the United States. The beneficiary is 16 years old at the present time and was born in Lao Cai, Vietnam on March 10, 1986. The record reflects that the petitioner adopted the beneficiary on November 13, 2000 in Vietnam.

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

On appeal, counsel submits a brief and an affidavit from the beneficiary. In part, counsel asserts that the beneficiary is the child of a surviving parent who is incapable of providing for the beneficiary's basic needs, consistent with the local standards of Vietnam.

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 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, the petitioner's response to the OIC's Notice, the OIC's final denial letter, and the appeal documents.

In the March 22, 2001 Notice of Intent to Deny, the OIC informed the petitioner that his office had conducted an investigation into the claims made by the petitioner in the I-600 petition. The petitioner had claimed that the beneficiary was the child of a surviving parent (biological father) who was incapable of providing for the beneficiary's basic needs. According to the OIC, his investigation uncovered that the biological father had remarried after the death of the biological mother. The OIC had interviewed the beneficiary's alleged step-mother, [redacted]

Duyen, who stated that she and the biological father had been married for several years and had two children of their own. [redacted] indicated that the beneficiary had left home approximately two years ago during which time he met the petitioner. The OIC also informed the petitioner that he verified [redacted] statements about her marriage to the biological father. The OIC maintained that:

> The Chairman of the People's Committee confirmed that both parents had indeed appeared before him as a married couple. He confirmed that they had indeed registered their marriage years ago and had a marriage certificate. He confirmed that he and his office had certified the referenced statements because he knew the claims made to be true.

The OIC stated that the beneficiary was ineligible for classification as an orphan because he was not *abandoned by both parents*, as that term is defined in 8 C.F.R. 204.3(b). The OIC further noted that even if the petitioner had established that the beneficiary was the child of a surviving parent, the evidence presented did not establish that the surviving parent was incapable of providing for the beneficiary's basic needs, consistent with the local standards in Vietnam.

In an April 11, 2001 response, the petitioner questioned the veracity of the OIC's claim that the biological father had remarried. According to the petitioner, the OIC never produced the alleged marriage certificate to which the OIC referred in his Notice of Intent to Deny. The petitioner further stated that the OIC inappropriately relied upon a statement that the biological father made in the April 10, 2000 "Agreement to Foreign Adoption," where he stated that he had remarried in 1988. According to the petitioner, this statement did not have any probative value as it was self-serving and did not bear on the letter's purpose, which was to establish that the biological father was incapable of caring for the beneficiary.

The OIC denied the petition on April 18, 2001 for the reasons stated in the Notice of Intent to Deny. The OIC was unconvinced by the petitioner's statement that the Service's inability to produce a marriage certificate for the remarriage of the biological father was evidence that the biological father [redacted] were not married.

On appeal, counsel for the petitioner states that although the petitioner has the burden of proof in these proceedings, the petitioner "cannot prove a negative." The "negative" to which counsel refers is that the biological father and [redacted] were never married. Counsel maintains that the evidence is clear that the beneficiary is the child of a surviving parent.

Counsel asserts that the beneficiary was abandoned by his surviving parent. Counsel refers to a statement by the beneficiary's uncle who indicates that the biological father and [redacted] never took care of the beneficiary. Counsel also believes that the April 10, 2000 "Agreement to Foreign Adoption," has probative value because the biological father asserts that he cannot care for the beneficiary.

The OIC contends that the evidence indicates that the biological father remarried after the death of the biological mother; the petitioner contends that the biological father has merely lived [redacted] a common-law marriage that is not recognized under Vietnamese law. The record contains three essential items of evidence concerning the alleged remarriage of the biological father. When viewed as a whole, these three items of evidence support the OIC's conclusion that the beneficiary acquired another parent, [redacted] (the beneficiary's step-mother), after the death of the biological mother. Therefore, the beneficiary is not the child of a *surviving parent*, which is defined in 8 C.F.R. 204.3(b) as "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."

I. EVIDENCE OF THE MARRIAGE BETWEEN THE BENEFICIARY'S FATHER AND STEP-MOTHER

(a) STATEMENTS OF [redacted] AND THE CHAIRMAN OF THE PEOPLE'S COMMITTEE

The first items of evidence to discuss are the statements made by [redacted] the Chairman of the People's Committee. According to [redacted] she and the biological father had been married many years ago. According to the Chairman, the biological father registered his second marriage years ago and a marriage certificate of this fact existed.

The record contains an investigative report from the OIC. Within this report are the facts that both [redacted] and the Chairman stated to the investigators, which the OIC disclosed to the petitioner in his Notice of Intent to Deny. According to the investigative report, the Chairman confirmed that both parents had indeed appeared before him as a married couple; they had indeed registered their marriage years ago and had a marriage certificate, and he and his office had certified the referenced statements because he knew the claims made to be true. Additionally, [redacted] confirmed that "she and [redacted] [biological father] had been married many years ago and had two children of their own."

On appeal, counsel does not dispute that either [redacted] or the Chairman made these statements to the investigators.

Counsel asserts on appeal that despite these statements, the Service bears the burden of producing the marriage certificate if it doubts the petitioner's claim that the biological father did not remarry. According to counsel:

> We submit that, although the Petitioner has the Burden of Proof, he cannot prove a negative. Thus, once the issue of the natural father's marital status is raised, it is required that who ever is alleging the bona fides of the marriage, produce the documentary evidence of the marriage. This has never been done. The evidence is clear that the beneficiary is an orphan of a sole surviving parent.

Counsel's statement regarding the burden of proof in this proceeding is inconsistent with the statute. According to section 291 of the Act, the burden of proof rests solely with the petitioner in visa petition proceedings. The Service is not requiring the petitioner to "prove a negative" as counsel claims. Rather, the OIC disclosed seemingly reliable statements from both and the Chairman regarding the remarriage of the biological father. In particular, the Chairman disclosed information concerning the existence of a marriage certificate between the biological father and Therefore, if the petitioner believes that both the Chairman and provided false information to the Service, the petitioner bears of burden of submitting persuasive evidence that a marriage certificate for and the biological father does not exist.

8 C.F.R. 103.2(b)(2)(ii) states:

> *Demonstrating that a record is not available*. Where a record does not exist, the applicant or petitioner must submit an original written statement on government letterhead establishing this from the relevant government or other authority. The statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available. However, a certification from an appropriate foreign government that a document does not exist is not required where the Department of State's Foreign Affairs Manual indicates this type of document generally does not exist. An applicant or petitioner who has not been able to acquire the necessary document or statement from the relevant foreign authority may submit evidence that repeated good faith attempts were made to obtain the required document or statement. However, where the Service finds that such documents or statements are generally available, it may require that the applicant or petitioner submit the required document or statement.

[redacted] was certainly competent to testify that she married the beneficiary's father. The Chairman was competent to testify concerning the couple's reputation in the community. FRE 803(19). The OIC did not have reason to doubt the veracity of either the Chairman's or [redacted] statements regarding the remarriage of the biological father. Therefore, pursuant to 8 C.F.R. 103.2(b)(2)(ii), the petitioner bears the burden of demonstrating the non-existence of a marriage certificate between the biological father and [redacted] through credible documentary evidence. Acceptable evidence of the non-existence of the marriage certificate may include, but is not limited to, a letter from the Vietnamese authorities, which states that it has searched its records and is unable to locate a marriage certificate for the biological father and [redacted]

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). The petitioner has not presented objective evidence to support its contention that the Chairman's statement regarding the existence of the marriage certificate is erroneous, or that [redacted] statement simply refers to a common-law marriage with the biological father and not a marriage that is recognized under Vietnamese law. Although counsel asserts that a marriage certificate does not exist, 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).

In this proceeding, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Absent objective evidence, there is no reason to believe that the statements of the Chairman and Ms. Nguyen Thi Duyen regarding the remarriage of the biological father were not credible.

(b) AGREEMENT TO FOREIGN ADOPTION

The second item of evidence to discuss is the April 10, 2000 "Agreement to Foreign Adoption" ("Agreement"). The biological father stated in the Agreement that "I remarried in 1988 and had two more children. . . ." The Agreement is signed by the biological father, the beneficiary, and [redacted] who is identified as the step-mother. Both the petitioner and counsel state that this Agreement is probative in determining that the biological father is incapable of providing for the beneficiary's basic needs. Counsel also argues that the biological father's

statement that he remarried in 1988 should be seen only as a self-serving statement and not evidence that he concluded a valid marriage under Vietnamese law. But Counsel does not explain in what way claiming to be married -- in a document to be presented to the Service -- should be seen as "self-serving." The U.S. immigration status of the father and step-mother is not at issue in this proceeding. Nor is there any indication of why a false claim to be married -- made, again, in a document to be submitted to the Service -- would be to their economic benefit. In fact, since admitting to be married complicates their effort to have the petitioner adopt their child, the statement that they are married could be seen as a statement *against* their interests. *Cf.* FRE 804(b)(3).

In deportation proceedings, evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986); see also Matter of D, 20 I&N Dec. 827, 831 (BIA 1994). Although the instant proceedings are not deportation proceedings, the Board's holding is instructive when considering whether an item of evidence that has been submitted in support of a petition has probative value to the issues to be decided. While the petitioner claims that the only probative facts in the Agreement are those that relate to whether the biological father is able to provide for the beneficiary's care, the Service finds that all of the biological father's admissions in the Agreement are relevant to a determination of whether the biological father remarried. It is untenable to say that the biological father's assertion that he is unable to care for the beneficiary is entitled to credit, but his assertion that he married [redacted] is not reliable.

The biological father, [redacted] and the beneficiary each signed the Agreement, indicating that the facts contained therein were true. There is no evidence to suggest that the Vietnamese authorities found the facts to be false or inaccurate, as they permitted the adoption of the beneficiary by the petitioner and entered the facts into the official adoption record. The facts in the Agreement are also consistent with the statements made by [redacted] and the Chairman in their conversations with Service investigators regarding the remarriage of the biological father. The Agreement is, therefore, probative to a determination of whether the beneficiary acquired another parent upon the death of his biological mother.

In his April 11, 2001 response to the OIC's Notice of Intent to Deny, the petitioner stated that the Agreement was "subscribed to by [redacted] [biological father], [redacted] [step-mother], the heads of Tung's [beneficiary] maternal and paternal families . . . ." If the petitioner did not consider [redacted] to be the beneficiary's step-mother, then there would be no basis to refer to [redacted] as the head of the

beneficiary's maternal family. Additionally, if [redacted] did not have any legal standing as the step-parent of the beneficiary, her consent on the Agreement would not have been required by the Vietnamese authorities. Even in a case to which the Federal Rules of Evidence strictly apply, marriage may be proved on the basis of reputation in the community. FRE 803(19). That the elder relatives of the beneficiary's family signed the statement strongly supports the conclusion that the beneficiary's parents' reputation is that they are married.

Despite the petitioner's and counsel's claim that the Agreement has limited probative value, neither party has presented any documentary evidence to contradict the biological father's claim that he remarried in 1988, at which time the beneficiary acquired another parent.

(c) JOINT AFFIDAVIT

The third and final item of evidence to discuss is the August 2, 2000 joint affidavit from the biological father and [redacted] In this affidavit, the two parties relinquish their parental rights ("we want to abrogate the parenthood towards the child . . . forever") and provide their consent for the beneficiary's emigration and adoption by the petitioner.

This affidavit also refers to [redacted] as the beneficiary's step-mother and is signed by both her and the biological father. When discussing the Vietnamese government's requirements for foreign adoptions, the United States Department of State states that:[1]

> If one was not already on file, the orphanage obtains an unconditional release for foreign adoption from the child's parents or guardian or from whoever has legal custody of the child.

The information provided by the Department of State indicates that the Vietnamese authorities require the parents or other legal custodian of a child to unconditionally release the child for emigration and adoption as a component of an authorized adoption. The beneficiary was not placed in an orphanage, and there is no evidence in the record that parental rights were terminated or that anyone else became the legal custodian of the beneficiary. Therefore, as stated in the previous section, if [redacted] did not have legal standing as the step-parent of the beneficiary, the Vietnamese authorities would not have required her to relinquish her parental rights over the beneficiary so that he could emigrate and be adopted by the

[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."

petitioner. [redacted] signature on this document indicates that she is one of the beneficiary's parents.

The evidence of record clearly establishes that the beneficiary has two parents -- his father and his step-mother. A child who has a step-mother is not the child of a surviving parent. 8 C.F.R. § 204.3(b). Clearly, the beneficiary does not qualify as an orphan on the ground that his surviving parent is unable to care for him properly.

II. ABANDONMENT

Nor does the child qualify as an orphan on the ground that both of his parents -- his father and step-mother -- have abandoned him. The definition of "abandonment" in 8 C.F.R. § 204.3(b) states expressly that:

> . . . A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. . . .

In the April 10, 2000 Agreement, both the biological father and the step-mother state that "we are in complete agreement to have HA [the beneficiary] adopted by [redacted] an American." In addition, an April 10, 2001 letter from [redacted] to the OIC indicates that the parents did not seek to abandon the beneficiary or relinquish their parental rights until the parents became aware of the petitioner's desire to adopt the beneficiary. These facts establish that the parents intended to transfer their parental rights to a specific person for a specific adoption. According to the regulation, if such an act occurs, a child is not considered to have been abandoned by both parents.

III. CONCLUSIONS

As the record of proceeding is presently constituted, there is insufficient evidence to conclude that the beneficiary is the child of a surviving parent. In fact, the evidence establishes that the beneficiary has two parents, his father and his step-mother. The evidence, moreover, precludes a finding that the beneficiary's parents have abandoned him.

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; it is concluded that 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).

ORDER: The appeal is dismissed.