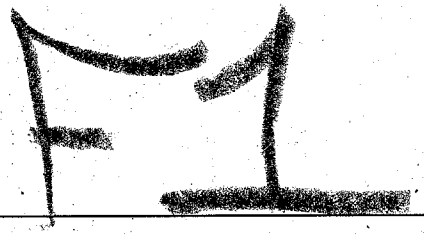
F1



U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: HO CHI MINH CITY, VIETNAM Date: MAR - 7 2003

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 Administrative Appeals Office (AAO) 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 November 11, 2001. The petitioner is a 51-year-old married citizen of the United States. The beneficiary is 33-months old at the present time and was born in Soc Trang province, Vietnam on July 5, 2000. The record reflects that the petitioner and her husband adopted the beneficiary on November 7, 2001 in Vietnam. The provincial authorities for the government of Vietnam subsequently revoked the decision of adoption on April 4, 2002.

The OIC denied the petition on the basis that the Vietnamese government subsequently revoked the beneficiary's adoption decree, thereby rendering the beneficiary ineligible for qualification as an orphan.

On appeal, counsel submits a brief and additional evidence. The petitioner returned the beneficiary to the orphanage upon notice of the revocation of the adoption decree. The petitioner enlisted the aid of the Vietnamese authorities to attempt to locate the beneficiary's birth mother to no avail. The petitioner and her husband adopted the beneficiary again in Vietnam in December 2002.

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(b) provides:

> *Disappearance of both parents* means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

The record of proceeding contains the Form I-600 petition and accompanying documentation, an Investigation Report, the OIC's Notice of Intent to Deny dated December 5, 2001, the OIC's Notice of Intent to Deny dated April 24, 2002, the petitioner's rebuttal to the OIC's Notice of Intent to Deny, the OIC's Supplemental Notice of Intent to Deny dated May 15, 2002, the OIC's decision, and the appeal documents.

The issue in this matter is whether the petitioner has sustained her burden of proof and overcome the OIC's finding that the beneficiary does not meet the definition of an orphan as set forth in section 101(b)(1)(F) of the Act.

According to the OIC, an investigation conducted by employees of his office in conjunction with Vietnamese authorities revealed that the woman who relinquished the beneficiary to the orphanage was not in fact the beneficiary's birth mother as she claimed, therefore the original adoption decree was invalid. The OIC concluded that the beneficiary was located and referred by the adoption agency for referral to the petitioner for adoption prior to the availability of any documentation establishing that the child was in fact an orphan, in the custody of a legitimate institution, and eligible for referral to a foreigner for adoption by the Vietnamese Ministry of Justice. The OIC determined that "the documentation and other evidence in this case establishes that the beneficiary was processed through an orphanage for a specific adoption subsequent to being located elsewhere by facilitators or agents of Universal Aid for Children, Inc., and identified for adoption by the petitioner."

The petitioner concedes that the beneficiary was relinquished to the orphanage by someone other than the beneficiary's birth mother. Counsel for the petitioner asserts that the petitioner returned the beneficiary to the orphanage upon notice of the

revocation of the initial adoption decree.[1] Counsel for the petitioner asserts that every effort was made in conformance with Vietnamese law to locate the birthmother, including publishing advertisements in local media, but she was never found. The petitioner then proceeded to readopt the beneficiary from the orphanage and a new giving and receiving ceremony was completed.[2]

The record of proceeding contains a copy of an investigative report. The record does not contain sworn witness statements, or any other objective evidence that would support the OIC's determination that the beneficiary was relinquished or released by her parents for a specific adoption. 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*, 19 I&N Dec. 533, 534 note (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence on the record indicates that there has been a reasonable effort to locate the beneficiary's birth parents as determined by a competent authority in Vietnam. Local counsel sent an investigator to the hospital where the beneficiary was born and ran an advertisement in a newspaper in an attempt to locate the birth mother. The Vietnamese authorities were satisfied with the effort such that they released the beneficiary for adoption, presumably on the basis that the birth parents had disappeared and there was no reasonable hope of their reappearance.

The OIC did not raise any other objections to the approval of the petition, and the petitioner has overcome the basis of the OIC's denial; the appeal shall 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 Act, 8 U.S.C. § 1101(b)(1)(F).

---

[1] At the Bureau's request, counsel for the petitioner provided the Bureau with a translated copy of the Proces-Verbal on the admission of the beneficiary to an orphanage in June 2002.

[2] It is noted that the director of the orphanage is named as the delivering party.

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.

ORDER: The appeal is sustained. The OIC's decision dated August 12, 2002 is withdrawn and the petition is approved.