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U.S. Department of Justice

Immigration and Naturalization Service

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

File: BAL 02 085 50013

Office: BALTIMORE, MARYLAND

Date: 12 SEP 2002

IN RE: Petitioner:  
Beneficiary:

Petition: 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:

SELF-REPRESENTED

**Public Copy**

**INSTRUCTIONS:**

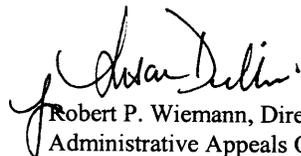
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 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 that 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 District Director of the Baltimore, Maryland district office 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 case remanded for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on April 11, 2001. The petitioner is a 46-year-old married citizen of the United States. The beneficiary is presently 15 years old. The beneficiary was born on August 15, 1987 in Akwa Ibom State, Nigeria.

The director denied the petition because the petitioner failed to establish that the beneficiary was under 16 years of age at the time the petition was filed and that the beneficiary was abandoned by her mother.

On appeal, the petitioner submits a letter.

The record of proceedings contains: a Form I-600 petition, the beneficiary's birth certificate listing two parents, a certificate of burial of the beneficiary's father, an original home study report, an updated home study report, an adoption order, the director's decision, and the appeal.

Section 101(b)(1)(F) of 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.

In a denial dated May 30, 2002, the director informed the petitioner that the I-600 petition was denied, in part, because the petitioner had failed to establish that the beneficiary was under the age of sixteen at the time the petition was filed. The director states:

Your home study repeatedly states that [the beneficiary's] date of birth is in August of 1985. In addition, when describing your family's daily routine, it is stated that after-school care will not be necessary because [the beneficiary] is 16 years old. In accordance with the regulations . . . an orphan must be under the age of sixteen at the time that the orphan

petition is filed. The late registered birth certificate that you provided, reporting that [the beneficiary] was born on August 15, 1987 does not establish the beneficiary's date of birth, particularly in light of the information provided in your home study.

In reply, the petitioner states that the date of birth in the home study is an error. He states that he and his wife may have mistakenly given the wrong date. The petitioner explains that the beneficiary was born in a home setting and prior to 1992 Nigerian children born at home rarely registered their births.

The Code of Federal Regulations provides that a petition filed on behalf of an orphan must be accompanied by the orphan's birth certificate; or, if the birth certificate is unobtainable, an explanation together with other proof of identity and age. The petitioner provided the service with a delayed birth certificate. Delayed birth certificates are generally not accorded the same weight as certificates issued at the time of birth. See Matter of Serna, 16 Int. Dec. 643 (BIA 1978). The contradictory information provided in the home study report undermines the credibility of the petitioner. Yet, the petitioner provided the same birth date on the Form I-600 petition as is on the birth certificate and adoption decree. The petitioner has met his burden of proof in establishing that the beneficiary was under the age of 16 at the time the petition was filed.

The director informed the petitioner that the I-600 petition was denied because the petitioner had failed to establish that the beneficiary was an orphan as defined in the Act. The director noted: "the record contains no evidence to support your claim that [the beneficiary] was abandoned by her mother shortly after her birth."

In response, the petitioner states:

I was told by my father and my siblings, the eye witnesses, that [the beneficiary's] maternal grandmother whom [the beneficiary] was abandon [sic] to by the mother, brought her to my father at the point of death. . . . From 1988 to present, the mother has not visited the child.

As the record is presently constituted, the petitioner has not met his burden of establishing that the beneficiary has been abandoned by both parents or that the sole surviving parent is incapable of providing proper care for the beneficiary.

The record contains the death certificate of the biological father who died in 1999. Therefore, upon the biological father's death, the biological mother became a surviving parent. 8 C.F.R. 204.3(b)

states, in pertinent part:

*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.

This case will be remanded to the director to enter a new decision. In order to properly assess the merits of the petitioner's claim that the beneficiary is an orphan, the director must request information regarding whether the biological mother is able to provide for the beneficiary's basic needs, consistent with the local standards of Nigeria. Pursuant to 8 C.F.R. 103.2(b)(8), where the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service may request additional evidence.

As always, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

**ORDER:** The director's decision is withdrawn. The case 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.