U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

File: Office: ATLANTA, GEORGIA Date: NOV 05 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Application for Advance Processing of Orphan Petition Pursuant to 8 C.F.R. § 204.3(c)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The District Director, of the Atlanta, Georgia, Citizenship and Immigration Services (CIS) district office denied the Application for Advance Processing of Orphan Petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The prospective petitioner filed the Application for Advance Processing of Orphan Petition (Form I-600A) on January 30, 2003.[1] At the time of filing, the prospective petitioner was a 34 year-old married citizen of the United States, who together with her spouse, sought to adopt a child from Guinea.

The district director denied the application based on the determination that the prospective petitioner failed to establish the legal immigration status of her spouse.

The regulation at 8 C.F.R. § 204.3(b) defines "prospective adoptive parent" as:

> A married United States citizen of any age and his or her spouse of any age . . . [t]he spouse of the United States citizen may be a citizen or an alien. An alien spouse must be in lawful immigration status if residing in the United States.

The record contains a copy of the prospective petitioner's spouse's Form I-94. The Form I-94 indicates that the spouse was lawfully admitted as a P-3 nonimmigrant on October 18, 2000. The record further reflects that the spouse was permitted to remain in the United States in this status until February 16, 2001. The record contains no evidence that the spouse obtained an extension of stay or a change of nonimmigrant classification after the authorized period of stay designated on his Form I-94 expired.[2]

The prospective petitioner files a timely appeal with no additional evidence.

On appeal, the prospective petitioner states that her husband is "legally able to work," and questions why, if he is able to work legally, CIS considers him an "unlawful alien." We note that in accordance with 8 C.F.R. § 274a.12(c)(9), an alien is authorized to work upon the filing of the Form I-485. However, while an alien may be authorized to work, such authorization has no bearing on the alien's lawful status in the United States. Similarly, neither the filing of the Form I-485, nor the filing or approval of the Form I-130, gives an alien lawful status in the United States.

Given the evidence contained in the record, we find the prospective petitioner has not shown that her spouse resides in the U.S. in a "lawful immigration status."

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.

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[1] The district director indicated that the date of filing is February 12, 2003. However, as the application and proper fee were stamped as received by the district director on January 30, 2003, this date is the considered to be the date of filing.

[2] The record contains a copy of a Form I-130 filed on behalf of the spouse by the prospective petitioner. The record also contains a copy of the spouse's I-485. However, neither the Form I-130, nor the Form I-485 had been approved at the time of filing.

ORDER: The appeal is dismissed.