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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

F1

[redacted]

FILE: [redacted] Office: PROVIDENCE, RHODE ISLAND Date: JUL 15 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(i)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i). The director denied the petition on the basis of her determination that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as defined at section 101(b)(1)(F)(i) of the Act. Specifically, the field office director found that because the petitioner's adoption of the beneficiary was the result of a direct relinquishment or release, the petitioner had failed to establish that the beneficiary had been "abandoned" by both parents as defined in the regulation.

Section 101(b)(1)(F)(i) of the Act defines an 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) of this title, 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; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States[.]

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

> *Abandonment by both parents* means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country

to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

* * *

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

Desertion by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

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.

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

* * *

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.*

Loss from both parents means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign-sending country.

* * *

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance

with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.

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.

The regulation at 8 C.F.R. § 204.3(d)(3) provides that orphan petitions filed concurrently with an advanced processing application, as is the case here, must contain the documentation required by 8 C.F.R. § 204.3(c), as well as the documentation required by 8 C.F.R. § 204.3(d)(1), except for the documentation required by 8 C.F.R. § 204.3(d)(1)(i).

Whether the petitioner has satisfied the criteria at 8 C.F.R. § 204.3(c) is not at issue. The pertinent provisions of 8 C.F.R. § 204.3(d) state the following:

(d) *Supporting documentation for a petition for an identified orphan . . .* An orphan petition must be accompanied by full documentation as follows:

* * *

(1)(ii) The orphan's birth certificate, or if such a certificate is not available, an explanation together with other proof of identity and age;

(iii) Evidence that the child is an orphan as appropriate to the case:

(A) Evidence that the orphan has been abandoned or deserted by, separated or lost from both parents, or that both parents have disappeared as those terms are defined in paragraph (b) of this section; or

(B) The death certificate(s) of the orphan's parent(s), if applicable;

(C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption. . . .

The petitioner is a thirty-nine-year-old citizen of the United States. The beneficiary was born in Cape Verde on August 4, 2005. The record indicates that the petitioner and his wife adopted the beneficiary in Cape Verde on April 10, 2006, and that the beneficiary has been living with the petitioner's mother-in-law in Cape Verde since she was two months of age.

The petitioner filed the instant Form I-600 on April 23, 2009,[1] and the field office director issued a subsequent notice of intent to deny the petition (NOID), to which the petitioner, through counsel, filed a timely response. In her February 3, 2010 decision denying the petition, the field office director, as noted previously, found the evidence of record insufficient to establish that the beneficiary had been abandoned by both birthparents and met the definition of an "orphan," as defined at section 101(b)(1)(F)(i) of the Act.

As noted previously, in order to meet the definition of an orphan at section 101(b)(1)(F)(i) of the Act, the petitioner must establish that the beneficiary 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO affirms the field office director's decision. Counsel's claims on appeal fail to overcome the grounds for denial of the petition.

I. Abandonment by both parents

The term "abandonment by both parents" is specifically defined at 8 C.F.R. § 204.3(b), and the petitioner has not established that the beneficiary meets the definition of an orphan as a result of having been abandoned by both of her birthparents. In order for the beneficiary to meet the definition of an orphan under this standard, the petitioner must demonstrate that both of the beneficiary's birthparents have "willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s)." 8 C.F.R. § 204.3(b). The regulation

[1] A previous Form I-600 filed by the petitioner on behalf of the beneficiary was filed on January 10, 2007 and denied on August 24, 2007.

emphasizes further that "relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment." *Id.* Moreover, if the child was relinquished or released to a third party for custodial care in anticipation of, or preparation for, adoption, then a finding of abandonment cannot be made unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. *See id.*

Both of the beneficiary's birthparents are living. In her April 10, 2006 adoption judgment, Judge [redacted] of the Judicial Department of Family and Juvenile Court of Praia, in Cape Verde, stated that the beneficiary's birthparents had "confided" custody of the beneficiary to the petitioner's mother-in-law in Cape Verde when the beneficiary was two months of age. J[redacted] noted further that the aim of placing the beneficiary into the custody of the petitioner's mother-in-law was to "prepare the grounds for future adoption of the child by the petitioners." In her November 18, 2008 "Declaration," [redacted] stated that the beneficiary "was abandoned by the biological parents at the house of [the petitioner's mother-in-law]."

The record contains statements from both the birthmother and birthfather consenting to the adoption. In their statements, both birthparents stated that although the beneficiary had been living with the petitioner's mother-in-law since she had been two months old, they had remained in contact with the beneficiary since the placement.

The record also contains a document from the Cape Verdean Ministry of Labour, Health, and Solidarity, dated June 9, 2006, which states that the beneficiary's birthparents acquiesced to the adoption of the beneficiary.

The record also contains a November 21, 2007 letter discussing the Cape Verdean child welfare system from [redacted], a lawyer in Cape Verde. According to Ms. [redacted] when a child is abandoned in that country, he or she is temporarily sheltered in a "Child Emergency Centre" because there are no orphanages in Cape Verde.[2]

Finally, the record contains three documents issued by the Cape Verdean Ministry of Labor, Professional Education, and Social Solidarity, Cape Verdean Institute for Children and Adolescents (the Institute). In the first document, entitled "Declaration," the Institute stated that it had been "called to intervene" in the matter "in the case of abandoning minor children in the house of [the petitioner's mother-in-law]." The Declaration stated that the Institute sent a caseworker to investigate the beneficiary's situation, and that the caseworker had determined that the birthmother had abandoned the beneficiary. The Declaration stated that the Institute asked the petitioner's mother-in-law to continue caring for the beneficiary while it conducted its inquiry, and that she agreed to continue doing so. According to this Declaration, the mother-in-law then informed the Institute that her daughter and the petitioner were interested in adopting the beneficiary. The second document from the Institute, entitled

[2] The term "Child Emergency Centre" is not explained, and the record does not indicate whether the beneficiary ever resided at such a center.

"Social Report," dated December 9, 2005, states that the birthparents consented to the adoption of the beneficiary by the petitioner and his wife. The third document from the Institute, which is untitled, is dated September 10, 2009. According to that document, the Institute is responsible for the care of children during an investigation, and it "does all it can to locate the biological parents so they can be heard as to reasons for the abandonment."

In her September 11, 2009 response to the field office director's NOID, counsel argued that the beneficiary "was not given up for adoption but was abandoned." Citing to the Institute's statement that it is responsible for the care of an abandoned child during an investigation, counsel asserted that although the beneficiary was residing with the petitioner's mother-in-law, because the Institute was conducting an investigation the beneficiary was actually in the care of the Institute.

In her March 1, 2010 appellate brief, counsel argues that although the beneficiary was abandoned by the birthparents at the home of the petitioner's mother-in-law, they did not relinquish the beneficiary to the petitioner's mother-in-law in anticipation of, or preparation for, adoption. Rather, adoption of the beneficiary was contemplated by the petitioner only after the birthparents left the beneficiary at the home of the petitioner's mother-in-law. Counsel contends that the record lacks evidence that the beneficiary's birthparents "were even aware of any possibility that anyone wanted to adopt" her. According to counsel, it was only after: (1) the birthparents abandoned the beneficiary at the home of the petitioner's mother-in-law; (2) the petitioner's mother-in-law called the Ministry to report the abandonment; and (3) the Institute began its investigation; that the idea that the petitioner and his wife would adopt the beneficiary "came to fruition."

At the outset of its analysis, the AAO notes that the record contains no description of the actual circumstances surrounding the birthparents' transfer of the beneficiary to the petitioner's mother-in-law. The record contains no evidence to support counsel's assertion that the birthparents were unaware of any possibility that anyone wanted to adopt the beneficiary. The lack of a detailed description of the circumstances surrounding the transfer of custody from the birthparents to the petitioner's mother-in-law renders it impossible for the AAO to make a finding of abandonment by both birthparents. For this reason alone, the petitioner has not established that the beneficiary was abandoned by both birthparents.

Having made that observation, the AAO turns to an analysis of the evidence of record. Upon review of the entire record, the AAO finds the evidence insufficient to establish that the beneficiary was "abandoned by both parents" as defined at 8 C.F.R. § 204.3(b). Again, the regulation specifically states that both birth parents must willfully forsake all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights *to any specific person or persons.* 8 C.F.R. § 204.3(b). The regulation further prescribes that "[a] relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment." *Id.* The record indicates clearly the birthparents' desire to transfer their parental rights, obligations, and claims, as well as control over and possession of, the beneficiary, directly to the petitioner and her husband. The birthparents were aware that the petitioner and her husband were preparing to adopt the beneficiary, and the record is clear that they consented to the adoption.

In their affidavits, which were issued prior to issuance of the adoption order, both the beneficiary's birthmother and birthfather acknowledged that the beneficiary had been living with the petitioner's mother-in-law, and that they had been in contact with the beneficiary since placing her in the mother-in-law's custody. They also consented to the adoption of the beneficiary by the petitioner and his wife. [redacted] noted in her April 10, 2006 findings that the birthparents had consented to the adoption of the beneficiary by the petitioner and his wife, and the June 9, 2006 document from the Cape Verdean Ministry of Labour, Health, and Solidarity also stated that the beneficiary's birthparents had consented to adoption of the beneficiary by the petitioner and his wife. The December 9, 2005 "Social Report," also stated that the birthparents consented to the adoption of the beneficiary by the petitioner and his wife.

Moreover, the record indicates that placement of the beneficiary with the petitioner's mother-in-law was in fact "in anticipation of, or preparation for, adoption." *Id.* The record, however, does not establish that the petitioner's mother-in-law is authorized under the child welfare laws of Cape Verde to act in such a capacity. *See id.* In her April 10, 2006 findings, [redacted] stated that the beneficiary's birthparents transferred custody of the beneficiary to the petitioner's mother-in-law, and that the mother-in-law has taken good care of the beneficiary with the aim of preparing the beneficiary for adoption by the petitioner and his wife. In her November 18, 2008 findings, Judge [redacted] stated that the beneficiary was directly abandoned by her birthparents at the mother-in-law's house. In other words, she was not placed there by the Institute or any other social welfare agency.

The AAO finds counsel's assertions on appeal unpersuasive. Although counsel asserts again that the petitioner and his wife did not contemplate adopting the beneficiary until after the Institute began its investigation of the matter, her assertion finds no support in the record, as none of the documents from the Investigation provide a date from which the investigation began, other than stating that the beneficiary was two months of age at the time. Counsel's assertion is also unpersuasive in that the record contains no explanation as to why the birthparents chose the petitioner's mother-in-law as the person to whom they would relinquish the child. Again, the record does not indicate that she is a social worker or that she is connected with the children's welfare system of Cape Verde in any way.

Finally, while the AAO acknowledges use of the term abandonment in several of the Cape Verdean documents, such usage does not establish the petitioner's claim: again, "abandonment by both parents" is specifically defined at 8 C.F.R. § 204.3(b). Whether the beneficiary has been "abandoned" pursuant to the laws of Cape Verde is not at issue here.

The record indicates clearly that: (1) the birthparents intended to transfer "all parental rights, obligations, and claims to the child, as well as all control over and possession of the child," to the petitioner and her husband; and (2) placement of the beneficiary with the petitioner's mother-in-law was "in anticipation of, or preparation for, adoption," and the record fails to establish that the petitioner's mother-in-law is authorized under the child welfare laws of Cape Verde to act in such a capacity.

Accordingly, the petitioner has not established that the beneficiary was "abandoned by both parents," as the term is defined at 8 C.F.R. § 204.3(b).

II. Death or disappearance of both parents; desertion by both parents; separation from both parents; loss of both parents; and surviving parent incapable of providing proper care and who has in writing irrevocably released the child for emigration and adoption

The record does not indicate that both of the birthparents have died or disappeared, as that term is defined at 8 C.F.R. § 204.3(b). As such, the beneficiary does not meet the definition of an orphan as a result of the death or disappearance of both parents.

Nor does the record indicate that the beneficiary has "become a ward of a competent authority" as the result of her birthparents' desertion. Accordingly, the beneficiary does not meet the definition of an orphan as a result of "the desertion by both parents," as that term is defined in the regulation at 8 C.F.R. § 204.3(b).

Nor does the record indicate that the beneficiary was involuntarily severed from her birthparents by action of a competent authority for good cause and in accordance with the laws of Cape Verde. Accordingly, the beneficiary does not meet the definition of an orphan as a result of "separation from both parents," as defined at 8 C.F.R. § 204.3(b).

Nor does the record indicate that the beneficiary was involuntarily and permanently severed or detached from her birthparents due to a natural disaster, civil unrest, or other calamitous event beyond the control of her birthparents and as verified by a competent authority. Accordingly, the beneficiary does not meet the definition of an orphan as a result of the "loss of both parents," as defined by the regulation at 8 C.F.R. § 204.3(b).

Finally, the record establishes that both of the beneficiary's birthparents are living. As such, neither the beneficiary's birthmother nor birthfather is a "surviving parent," as that term is defined at 8 C.F.R. § 204.3(b). Accordingly, the beneficiary does not meet the definition of an orphan under this standard.

III. Sole parent incapable of providing proper care and who has in writing irrevocably released the child for emigration and adoption

The record does not establish that the beneficiary meets the definition of an orphan because she has a sole parent incapable of providing proper care, as this standard is defined at 8 C.F.R. § 204.3(b). The regulation prescribes that the term "sole parent" only applies to the mother of a child born out of wedlock who has not acquired another parent and that the definition "is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate."

Although the record shows that the beneficiary was born out of wedlock, the petitioner has submitted no evidence to establish that the laws of Cape Verde distinguish between a child born in

or out of wedlock. In *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973), the Board of Immigration Appeals (BIA) held that the law of a foreign country is a question of fact which must be proved by the applicant if he relies upon it to establish eligibility for an immigration benefit. The petitioner makes no argument and submits no evidence regarding the legitimacy laws of Cape Verde. As such, the record fails to establish that the birthmother is the beneficiary's sole parent. Accordingly, the beneficiary does not meet the definition of an orphan under this standard.

IV. Conclusion

As set forth in the previous discussion, the petitioner has failed to establish that the beneficiary meets the definition of an "orphan," as that term is defined at section 101(b)(1)(F)(i) of the Act and the director properly denied the petition. The petitioner has not overcome the grounds for denial on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.