

(b)(6)



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: DEC 20 2013

Office: NATIONAL BENEFITS CENTER [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director (“the director”) of the National Benefits Center, denied the Petition to Classify Orphan as an Immediate Relative (Form I-600), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks to classify the beneficiary as an orphan pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F). The director denied the petition on the basis of his determination that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as that term is defined at section 101(b)(1)(F)(i) of the Act. On appeal, the petitioner submits additional evidence.

Applicable Law

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

The regulation at 8 C.F.R. § 204.3(b) provides definitions for certain terms found at section 101(b)(1)(F) of the Act and states, in pertinent parts:

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.

Factual and Procedural History

The petitioner is a married 48-year-old U.S. citizen who seeks to classify the beneficiary, who is his nephew and a citizen of Ghana, as an orphan. The petitioner filed the Form I-600 with U.S. Citizenship and Immigration Services (USCIS) on March 20, 2013, when the beneficiary was sixteen years old. On the Form I-600, the petitioner stated that the beneficiary is an orphan because he has only one parent who is the sole or surviving parent. The petitioner initially submitted: the birth mother's written irrevocable release of the beneficiary for adoption by the petitioner; a court order granting the petitioner adoption of the beneficiary; a certified birth registration for the beneficiary, listing the petitioner and his wife as the parents; the petitioner's marriage certificate; and evidence of the petitioner's U.S. citizenship and his wife's lawful permanent resident status.

The director subsequently issued a Request for Evidence (RFE) to demonstrate that the beneficiary is an orphan under section 101(b)(1)(F)(i) of the Act. The petitioner responded with an affidavit from the birth mother discussing the reason for her relinquishment of the beneficiary to the petitioner. The director found this evidence insufficient to establish eligibility and denied the petition. The petitioner timely appealed.

On appeal, the petitioner submits: the birth mother's affidavit of consent for the petitioner's adoption of the beneficiary; the beneficiary's baptism certificate; the beneficiary's birth registration, listing his birth parents' names; and an additional birth registration for the beneficiary with the petitioner and his wife listed as the parents.

Analysis

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, we find that the evidence in the record does not demonstrate the beneficiary's eligibility as an orphan. The beneficiary's baptism certificate and birth registration certificates show that his birth date is March 8, 1997. The Form I-600 petition was filed with USCIS on March 20, 2013, when the beneficiary was sixteen years old. Section 101(b)(1)(F)(i) of the Act specifically requires the filing of an orphan petition prior to a child's sixteenth birthday. The statutory cutoff age of sixteen years to meet the definition of "orphan" involves a threshold condition for eligibility under section 101(b)(1)(F)(i) of the Act. The statute does not allow for an exception to this requirement. The beneficiary is therefore not an orphan under the Act, as he was over sixteen years old when the Form I-600 was filed.

The record also does not demonstrate that the beneficiary is an orphan under the other criteria required by section 101(b)(1)(F)(i) of the Act. On the Form I-600, the petitioner stated that the beneficiary has only one parent because the beneficiary's father "abandoned the family." The beneficiary's birth mother stated in her February 28, 2012 affidavit that she consents to the petitioner's adoption of the beneficiary because the beneficiary's birth father's whereabouts are unknown and she is incapable of providing the beneficiary with proper care. A mother may be classified as a *sole parent* only when the beneficiary is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. See 8 C.F.R. § 204.3(b) (definition of *sole parent*). The regulation at 8 C.F.R. § 204.3(b) prescribes that the term "sole parent" only applies to children born out of wedlock 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." The petitioner has submitted no evidence to establish that the laws of Ghana 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 petitioner 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 Ghana. Moreover, even if the petitioner had established that the laws of Ghana distinguish between a child born in or out of wedlock, the record would still not establish that the beneficiary has a sole parent, as the record does not establish that the beneficiary was himself born out of wedlock. For both of these reasons, the record fails to establish that the birth mother is the beneficiary's sole parent. Accordingly, the beneficiary does not meet the definition of an orphan under this standard.

The record fails to demonstrate that the beneficiary meets any of the remaining definitions of an orphan at section 101(b)(1)(F)(i) of the Act. The record does not indicate that both of the beneficiary's birth parents have died, abandoned him, disappeared, or that the beneficiary has become a ward of competent authority as the result of his birth parents' desertion. The record also does not indicate that the beneficiary was involuntarily severed from his birth parents by action of a competent authority for good cause and in accordance with the laws of Ghana. Nor does the record show that the beneficiary was involuntarily and permanently severed or detached from his birth parents due to a natural disaster, civil unrest, or other calamitous event beyond the control of his birth parents and as verified by a competent authority. The record indicates that both of the beneficiary's birth parents are living. As such, neither the beneficiary's birth mother nor birth father is a "surviving parent."

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. Consequently, the appeal will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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