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U.S. Citizenship
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Services

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FILE:



Office: BALTIMORE, MD

Date:

OCT 24 2005

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)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The District Director, Baltimore, Maryland denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a twenty-four-year-old married citizen of the United States. The beneficiary was born in Guatemala on April 12, 1988, and he is seventeen-years-old.

The district director found the petitioner had filed the Petition to Classify Orphan as an Immediate Relative (I-600 petition) on April 14, 2004, two days after the applicant turned sixteen years old. The district director found that the beneficiary therefore did not meet the age requirement set forth in section 101(b)(1) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1101(b)(1), and the petition was denied.

Counsel asserts on appeal that the I-600 petition was filed with U.S. Citizenship and Immigration Services (CIS) on April 9, 2004, two days prior to the beneficiary's sixteenth birthday. Counsel claims that FedEx confirmation documentation submitted on appeal establishes the petitioner's April 9, 2004 filing date.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F)(i), 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; 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. (Emphasis added).

The record contains the following evidence relating to the petitioner's I-600 petition and I-600A, Application for Advance Processing of Orphan Petition (I-600A application) filing date:

The original I-600 petition containing a CIS "Received" stamp dated April 14, 2004, as well as Baltimore, Maryland CIS file bar code dated April 14, 2004, and personal check, payment receipt information.

An April 16, 2004, letter from the district director acknowledging CIS receipt of the petitioner's orphan petition, filed on April 14, 2004.

A copy of a FedEx e-mail sent to counsel on April 9, 2004, stating that FedEx "[r]ecords indicate that the shipment sent from [REDACTED] Attorney at Law to U.S. C.I.S. Baltimore District/Fallon F has been delivered. The package was delivered on 04/09/2004 at 9:25 AM and signed for or released by [REDACTED]. The ship date of the shipment was 04/08/2004. The tracking number of this shipment was [REDACTED]."

A copy of the FedEx label addressed to CIS Baltimore District office and containing a reference stating, "Contreras I-600 / I-600A". The label states further that the document is a priority overnight delivery to be delivered by Friday, April 9, 2004. The tracking number on the label is [REDACTED]

The AAO finds that the FedEx documentation submitted by counsel establishes that the petitioner's I-600 petition was filed on April 9, 2004, three days prior to the beneficiary's sixteenth birthday. The beneficiary therefore meets the age requirements to qualify as an "orphan" under section 101(b)(1)(F) of the Act.

The AAO notes that it conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-46 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003).

The AAO finds that in spite of the above findings regarding the beneficiary's age at the time of filing, the beneficiary remains ineligible for classification as an orphan based on the petitioner's failure to establish that the beneficiary is present in the United States in parole status.

Title 8 of the Code of Federal Regulations (8 C.F.R.), section 204.3(k)(3) states:

Child in the United States. A child who is in parole status and who has not been adopted in the United States is eligible for the benefits of an orphan petition when all the requirements of sections 101(b)(1)(F) and 204(d) and (e) of the Act have been met. A child in the United States either illegally or as a nonimmigrant, however, is ineligible for the benefits of an orphan petition.

The I-600 petition and I-600A application information contained in the record reflect that the beneficiary resides in the U.S. with the petitioner. Circuit Court of Anne Arundel County, Maryland, custody consent information and July 13, 2004 pleadings submitted by counsel to the immigration judge further confirm the beneficiary's residence in the United States. The record contains no evidence, however, to establish that the beneficiary is in the United States in parole status, as required by 8 C.F.R. § 204.3(k)(3). Moreover, removal proceeding evidence contained in the record reflects that the applicant entered the U.S. without admission or parole and that he is illegally present in the United States. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary qualifies as an orphan pursuant to section 101(b)(1)(F) of the Act.

In visa petition proceedings, the burden of proof rests solely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met her burden. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.