

Department of Homeland Security
U.S. Citizenship and Immigration Services
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



FI

FILE: [REDACTED] Office: ST. PAUL (BLOOMINGTON), MN Date: SEP 22 2005

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:

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, St. Paul (Bloomington), Minnesota denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Petition to Classify Orphan as an Immediate Relative (I-600 petition) on January 13, 2005. The petitioner is a fifty-three-year-old married U.S. citizen. The beneficiary was born in Kenya on April 16, 1997, and he is eight-years-old. The petitioner and his spouse, [REDACTED] (the petitioners), seek to classify the beneficiary as an orphan and immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F).

The district director found that the petitioners had failed to establish that they adopted or secured custody of the beneficiary in accordance with Kenyan law, as set forth in the Act and in Volume 8 of the Code of Federal Regulations (8 C.F.R.). The petition was denied accordingly.

The petitioners assert on appeal that the Child Welfare Society of Kenya (CWSK) is now processing the beneficiary's adoption on their behalf, and that they are therefore in compliance with Kenyan adoption laws.

Section 101(b)(1)(F)(i) of the Act, 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.

8 C.F.R. § 204.3(d) states in pertinent part:

(1) [T]he following supporting documentation must accompany an orphan petition filed after approval of the advanced processing application:

....

(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 . . . and

(iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country:

(B) [I]f the orphan is to be adopted in the United States because there was no adoption abroad, or the unmarried petitioner, or married petitioner and spouse, did not personally see the orphan prior to or during the adoption proceeding abroad, and/or the adoption abroad was not full and final:

- (1) Evidence that the prospective adoptive parents have, or a person or entity working on their behalf has, secured custody of the orphan in accordance with the laws of the foreign-sending country.
- (2) An irrevocable release of the orphan for emigration and adoption from the person, organization, or competent authority which had the immediately previous legal custody or control over the orphan if the adoption was not full and final under the laws of the foreign sending country

The record contains the following evidence relating to the beneficiary's status as an "orphan":

A copy of a Kenyan Certificate of Birth reflecting that [REDACTED] was born in Kenya on [REDACTED]

A copy of a Kenyan Certificate of Death reflecting that [REDACTED] died of illness on 3/6/1997.

A copy of a Kenyan Certificate of Death reflecting that [REDACTED] died of illness on 11/7/2000.¹

A copy of an Affidavit signed and sworn to by [REDACTED] before the Senior Resident Magistrate Court at Lodwar, Kenya on March 2, 2005, stating that [REDACTED] is the beneficiary's uncle, and that the beneficiary's biological parents died and left him as the beneficiary's guardian. The Affidavit states that the petitioner is currently the beneficiary's sponsor and that [REDACTED] extends his guardianship to the petitioner through Share International.

A May 19, 2005, letter signed by Martin Ngunga, Social Worker with Child Welfare Society of Kenya, Registered Adoption Society, stating that the petitioners are in the process of complying with legal requirements for a Kenyan, in country adoption of the beneficiary and his four siblings. The letter states that the CWSK office in Lodwar, Kenya has been informed of the process and that the office has compiled their report. The letter states that the magistrate's court in Lodwar is also aware of the petitioners' adoption process. The letter additionally states that CWSK is the only registered adoptive society in Kenya, and that it is taking the necessary legal steps to ensure legal adoption of the beneficiary.

¹ The authenticity of the Kenyan birth and death certificates has not been addressed or put forth as an issue by the district director. The AAO therefore accepts the Kenyan certificates as authentic for purposes of the present decision.

As noted in the district director's decision, the U.S. Department of State has stated that, in Kenya:

Many steps must be taken before a child can be placed in the care of the adoptive parent. If anyone other than an adoption agency places a child with prospective adoptive parents, the Chief Inspector of Children must be notified of the placement. The adoption society or a legal guardian must make inquiries and obtain reports on the personal circumstances of the applicant, child, and child's parents or guardians.

Unless otherwise directed, the applicant, as well as the child to be adopted, must attend the hearing on the application for adoption. If the court approves the adoption order, the Registrar draws it up and a certified copy is served on the Registrar-General within thirty days. After an adoption decree is approved and the appropriate paperwork has been filed and issued, the adoptive parents can apply for a Kenyan passport for the child. Once the passport has been issued, the child is free to depart the country. *See* http://www.travel.state.gov/family/adoption/country_409.html.

The AAO finds that the petitioners have failed to meet the requirements set forth in 8 C.F.R. § 204.3(d)(1)(iv). The petitioners have provided no evidence to establish that they obtained a legal order of guardianship or custody over the beneficiary. Moreover, the AAO finds that the Affidavit written by the beneficiary's uncle and the CWSK letter submitted by the petitioners, fail to establish that the petitioners or a person or entity working on their behalf has custody of the beneficiary for emigration and adoption in accordance with Kenyan law.

The AAO finds further that the petitioners have failed to meet the requirements set forth in 8 C.F.R. § 204.3(d)(1)(iv)(B). Although the CWSK letter submitted on appeal suggests that the petitioners are in the process of complying with Kenyan adoption laws, the evidence in the record does not establish that the petitioners have, as of yet, secured custody of the beneficiary in accordance with Kenyan laws. The evidence also fails to establish that a person or entity working on the petitioners' behalf has, as of yet, secured custody of the beneficiary in accordance with Kenyan laws. The evidence contained in the record additionally fails to demonstrate that the petitioners have, as of yet, secured an irrevocable release of the beneficiary for emigration and adoption from a person, organization, or competent authority which had immediate previous custody or control over the orphan, in accordance with Kenyan laws, and the petitioners failed to establish that they have obtained a full and final adoption of the beneficiary pursuant to Kenyan law.

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 petitioners have failed to meet their burden of establishing that the beneficiary is an "orphan" as set forth in section 101(b)(1)(F) of the Act. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.