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FILE:



OFFICE: EL PASO, TEXAS

DATE: JAN 22 2008

IN RE:

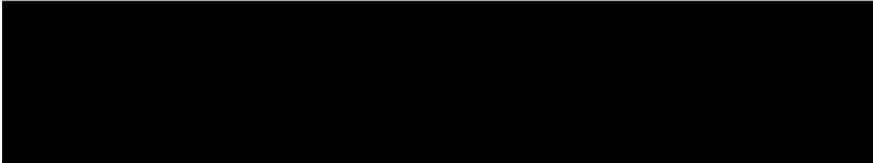
Petitioner:

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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, El Paso, Texas, 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 the Petition to Classify Orphan as an Immediate Relative (I-600 Petition) in April 2006. The petitioner is a thirty-six-year-old married U.S. citizen. The beneficiary was born in Mexico on November 4, 1993, and he is presently fourteen years old.

The I-600 petition was denied by the director on February 16, 2007, based on a finding that the submitted evidence failed to demonstrate that the beneficiary qualified as an “orphan” as defined under section 101(b)(F)(1) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1101(b)(F)(1). The director also found that the home study preparer failed to recommend the adoption and establish the petitioner’s ability to support the beneficiary, and state that space requirements complied with state laws. The petitioner filed a timely appeal.

The AAO will first address the finding that the beneficiary fails to qualify as an orphan as defined under the Act.

Section 101(b)(1)(F) 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.

The petitioner claims that the beneficiary is an orphan because he has only one parent who is the sole or surviving parent. The regulation under 8 C.F.R. § 204.3(b) defines a “sole parent” and “incapable of providing proper care,” as follows:

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.

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*.¹

¹ 8 C.F.R. § 204.3(b) provides that:

The birth certificate in the record conveys that the beneficiary is illegitimate as it shows that he was born out-of-wedlock in Mexico to [REDACTED]. But the district director was correct in finding that the record fails to establish that the beneficiary has not acquired a parent within the meaning of section 101(b)(2) of the Act. As stated by the district director, the statement by the beneficiary's mother, in which she gives her consent to the adoption, indicates that she is a married woman: [REDACTED]. Because Ms.

entered into a marriage prior to the beneficiary's eighteenth birthday, under section 101(b)(2) of the Act her husband is considered the beneficiary's stepfather and parent. With the presence of two parents, the regulations require that the petitioner show that the beneficiary qualifies as an orphan because his parents have disappeared, or have abandoned or deserted him, or separated from him. 8 C.F.R. § 204.3(b). No documentation in the record shows that both of the beneficiary's parents have disappeared, or have abandoned or deserted him, or separated from him. Thus, the petitioner fails to establish that the beneficiary qualifies as an orphan under the Act.

If it were established that [REDACTED] were in fact the beneficiary's sole parent, she must show that she is no longer able to provide for her son's basic needs, consistent with the local standards of Mexico, as set forth in 8 C.F.R. § 204.3(b). The record contains a handwritten letter by the beneficiary's mother, in which she gives her consent to have her neighbor communicate to [REDACTED] and his wife, [REDACTED], that:

[I]t is my desire to give them the rights over my minor son [REDACTED] and to come by to pick him up from the city of Melchor Muzquiz Coahuila, Mexico[,] now that it's impossible to continue to support my son economically[,] and that [REDACTED] and her husband[,] [REDACTED][,] have always loved my son like their own even though they are aunt/uncle to my son[,] [REDACTED].

The AAO finds that the affidavit by the beneficiary's natural mother lacks any detail regarding her inability to provide proper care to the beneficiary and the record has no documentation in support of her claim.

Although the petitioners indicate that they have adopted the beneficiary, the record contains no evidence of an adoption decree. See 9 Foreign Affairs Manual 42.21, N.13.2-3. The document in the record prepared by Hector J. Pineda Martinez, Attorney, reflects the intent of the petitioner and her husband to adopt the beneficiary; however, the document is not a final adoption decree.

The AAO will now address the finding that the home study preparer failed to recommend the adoption and establish the petitioner's ability to support the beneficiary, and show that space requirements complied with state laws.

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.

In the undated brief, counsel states that the “[p]etitioners would like to have an opportunity to respond and to have another home study done.” It is noted that the appeal process provides the petitioners with an opportunity to respond to the denial of the orphan petition and to submit additional evidence. The undated brief is the only response and evidence submitted in support of the appeal.

The regulation under 8 C.F.R. § 204.3(e) describes home study requirements, which include screening for abuse and violence and checking available child abuse registries; information concerning history of abuse and/or violence; and disclosure of criminal history; and with regard to living accommodations, “an assessment of the suitability of accommodations for a child and a determination whether such space meets applicable State requirements, if any.” The district director was correct in finding that the home study and addendum failed to properly address these areas. For example, neither the home study nor the unsigned addendum indicates the source of the preparer’s statements that the [REDACTED] “do not have any history of abuse or violence toward children” and that there is “no history of substance abuse, sexual or child abuse or domestic violence for either of the individuals.” The regulation states that the “home study preparer must include each prospective adoptive parent’s response to the questions regarding abuse and violence.” 8 C.F.R. § 204.3(e). With regard to living accommodations, the preparer does not include an assessment of whether living accommodations meet applicable state requirements. 8 C.F.R. § 204.3(e). The AAO therefore finds that the home study fails to comply with requirements contained in 8 C.F.R. § 204.3(e).

Furthermore, the AAO finds that the home study preparer’s assessment fails to unequivocally indicate that the [REDACTED] are able to properly provide for the beneficiary’s education and health care, and have sufficient financial resources.

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 failed to meet his burden in the present matter. The appeal will therefore be dismissed

ORDER: The appeal is dismissed.