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FILE:

Office: ATLANTA, GA
(CHARLOTTE, SC)

Date:

JAN 07 2009

IN RE:

Petitioner:
Beneficiary:

PETITION:

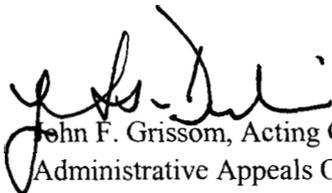
Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

ON BEHALF OF APPLICANT:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, Atlanta, Georgia (Charlotte, South Carolina sub-office) revoked approval of the petitioner's, Petition to Classify Orphan as an Immediate Relative (Form I-600) and denied the petition on June 26, 2007. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the Form I-600 will be denied.

The petitioner filed the Form I-600 on June 2, 2005. The petitioner is a fifty-seven-year old married citizen of the United States. The beneficiary was born in Nigeria on February 8, 1999, and she is presently nine-years-old.

The district director initially approved the Form I-600 on November 1, 2005. A subsequent investigation was conducted in late 2006 by the U.S. Consulate in Lagos, Nigeria. The investigation results raised concerns regarding whether:

- The petitioner lived with his wife in the United States;
- The petitioner was legally divorced from a previous wife;
- The identity of the beneficiary's natural mother had been established;
- Abandonment by the beneficiary's natural father had been established;
- The beneficiary's natural mother was able to provide proper care to the beneficiary;
- The beneficiary was legally adopted by the petitioner, in accordance with the laws in Gombe State, Nigeria.

Based on the above concerns, the district director issued a May 8, 2007 Notice of Intent to Revoke the approval of the petitioner's Form I-600. The district director determined on June 26, 2007 that rebuttal evidence established the petitioner had legally divorced his first wife and that he resided in the United States with his current wife. The district director found, however, that rebuttal evidence failed to establish that the beneficiary's alleged biological mother was unable to provide proper care to the beneficiary in accordance with the local standards in Nigeria, or that the petitioner had been adopted in accord with legal requirements in Gombe State, Nigeria. The district director concluded that the petitioner had therefore failed to establish that the beneficiary met the definition of an orphan as defined in section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F).¹ The Form I-600 was denied accordingly.

Through counsel, the petitioner indicates on appeal that he is married to the beneficiary's maternal aunt. The petitioner explains that the beneficiary's biological mother () gave birth to the beneficiary out of wedlock at the age of sixteen. The petitioner states that the beneficiary's biological father consistently denied his paternity over the beneficiary, and that his only acknowledgment relating to paternity was to write a recent affidavit for the petitioner stating that he abandoned the beneficiary, that he has not, and will not, provide financial or paternal support to the beneficiary, and that he relinquishes any parental rights over the beneficiary. The petitioner indicates that the evidence contained in the record demonstrates that () is the beneficiary's biological mother. In addition, the petitioner asserts that Nigerian court and government ministry evidence contained in the record establish that he and his wife jointly adopted the beneficiary according to the legal requirements for adoption in Gombe

¹ Because the petitioner failed to establish that the beneficiary met the definition of an orphan, the district director did not conclusively address the issue of whether the identity of the beneficiary's biological mother, or abandonment by her biological father, had been established.

State, Nigeria. The petitioner indicates that the evidence in the record establishes [REDACTED] was young, without an income, and living with her parents when she gave birth to the beneficiary, and he states that [REDACTED] remains dependent on her parents for her upkeep. The petitioner concludes that he has therefore established that [REDACTED] is unable to provide proper care to the beneficiary in accordance with local standards in Nigeria, and that the beneficiary qualifies as an orphan under section 101(b)(1)(F)(i) of the Act.

Section 101(b)(1)(F)(i) of the Act, defines the term 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 regulation provides at 8 C.F.R. § 204.3(b) that:

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.

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. . . .

The evidence relating to the beneficiary's status as an orphan consists of the following:

A November 29, 2006, Consular Memorandum reflecting the following concerns:

During the Consular interview the petitioner presented a Nigerian birth certificate reflecting that they were the beneficiary's parents. The memorandum notes that this is common in Nigerian adoption cases after a child has been legally adopted. However, in the present case, no final adoption order existed at the time of the consular interview. At the time of her interview, the beneficiary's natural mother provided no proof that she was the beneficiary's biological mother, and a post natal document submitted later to confirm maternity appeared to have been created recently, in that the same individual appeared to have made all the entries at the same time with the same pen. The memorandum noted further that investigation results confirmed that the beneficiary lives with her alleged biological mother and that her biological mother appeared able to properly care for the beneficiary.

An October 22, 2005 letter from the petitioner explaining that the beneficiary's original birth certificate listed [REDACTED] as her father. The petitioner states that [REDACTED] is actually the beneficiary's maternal grandfather, and that it is customary in northern Nigeria for the father of an unwed child to provide his name on the birth certificate if the biological father refuses to acknowledge paternity, so that the child may have a family name.

A Nigerian birth certificate registered on May 20, 2005, reflecting that the beneficiary was born to [REDACTED] and [REDACTED] on February 8, 1999.

A Nigerian birth certificate registered on December 14, 2005 reflecting that the beneficiary was born on February 8, 1999, that her mother is [REDACTED] and that her father is [REDACTED] (the petitioner.)

A June 29, 2004 statement by [REDACTED] stating that she is the beneficiary's biological mother and that she irrevocably releases her daughter to the petitioner and his wife (her sister) for adoption and emigration purposes. [REDACTED] indicates that the beneficiary's father abandoned the child at birth, and that as a result the beneficiary's maternal grandfather's name is listed on the beneficiary's birth certificate so that she could have her family's last name. [REDACTED] states that about 5 months after the beneficiary's birth, she and the beneficiary moved in with the petitioner and his wife. She states that due to the economic and personal hardship she has encountered in caring for the beneficiary, and due to the personal bond that has formed between the beneficiary, and her sister and the petitioner, she believes it would be in the child's best interest to be adopted into the petitioner's family.

A subsequent July 22, 2005 declaration signed by [REDACTED] stating that she is also known as [REDACTED] and that she is the beneficiary's biological mother.² She states that the beneficiary was born out of wedlock on February 8, 1999, and that she believes that the beneficiary's biological father is [REDACTED], a police officer in Gombe State. She states that [REDACTED] consistently denied paternity of

² does not explain her use of another last name.

the beneficiary until recently, and she indicates that due to his denial of paternity, she listed her father's name in the paternal information section of the beneficiary's birth certificate. [REDACTED] states that when the beneficiary was five months old, she took the beneficiary to live with her sister and the petitioner in Lagos, Nigeria. The petitioners have since been providing for her and the beneficiary. [REDACTED] states that she consents to the petitioner's proposed adoption, and that the adoption is in the interest of her daughter.

A third July 2, 2008 affidavit signed by [REDACTED] stating that she is the beneficiary's biological mother, that she gave birth to the beneficiary out of wedlock on February 8, 1999, and that her sister and the petitioner took care of them after the beneficiary's birth. She states that the beneficiary stayed with the petitioners from August 1999 to October 2003, when the petitioners left Nigeria, and she states that the petitioners supported the beneficiary financially and morally. [REDACTED] states that the petitioners adopted the beneficiary in December 2006, and that they presently finance the education of the beneficiary. [REDACTED] consents to the beneficiary's emigration to the United States, and she believes it would be in the beneficiary's best interest to live with the petitioners in the United States.

A June 29, 2004 statement by [REDACTED], reflecting that he is the beneficiary's maternal grandfather, and that he supports the adoption of his granddaughter by the petitioner and his eldest daughter. He states that when the beneficiary was born he tried to persuade the suspected father to take responsibility for the pregnancy, but that the father denied paternity.

A subsequent July 2, 2008 affidavit signed by [REDACTED] stating that he is a retired police officer and the grandfather of the beneficiary. He states that his daughter, [REDACTED], gave birth to the beneficiary out of wedlock on February 8, 1999 and that his eldest daughter and her husband (the petitioner) supported the beneficiary financially and morally from the time of her birth until the petitioners left for the U.S. in October 2003. [REDACTED] indicates that the beneficiary has resided with him since the petitioners' departure to the United States, but that the petitioners have always financed and supported the beneficiary's education. He states his belief that it would be in the best interest of the beneficiary to live with her adopted parents in the United States.

A July 22, 2005 declaration signed by [REDACTED] stating that he is the beneficiary's biological father and that [REDACTED] is the beneficiary's biological mother. He states that the beneficiary was born out of wedlock, and that he denied his paternity until now for personal reasons. He states that he does not object to the beneficiary's use of her mother's surname, and that the beneficiary has been in the custody of her mother's family who have been solely responsible for her welfare and upkeep. [REDACTED] states that he gives his consent to the petitioner and the beneficiary's maternal aunt to adopt the beneficiary.

A July 25, 2008 affidavit signed by the beneficiary's maternal uncle stating that the beneficiary lives with her grandfather, but that she seems displaced and speaks of going to her family in America. He states that he assisted with the beneficiary's care during her adoption period in 2004, and that after the beneficiary's U.S. visa was delayed the beneficiary moved to Gombe to live with her maternal grandparents.

A December 12, 2005 letter from the Ministry of Women Affairs and Youth Development, (MWAYD) in Gombe State, Nigeria indicating that the MWAYD previously granted full custody of the beneficiary to [REDACTED] (the petitioner's wife.) The MWAYD states that Gombe State has no specific law on adoption of children, but that the MWAYD conducted a satisfactory investigation in the beneficiary's case, and has no objection to the adoption of the beneficiary by the petitioner and his wife.

A May 28, 2007 Interview/Investigation Report prepared by the Gombe State Government of Nigeria, Ministry of Women Affairs and Social Welfare (MWASF) reflecting that:

[REDACTED] and [REDACTED] are the children of [REDACTED] and [REDACTED].
[REDACTED] gave birth to the beneficiary out of wedlock on February 8, 1999;
The petitioner and his wife have cared for, and supported the beneficiary and [REDACTED] since the time the beneficiary was born;
[REDACTED] is unemployed and cannot support herself or the beneficiary;
[REDACTED] cannot support the beneficiary educationally, as she herself needs support to further her education;
[REDACTED] the beneficiary's maternal grandfather, cannot support the beneficiary and her biological mother on his salary;
The beneficiary's biological father has never supported the beneficiary;
The petitioner and his wife applied for adoption of the beneficiary before the Chief Magistrate Court No. 1, Gombe, Nigeria and the adoption was granted with the full knowledge and consent of both [REDACTED] and [REDACTED].
Pursuant to her adoption, the beneficiary's name was changed.

A July 25, 2007 letter from the Gombe State Government of Nigeria, Ministry of Women Affairs and Social Welfare (MWASF), confirming their approval of the beneficiary's adoption by the petitioner and his wife. The letter indicates that the MWASF carried out an investigation in the beneficiary's case, and that they were fully satisfied that the adoption could proceed. The letter states that the petitioner's wife applied for, and obtained, a Court Order under the Child's Rights Act of 2003, and that a copy of the order was served on the MWASF for its information and record.

A December 11, 2006 Court Order from the Chief Magistrate Court of Gombe State, Nigeria, allowing the petitioner and his wife to adopt the beneficiary as their child,

and stating the beneficiary is allowed to live with the petitioner and his wife in the U.S. as their adopted daughter.

An educational certificate reflecting that [REDACTED] successfully completed her senior secondary education at Baptist Academy Gombe on 01-02-08.

The AAO finds, upon review of the evidence, that the birth certificate evidence, combined with the MWASF, MWAYD, Nigerian Court and family statement evidence persuasively establishes Ms. [REDACTED] maternity over the beneficiary. The petitioner has therefore established that [REDACTED] is the beneficiary's biological mother. The AAO finds further that the evidence establishes that [REDACTED] gave birth to the beneficiary out of wedlock.

In Nigeria, a child born out of wedlock is considered to be illegitimate, and may become legitimated only upon the marriage of the parents, or upon the biological father's acknowledgement. "Acknowledgment involves conduct or an act by the father which definitely indicates that the child is his own." *Matter of Cocker*, 14 I&N Dec. 521, 522 (BIA 1974.) The record contains no evidence to indicate or establish that the beneficiary's biological parents ever married. The evidence in the record additionally fails to establish that the beneficiary's biological father engaged in an act or conduct which would definitely indicate that the beneficiary was his own child. To the contrary, the evidence indicates that the beneficiary's biological father has denied his paternity over the beneficiary until recently when he acknowledged paternity in writing for the purpose of irrevocably releasing the beneficiary for emigration and adoption. The petitioner therefore met the initial requirements for considerations as an orphan under the sole parent definition contained in 8 C.F.R. § 204.3(b). The AAO finds that the petitioner has failed, however, to establish that the beneficiary's biological mother is unable to provide proper care to the beneficiary as required by the second part of the sole parent definition.

The AAO notes that the Nigerian Ministry of Women Affairs and Social Welfare and family statement conclusions that the beneficiary's biological mother is dependent on her parents and unemployed and unable to care for the beneficiary are premised on [REDACTED] status as a student and/or on her status as a young girl who had the beneficiary at the age of sixteen. A review of all of the evidence in the record reflects, however, that [REDACTED] is now an adult with a secondary education degree. The U.S. consular investigation evidence reflects that the beneficiary lives in the same household as her biological mother, and the record contains no detailed or current evidence to clarify or corroborate the claim that [REDACTED] is unable work or to provide proper care to the beneficiary in accordance with the local standards in Nigeria. Accordingly, the petitioner has failed to establish that all of the requirements contained in the sole parent definition have been met, as set forth in 8 C.F.R. § 204.3(b). The beneficiary therefore does not meet the definition of an orphan, as set forth in section 101(b)(1)(F) of the Act.

Because the beneficiary does not meet the definition of an orphan, the AAO finds it unnecessary to address whether the petitioner's adoption of the beneficiary was legally valid under Nigerian 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 petitioner failed to meet his burden of proof in the present matter. The appeal will therefore be dismissed and the Form I-600 will be denied.



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