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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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[Redacted]

FILE:

[Redacted]

Office: ATLANTA, GA Date:  
(CHARLOTTE, NC)

NOV 18 2009

IN RE:

Petitioner:  
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:

[Redacted]

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The district director initially approved the Form I-600, Petition to Classify Orphan as an Immediate Relative. However, upon receipt of additional information from the United States Consulate in Lagos, Nigeria, the district director issued a notice of intent to revoke (NOIR), and ultimately did revoke approval of the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, and the matter is again before the AAO on motion to reopen or reconsider. The matter will be reopened, and the previous decisions of the district director and the AAO will be affirmed. Approval of the petition will be revoked.

The petitioner seeks classification of an orphan as an 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 approved the petition on June 2, 2005. She issued the NOIR on May 8, 2007, and revoked the petition's approval on June 26, 2007. The AAO dismissed the petitioner's appeal on January 7, 2009. As the facts and procedural history of this case were adequately documented in its January 7, 2009 decision, the AAO will only repeat certain facts as necessary here.

In its January 7, 2009 decision, the AAO dismissed the petitioner's appeal on the basis of its determination that the petitioner had failed to establish that the beneficiary's birthmother is unable to provide proper care to the beneficiary. The AAO determined that, as such, the petitioner had failed to establish that the beneficiary meets the definition of an orphan, as that term is defined in the statute and regulations.<sup>1</sup>

On motion to reopen or reconsider, the petitioner submits a brief and additional evidence. Before addressing the substantive matters raised by the petitioner, the AAO must first determine whether the petitioner's submission meets the technical requirements set forth at 8 C.F.R. § 103.5 regarding a motion to reopen or reconsider. If the requirements of neither type of motion are satisfied, the AAO is required to dismiss the petitioner's submission. 8 C.F.R. § 103.5(a)(4).

The petitioner's submission does not meet the requirements of a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, the following:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner's submission does not satisfy these requirements. Again, in order for a submission to qualify as a motion to reconsider, that submission must, at the time it is filed, establish that the decision it seeks to have reconsidered was incorrect at the time it was issued. 8 C.F.R. § 103.5(a)(2). Thus, in order for this submission to qualify as a motion to reconsider, it must establish that the record

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<sup>1</sup> The AAO noted in its January 7, 2009 decision that since the petitioner had failed to establish that the beneficiary meets the definition of an orphan, it was unnecessary for the AAO to analyze the issue of whether the petitioner's adoption of the beneficiary was valid under Nigerian law.

of proceeding, as it existed on January 7, 2009, was sufficient to warrant approval. Furthermore, the petitioner must state the specific reasons for reconsideration, and submit any pertinent precedent decisions to establish that the AAO's January 7, 2009 decision was based upon an incorrect application of law or policy.

The petitioner's submission satisfies none of these requirements. The petitioner does not submit any pertinent precedent decisions, and does not argue that the AAO applied any laws or policies incorrectly. Nor does it establish that the AAO's decision was incorrect based upon the record before it at the time it issued its decision, as he relies upon documentation and arguments that were not before the AAO on January 7, 2009. Accordingly, the petitioner's submission does not qualify as a motion to reconsider. The AAO's January 7, 2009 decision, therefore, will not be reconsidered.

With regard to motions to reopen, the regulation at 8 C.F.R. 103.5(a)(2) states, in pertinent part, the following:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based upon the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup> Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. The petitioner's submission includes the following documents that may be considered "new" under 8 C.F.R. § 103.5(a)(2):

- Receipts for wire transfers from the petitioner's wife to the beneficiary's birthmother; and
- The petitioner's brief.<sup>3</sup>

Accordingly, the petitioner's submission satisfies the qualifications of a motion to reopen. The AAO, therefore, will reopen the matter to consider the petitioner's new evidence, and issue a new decision. The AAO will only address the new evidence submitted by the petitioner, as its January 7, 2009 decision addressed the other evidence of record.

The sole issue before the AAO is whether the petitioner has established that the beneficiary's birthmother is incapable of providing proper care to the beneficiary, consistent with the standards of

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<sup>2</sup> The word "new" is defined as "1. Having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New College Dictionary* 736 (Houghton Mifflin 2001)(emphasis in original).

<sup>3</sup> Although the petitioner submits a document entitled "Re-permission to foster [the beneficiary] to [REDACTED]," and refers to it as "new evidence," the AAO notes that since the document is dated June 30, 2004, it may not be considered "new" under 8 C.F.R. § 103.5(a)(2).

Nigeria. If the petitioner succeeds in making that case, the AAO will then address the issue of the petitioner's adoption of the beneficiary in Nigeria.

With regard to the ability of the beneficiary's birthmother to provide proper care to the beneficiary, the AAO stated the following in its January 7, 2009 decision:

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 [the beneficiary's birthmother's] 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 [the birthmother] 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 [the birthmother] is unable to work or to provide proper care to the beneficiary in accordance with 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.

In his brief, the petitioner notes that although the report by the U.S. Consulate in Lagos found that the beneficiary was living with her birthmother, it contained no information regarding how she was supporting the beneficiary. The petitioner states that although the birthmother now has a secondary school certificate, she remains unemployed and unable to meet the basic needs of the beneficiary. The petitioner argues that such "basic needs" include "a bonding and identity as mother to child." The petitioner states that a mother-child relationship between the beneficiary and her birthmother was never encouraged, formed, or recognized, as only the petitioner and his wife were recognized as the true and actual parents of the beneficiary. The petitioner argues that, as such, even if the birthmother is able to obtain gainful employment, she would not be able to provide for the beneficiary's basic needs. The petitioner also submits the previously-referenced wire transfer receipts as evidence that he and his wife have been supporting the beneficiary financially.

The AAO is not persuaded by the petitioner's assertions in support of his motion to reopen. In order to establish that the birthmother is incapable of providing proper care, the record must demonstrate that she is unable to provide for the child's basic needs, consistent with local standards. First, the petitioner has submitted no evidence whatsoever regarding "local standards" in Nigeria. Moreover, although the petitioner states that the birthmother is unemployed, he fails to submit any evidence or offer any explanation as to why she cannot obtain gainful employment which would enable her to provide proper care to the beneficiary, consistent with local standards in Nigeria. The petitioner's claim that the beneficiary's birthmother is unable to provide proper care is based largely on the petitioner's own assessments and is not supported by any reference to the birthmother's actual income or earning capacity, or to local standards in Nigeria. Nor do the wire transfer receipts establish that the birthmother is unable to provide proper care to the beneficiary. Finally, while the AAO does not

wish to diminish the importance of the petitioner's concerns over the importance of parental bonding, the evidence of record does not establish that the birthmother is unable to provide for such basic needs as food, water, shelter, etc.

The new evidence submitted by the petitioner on motion to reopen fails to demonstrate that the beneficiary's birthmother, her sole parent, is incapable of providing proper care to the beneficiary. The petitioner, therefore, has failed to establish that the beneficiary meets the definition of an orphan, as that term is defined in the statute and regulation. The AAO affirms its January 7, 2009 decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The motion to reopen is dismissed. The AAO affirms its January 7, 2009 decision. Approval of the petition is revoked.