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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
and Immigration
Services

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[redacted]

FILE: [redacted] Office: BOSTON, MA Date: OCT 13 2009

AAO 09 201 50005

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 field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 field office director denied the petition on the basis of her determination that (1) the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act; and (2) that the petitioner had failed to establish that a full and final adoption has been granted to the petitioner or, in the alternative, that a legal guardianship has been granted that would show compliance with the laws of the foreign-sending country.

Section 101(b)(1)(F)(i) of the Act defines an 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) of this title, 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; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States[.]

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

> *Abandonment by both parents* means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country

to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

* * *

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

Desertion by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

Disappearance of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws 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. 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.

* * *

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.*

Loss from both parents means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign-sending country.

* * *

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance

with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

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 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.

Surviving parent means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be *incapable of providing proper care* as that term is defined in this section.

The regulation at 8 C.F.R. § 204.3(d)(3) provides that orphan petitions filed concurrently with an advanced processing application must contain the documentation required by 8 C.F.R. § 204.3(c), as well as the documentation required by 8 C.F.R. § 204.3(d)(1), except for the documentation required by 8 C.F.R. § 204.3(d)(1)(i).

Whether the petitioner has satisfied the criteria at 8 C.F.R. § 204.3(c) is not at issue. The pertinent provisions of 8 C.F.R. § 204.3(d) state the following:

(d) Supporting documentation for a petition for an identified orphan . . . An orphan petition must be accompanied by full documentation as follows:

* * *

(1) (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

* * *

(C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this

section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption; 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:

(A) A legible, certified copy of the adoption decree, if the orphan has been the subject of a full and final adoption abroad . . . ; or

(B) If the orphan is to be adopted in the United States because there was not adoption 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;

(*3*) Evidence of compliance with all preadoption requirements, if any, of the State of the orphan's proposed residence. . . .; and

(*4*) Evidence that the State of the orphan's proposed residence allows readoption or provides for judicial recognition of the adoption abroad if there was an adoption abroad which does not meet statutory requirements pursuant to section 101(b)(1)(F) of the Act. . . .

The petitioner is a sixty-eight-year-old citizen of the United States. The beneficiary was born in Uganda on June 6, 1989. The beneficiary is the biological nephew of the petitioner.

The petitioner filed the Form I-600 on March 20, 2007. The field office director issued two requests for additional evidence on October 8, 2008. The petitioner, through counsel, responded to the field office director's requests on December 29, 2008, and requested that the deadline for responding to the request for additional evidence be extended to March 1, 2009.

The field office director issued a notice of intent to deny (NOID) the petition on January 12, 2009, and the petitioner, through counsel, submitted a response on February 3, 2009. The field office director denied the petition on May 28, 2009. A timely appeal was submitted on June 26, 2009.

As was noted previously, the field office director denied the petition on two grounds: (1) her determination that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as that term is defined in the Act; and (2) her determination that the petitioner had failed to establish that a full and final adoption has been granted to the petitioner or, in the alternative, that a legal guardianship has been granted that would show compliance with the laws of the foreign-sending country. Upon review of the entire record of proceeding, the AAO agrees with the grounds of the director's denial.

Whether the beneficiary qualifies for classification as an orphan, as that term is defined in the Act

The AAO will first address the director's determination that the petitioner has failed to establish that the beneficiary qualifies for classification as an orphan as that term is defined in the Act. In reviewing the director's determination, the AAO finds necessary a review of the factual background of this case.

The record indicates that the beneficiary's birthparents died several years ago. The record contains documentation regarding their deaths,[1] and the field office director has not disputed the veracity of such documentation.

The beneficiary was adopted by [redacted] in Uganda, on December 31, 2003. Again, the record contains documentation regarding the adoption, and the field office director has not disputed the veracity of such documentation. **At the time she adopted the beneficiary,** was married to [redacted][3]

[1] Such documents indicate that the beneficiary's birthmother died in 1999, and that his birthfather died in 2002.

[2] [redacted] is the petitioner's biological sister, and the beneficiary's biological aunt.

[3] The record indicates that the marriage took place on May 13, 1996, in New York. A final divorce decree was issued on April 1, 2005.

In her January 12, 2009 NOID, the field office director notified the petitioner that although was not named on the Ugandan adoption decree as an adoptive parent, and that the child was not discussed in the couple's divorce decree, he was nonetheless, by virtue of the adoption, a legal adoptive parent, and that the record contained no evidence that he had relinquished his rights as an adoptive parent.

As was noted previously, the petitioner, through counsel responded to the field office director's NOID on February 3, 2009. In her January 27, 2009 letter, counsel directed the field office director to an affidavit from **which, according to counsel, explained how** had absconded. In her January 26, 2009 affidavit, stated, in pertinent part, the following:

> My husband, is no where to be found. He and I have been separated since 2002, long before I adopted the children in 2003. This is indicated in the divorce. He has never had any involvement with the children. He has absconded to avoid paying me the judgment ordered in the divorce. It is impossible to get any kind of irrevocable surrender from him as I have no idea where to find him.

Both counsel and referred the field office director to "decree of divorce *a vinculo matrimonii*"[4] from which was granted by the Circuit Court of Loudoun County, Virginia on April 1, 2005. As noted by counsel and the judge presiding over the case annotated the decree to indicate that did not appear for the final proceeding on April 1, 2005, despite having been advised at the March 9, 2005 hearing that a final decree would be issued on April 1, 2005.

The field office director found this evidence insufficient, and denied the petition on May 28, 2009. On appeal, the petitioner submits a June 26, 2008 letter from the Deputy Registrar of the Family Division of the High Court of Uganda. That letter states the following:

> A perusal of the files relating to the Adoption of the above named three children reveals that all were adopted by , who was the **sole petitioner**, on court orders dated 31st December, 2003, at Chief Magistrates' Court sitting at Mukono [emphasis in original].
>
> Attached herewith are certified copies of the relevant documents.[5]

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[4] *Black's Law Dictionary* defines divorce *a vinculo matrimonii* as follows:

> A divorce from the bonds of marriage. A total, absolute divorce of husband and wife, dissolving the marriage tie, and releasing the parties from their matrimonial obligations.

Black's Law Dictionary 480 (6th ed., West 1990).

[5] The AAO notes that such "certified copies of the relevant documents" were not submitted.

In her June 29, 2009 letter, counsel asserts that this letter "confirms that adopted these children alone, without the involvement of her estranged husband," and that it "supports her contention that has nothing to do with these children." On the Form I-290B, the petitioner states that has never met the beneficiary; that adopted the beneficiary alone; that has absconded; and that does not know where he is. The petitioner asserts that, as such, should be considered a "sole parent," as that term is defined at 8 C.F.R. § 204.3(b).

The AAO does not find the assertions of counsel or the petitioner sufficient. The AAO will first address the June 26, 2008 letter from the Deputy Registrar of the Family Division of the High Court of Uganda. As noted earlier, counsel states on appeal that this letter confirms that adopted the beneficiary alone, and that has nothing to do with the beneficiary. Counsel, however, is missing the point. Neither the field office director nor the AAO have questioned the petitioner's assertions with regard to the role played by or lack thereof, in the life of the beneficiary. Nor has the field office director or the AAO disputed that his name does not appear on the December 31, 2003 "Adoption of Children Schedule Form." At issue are the parental rights vested with when his wife, , adopted the beneficiary. Regarding the assertions of the lack of relationship between Prince and the beneficiary, as well as the lack of his name on the "Adoption of Children Schedule Form," the record must establish that these factors either terminated his parental rights, or that such rights failed to vest initially. It must also establish that such rights are nonexistent under the laws of Uganda as well as those of the state in which the couple was living at the time of the adoption.[6]

The letter from the Deputy Registrar of the Family Division of the High Court of Uganda states only that was the "sole petitioner" in the beneficiary's adoption. It neither defines the term "sole petitioner" nor explains the significance of this term under Ugandan law. This letter does not establish that adoption of the beneficiary failed to vest any parental rights in , her then-husband. While the AAO does not question the veracity of this letter, this letter fails to stand for the proposition cited by counsel and the petitioner. Furthermore, as previously noted, the "certified copies of the relevant documents" referenced in the letter's conclusion were not submitted.

The fact remains that was legally married to at the time she adopted the beneficiary. As discussed in the preceding paragraph, she has failed to establish that, under the laws of Uganda, did not acquire parental rights to the beneficiary by virtue of the adoption. The record also fails to establish that did not acquire parental rights to the beneficiary by virtue of the adoption under the laws of the state in which the couple was residing at the time the adoption took place. Although some states allow an individual who is

[6] Although the record is unclear as to the State in which the couple was living at the time adopted the beneficiary, the language of the divorce decree indicates they were living in the State of Virginia.

legally separated from his or her spouse to adopt a child without creating an obligation on the nonadopting spouse, the petitioner has failed to establish: (1) that and were living in such a state; and (2) that they were in fact legally separated. As the record is unclear regarding the state in which the couple was living at the time of the adoption, the AAO will not attempt to enter into an analysis of relevant state laws. Neither counsel nor the petitioner have cited to any regulations or caselaw from the state in which the couple was living at the time the adoption occurred in support of their contention that did not acquire any parental rights to the beneficiary by virtue of the adoption.

For all of these reasons, the AAO finds the record insufficient to establish that did not acquire parental rights by virtue of adoption of the beneficiary. The AAO turns next to a consideration of whether the petitioner, having failed to establish that did not acquire parental rights by virtue of s adoption of the beneficiary, has established that, by virtue of his behavior, s has surrendered such rights.

As was noted previously, counsel, the petitioner, and state that has never been involved with the children, that he has disappeared in order to avoid paying the divorce settlement. However, no evidence has been submitted to establish that such behavior has resulted in the termination of his parental rights (which, again, the petitioner has failed to establish failed to vest as a result of the adoption) by the relevant authorities in either Uganda or the state in which the couple resided. The record, therefore, lacks evidence that does not retain his parental rights to the beneficiary.

As was noted previously, the term "orphan" as defined at section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F) requires a demonstration that the beneficiary "is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents." The terms "abandonment by both parents," "desertion by both parents," "separation from both parents," and "loss of both parents" are specifically defined in the regulation at 8 C.F.R. § 204.3(b). Because the petitioner has failed to resolve the issue of the parental rights of to the beneficiary, she has failed to establish that the beneficiary qualifies for classification as an orphan under these standards.

As was noted previously, the petitioner contends on appeal that because has "disappeared and abandoned her and the children she adopted," should be considered the beneficiary's "sole parent," as that term is defined at 8 C.F.R. § 204.3(b), and that her "irrevocable surrender" to the petitioner "should be sufficient." The AAO disagrees.

First, the petitioner has failed to establish that meets the definition of a "sole parent," as that term is defined at 8 C.F.R. § 204.3(b). Again, 8 C.F.R. § 204.3(b) defines a "sole parent" as "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." 8 C.F.R. § 204.3(b) also states specifically that "[t]his definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all children are considered to be legitimate." The record is devoid of any information regarding whether the laws of Uganda

distinguish between children born in or out of wedlock and, further, the petitioner's failure to resolve the questions regarding the parental status of preclude a determination that the beneficiary is "illegitimate." The record, therefore, does not establish that is the beneficiary's "sole parent."

Second, beyond the director's decision, the AAO finds that, even if the record did establish that was the beneficiary's "sole" (or even "surviving") parent, the record would still be insufficient to approve the petition. As was noted previously, the regulation at 8 C.F.R. § 204.3(b) requires the petitioner to demonstrate that the orphan's sole parent is "incapable of providing proper care" to the beneficiary. In order for the petitioner to establish that is "incapable of providing proper care," that regulation requires that the record demonstrate that is unable to provide for "the child's basic needs, consistent with the local standards of the foreign-sending country." The petitioner has not met this standard. First, the record is devoid of any documentary evidence regarding living standards in Uganda, which would enable the AAO to analyze whether is incapable of providing for basic needs consistent with such standards. The record is also devoid of evidence regarding financial situation, which would also be necessary for such a determination. Accordingly, even if the record did establish that is the beneficiary's "sole parent," the record would still be insufficient to classify the beneficiary as an orphan, as it does not indicate that is incapable of providing for the beneficiary's basic needs, consistent with the standards of Uganda.

In accordance with the preceding discussion, the AAO finds the record of proceeding inadequate to classify the beneficiary as an orphan. As a result of the failure to satisfy the field office director's concerns over the status of the parental rights of , the petitioner has failed to establish that the beneficiary has been abandoned or deserted by, or separated or lost from, both parents. Nor has she established that is the sole or surviving parent who is incapable of providing proper care to the beneficiary consistent with the standards of Uganda. The field office director properly denied the petition on this ground.

Whether the petitioner has established that a full and final adoption has been granted to the petitioner or, in the alternative, that a legal guardianship has been granted that would show compliance with the laws of Uganda

The second ground of the field office director's May 28, 2009 decision was her determination that the petitioner had failed to establish that a full and final adoption had been granted to the petitioner, or, in the alternative, that a legal guardianship, in compliance with the laws of Uganda, had been granted. The AAO notes that the field office director made the same finding in her January 12, 2009 NOID.

Neither counsel nor the petitioner addressed this matter in response to the NOID, and neither addresses it on appeal. Accordingly, the petitioner has failed to overcome this ground of the field office director's decision.

Conclusion

The petitioner has failed to establish: (1) that the beneficiary qualifies for classification as an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act; and (2) that a full and final adoption has been granted to the petitioner or, in the alternative, that a legal guardianship has been granted that would show compliance with the laws of the foreign-sending country. Accordingly, the AAO will not disturb the field office director's denial of the petition.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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