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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

F1

[redacted]

FILE: [redacted] Office: NEWARK, NEW JERSEY Date: APR 19 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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

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 initially approved the Form I-600, Petition to Classify Orphan as an Immediate Relative. However, upon receipt of correspondence from the United States Consulate in Bridgetown, Barbados, the director issued a notice of intent to revoke, and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The field office director's decision will be withdrawn and the matter remanded for further processing.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i). The field office director denied the petition on the basis of her determination that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as that term is defined at section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i).

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:

> *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*.
>
> * * *
>
> *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.

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

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

* * *

(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;

(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. . . .

Finally, the regulation at 8 C.F.R. § 204.3(k)(1) states, in pertinent part, the following:

An I-604 investigation must be completed in every orphan case. The investigation must be completed by a consular officer except when the petition is properly filed at a Service office overseas, in which case it must be completed by a Service officer. An I-604 investigation shall be completed before a petition is adjudicated abroad. When a petition is adjudicated by a stateside Service office, the I-604 investigation is normally completed after the case has been forwarded to visa-issuing post abroad. However, in a case where the director of a stateside Service office adjudicating the petition has articulable concerns that can only be resolved through the I-604 investigation, he or she shall request the investigation prior to adjudication. In any case in which there are significant differences between the facts presented in the approved advanced processing application and/or orphan petition and the facts uncovered by the I-604 investigation, the overseas site may consult directly with the appropriate Service office. In any instance where an I-604 investigation reveals negative information sufficient to sustain a denial or revocation, the investigation report, supporting documentation, and petition shall be forwarded to the appropriate Service office for action. Depending on the circumstances surrounding the case, the I-604 investigation shall include, but shall not necessarily be limited to, document

checks, telephonic checks, interview(s) with the natural parent(s), and/or a field investigation.

The petitioner is a forty-six-old citizen of the United States. The beneficiary was born in Saint Vincent and the Grenadines on September 3, 1999. The petitioner filed Form I-600A, Application for Advance Processing of Orphan Petition, on August 2, 2005. The Form I-600A was approved on June 3, 2006. The petitioner filed the Form I-600 on May 31, 2006. The Form I-600 was approved on June 3, 2006.

The United States Consulate in Bridgetown, Barbados, returned the file to the National Visa Center (NVC) on October 6, 2006, and the NVC returned the file to the field office director on December 28, 2006.

The director issued a notice of intent to revoke (NOIR) approval of the petition on September 26, 2008. In her NOIR, the director relayed the concerns of the U.S. Consulate in Bridgetown to the petitioner, and afforded her thirty days during which to address such concerns. As noted by the director, the Consulate's October 6, 2006 notice stated that, since there was a direct transfer of the beneficiary from the birth mother to the petitioner, the beneficiary could not be considered an orphan due to having been abandoned, deserted, separated, or lost from her birth parents. The AAO notes that, although not stated specifically, as she cited to portions of the *Foreign Affairs Manual* interpreting the regulatory definition, the NOIR focused heavily on the definition of "abandonment by both parents" as set forth at 8 C.F.R. § 204.3(b).

In his October 14, 2008 response to the NOIR, previous counsel noted the director's focus on the "abandonment by both parents" standard, and noted that the petitioner had never claimed that the beneficiary was abandoned by both of her birth parents. Counsel directed the director to the statutory definition of an orphan contained at section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i), which was set forth earlier in this decision, and which states that in order to meet the definition of an orphan as set forth at section 101(b)(1)(F)(i) of the Act, the petitioner must establish that the beneficiary 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.

Previous counsel noted further that the petitioner had marked the box at Page 2, Block II, Question 16 of the Form I-600 in order to claim[1] that the beneficiary qualifies for classification as an orphan based upon, in the words of the form, "He/she has only one parent who is the sole or surviving parent." She did not mark the box to claim that the beneficiary qualifies for classification as an orphan based upon, in the words of the form, "He/she has no parents." Previous counsel asserted that the beneficiary qualifies for classification as an orphan because, pursuant to section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i), her sole parent is incapable of providing proper care to the beneficiary and has in writing irrevocably released the child for emigration and adoption. Finally, previous counsel

[1] The Form I-600, which is part of the record of proceeding, confirms this claim by previous counsel.

noted the nearly two-year time period that elapsed between the consular return and the director's issuance of the NOIR.

Finding previous counsel's response inadequate, the director revoked approval of the petition on October 7, 2009. The AAO notes that the director did not address any of previous counsel's arguments. In particular, the director did not address previous counsel's assertion that she was adjudicating the case under an improper standard. Rather, the director stated that the response "did not provide additional evidence to reverse the NOIR."

Previous counsel timely filed the Form I-290B, Notice of Appeal, on October 21, 2009, and newly-retained counsel submitted a timely appellate brief and supporting documentation on November 19, 2009. The AAO reviewed the entire record of proceeding before issuing its decision.

Upon review, the AAO withdraws the field office director's October 7, 2009 decision. At the outset of its analysis, the AAO reiterates the language of section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i), which was set forth in full previously, and specifically defines, in relevant part, an orphan as a child:

> 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 [emphasis added]. . . .

While the AAO agrees that the beneficiary does not qualify as an orphan under the first half of this definition, neither the correspondence from the consulate nor the decision of the director contained any analysis of whether the beneficiary qualifies as an orphan under the second half of this definition: whether she has a sole or surviving parent who is incapable of providing proper care, and who has in writing irrevocably released the child for emigration and adoption. As the petitioner is entitled to a full adjudication under the relevant statutory and regulatory criteria at issue in this case, the director's decision will be withdrawn and the matter remanded for further processing in accordance with this decision.

The terms "sole parent" and "incapable of providing proper care" are both defined at 8 C.F.R. § 204.3(b). The AAO notes that it is this criterion under which the petitioner seeks eligibility for immigrant classification on behalf of the beneficiary. In order to establish eligibility under this criterion, the petitioner must establish: (1) that the birth mother satisfies the definition of a "sole parent"; (2) that the birth mother is incapable of providing proper care to the beneficiary, consistent with local standards in Saint Vincent and the Grenadines; and (3) that the birth mother has, in writing, irrevocably released the child for emigration and adoption.

At the outset, the AAO finds the evidence of record sufficient to satisfy the third requirement: that the birth mother has, in writing, irrevocably released the child for emigration and adoption. The record contains three written consents from the birth mother, an adoption order from a local court of law, and a "certified copy of an entry – adoption." The AAO finds such documentation sufficient to establish the requisite irrevocable release in writing.

Having made that determination, the AAO turns next to the questions of whether the birth mother can be defined as a sole parent and if so, whether the record contains sufficient evidence that she is incapable of providing proper care to the beneficiary consistent with local standards in Saint Vincent and the Grenadines.

A crucial element in establishing that the beneficiary's birth mother meets regulatory definition of a "sole parent," pursuant to 8 C.F.R. § 204.3(b), is the requirement that the petitioner first establish that the beneficiary "is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act." However, 8 C.F.R. § 204.3(b) goes on to state that the definition of a sole parent "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 petitioner has failed to demonstrate that the laws of Saint Vincent and the Grenadines distinguish between children born in and out of wedlock.[2]

Finally, the regulation at 8 C.F.R. § 204.3(b) states specifically that, in all cases, a sole parent must be "incapable of providing proper care." The phrase "incapable of providing proper care" is defined at 8 C.F.R. § 204.3(b) as "a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of [Saint Vincent and the Grenadines]." The record of proceeding as currently constituted fails to make such a demonstration. First, the petitioner has submitted no evidence whatsoever regarding local living standards in Saint Vincent and the Grenadines. Second, the AAO finds the record insufficient to meet the petitioner's burden of proof regarding the birth mother's inability to provide proper care to the beneficiary consistent with such standards. For example, while the record indicates that the birth mother gave birth to the beneficiary at a young age and did not finish school, the record lacks data or any other documentary evidence suggesting that, in Saint Vincent and the Grenadines, such factors would preclude her from providing proper care consistent with local standards.

As the AAO has withdrawn the director's decision and the director did not address the eligibility of the beneficiary for classification as an orphan as the child of a "sole parent," the petition will be remanded for the entry of a new decision. The director may afford the petitioner additional time during which to submit additional evidence and/or information prior to entering a new decision. The director shall then render a new decision based on the evidence of record as it relates to the relevant statutory and regulatory requirements for eligibility.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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[2] We note that Saint Vincent and the Grenadines addressed this issue in 1980 when it passed the Status of Children Act. *See* Zanifa Powell, *Elements of Child Law in the Commonwealth Caribbean* (University of West Indies Press 2000). While the resource cited at footnote 5 indicates that the purpose of the statute was to ensure that children born both inside and outside of wedlock are treated equally, it also states that that there are still some areas of law in which children born inside and outside of wedlock are still treated differently. However, it does not go into any meaningful detail regarding such differences.

ORDER: The field office director's October 7, 2009 decision is withdrawn. The petition is remanded to the field office director for continued processing and eventual entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.