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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

PUBLIC COPY

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[Redacted]

FILE: [Redacted]

Office: DALLAS

Date:

JUL 16 2010

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i). The director denied the petition on the basis of his determination that the petitioner had failed to establish that the petitioner's adoption of the beneficiary in Nigeria took place in accordance with the laws of Nigeria. Accordingly, the petitioner the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as 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:

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.

* * *

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.

* * *

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) 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. . . .
- (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. . . .

The petitioner is a sixty-five-year-old citizen of the United States. The field office director approved Form I-600A, Application for Advance Processing of Orphan Petition, on behalf of the petitioner and his wife on May 5, 2009, and the record indicates that he and his wife adopted the beneficiary in Nigeria on July 23, 2009.

The petitioner filed the instant Form I-600 on September 2, 2009. In her November 3, 2009 request for additional evidence, the field office director notified the petitioner that in order for a Nigerian adoption to be valid, the child must have been in the physical care and legal custody of the adoptive parent, in Nigeria, for at least three consecutive months prior to the adoption. The field office director advised further that this requirement could not be satisfied by having the child reside with another family member for the requisite three-month period, even if a power of attorney is in effect.

In response to the field office director's request the petitioner submitted, among other items, a December 9, 2009 letter from [REDACTED], a licensed clinical social worker, conceding that the petitioner and his wife were not living in Nigeria at the time the adoption was granted, and had not lived with the beneficiary for three consecutive months prior to the adoption. [REDACTED] stated that compliance with the residency requirement is within the discretion of the judge, and that the Ministry of Women's Affairs and Social Development, which conducted an investigation of the adoption, was aware that the petitioner and his wife were not living in Nigeria. [REDACTED] stated that the judge who issued the adoption order was also aware of the petitioner's residence in the United States and that, as such, "we must assume that the judge waived this requirement since he granted the adoptions." [REDACTED] cited what she claimed to be an electronic mail message from the Fraud Prevention Unit (FPU) at the U.S. Consulate General in Lagos, Nigeria. According to that message, adoption law in Imo State requires the adoptive child to have been in the physical care and possession of the adoptive parent for at least three consecutive months immediately preceding the date of the adoption order. The FPU stated that judges have discretion in waiving adoption requirements.

In her January 20, 2010 decision denying the petition, the field office director, as noted previously, found the evidence of record insufficient to establish that the beneficiary meets the definition of an "orphan" at section 101(b)(1)(F)(i) of the Act. The field office director found that because the petitioner had failed to establish that he and his wife had resided in Nigeria with the beneficiary for three consecutive months prior to the adoption, the adoption did not take place in accordance with the laws of Nigeria. On appeal, counsel submits a brief and additional evidence.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the ground for denial on appeal. The AAO affirms the field office director's decision that the petitioner has failed to establish that he has completed an adoption of the beneficiary in accordance with the laws of Nigeria pursuant to 8 C.F.R. § 204.3(d)(iv). Beyond the decision of the director, the AAO finds further that the petitioner has failed to establish that the beneficiary qualifies for classification as an orphan as defined in the Act. As noted previously, in order to meet the definition of an orphan 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. In this particular case, the petitioner has failed to establish that the beneficiary's surviving parent is incapable of providing proper care to the beneficiary, consistent with local standards in Nigeria. The AAO will address each of these matters in turn.

I. Whether the petitioner has completed an adoption of the beneficiary in accordance with the laws of Nigeria

As noted previously, the regulation at 8 C.F.R. § 204.3(d)(iv) requires the petitioner to demonstrate that his adoption of the beneficiary took place in accordance with the laws of Nigeria. The record indicates that the petitioner and his wife adopted the beneficiary in Nigeria on July 23, 2009.

With regard to the process of legally adopting a child in accordance with the laws of Nigeria, the U.S. Department of State (DOS) states, in pertinent part, the following:

Non-Nigerians may not adopt children in Nigeria. True adoptions in Nigeria are very rare. Adoption in Nigeria must be initiated from the Ministry of Social Services, not directly with the court by the adoptive parents. Any adoption not done under the auspices of the Ministry of Social Services is not valid.¹

The DOS further states, in pertinent part, the following:

Nigerian adoption laws are complex and vary from state to state. In general, prospective adoptive parents who intend to adopt a specific child must first obtain temporary custody of the child. Prospective adoptive parents are advised to obtain information on adopting in individual states through the state social welfare office. Please note that the only proper and legal way to do an adoption in Nigeria is to work with the respective state social welfare office (usually named the State Ministry of Women's or Family Affairs). Prospective parents should not attempt to process their adoption through local officials who may attempt to circumvent the legal process.

* * *

The social welfare office of the state where the child is located is considered the adoption authority. The application for adoption originates from the social welfare office of the state where the child is located. Prospective parents should not attempt to begin the adoption process through local officials instead of the state social welfare office. The Government office responsible for adoptions in Nigeria is the magistrate court of the state where the child is located. . . .

¹ U.S. Department of State, Country Reciprocity Schedules, Nigeria Reciprocity Schedule, *Adoption Certificates*, http://travel.state.gov/visa/frvi/reciprocity/reciprocity_4881.html?cid=3640 (accessed June 2, 2010).

In most Nigerian states, the adoption process begins when an application for an adoption order is made in accordance with local requirements and submitted to the registrar of the competent court. The court then assigns a guardian ad litem for the child to represent him/her in the adoption proceedings. The guardian ad litem is the social welfare officer in charge of the area where the juvenile resides, or a probation officer or some other person suitably qualified in the opinion of the court of assignment. The guardian ad litem investigates the circumstances related to the proposed adoption and files a report to the court. The guardian ad litem represents the child's interests until the magistrate questions the prospective adoptive parents and grants the adoption order giving legal custody to the adoptive parents.

The guardian ad litem investigates the circumstances relevant to the proposed adoption and reports in writing to the court. Prospective adoptive parents must inform the social welfare officer of their intention to adopt at least three months before the court order is made. For at least three consecutive months immediately preceding an adoption order, the child must have been in the physical care and legal custody of the applicant parents in Nigeria. An applicant cannot have the child reside with another family member in lieu of living with the applicant, even if a Power of Attorney is in effect.

The social welfare officer visits the home of the adoptive parents until the officer is satisfied that the juvenile is settled and the prospective adoptive parents are capable of looking after him or her. . . .²

As evidence of the petitioner's adoption of the beneficiary, record contains a copy of a July 23, 2009 judgment from the Magistrate's Court of Imo State, in Nigeria. The petitioner also submits, as noted previously, what is claimed to be an electronic mail message from the FPU at the U.S. Consulate General in Lagos, Nigeria, stating that adoption law in Imo State requires the adoptive child to have been in the physical care and possession of the adoptive parent for at least three consecutive months immediately preceding the date of the adoption order, and that judges have discretion in waiving adoption requirements. The petitioner also submits a July 23, 2009 statement from the Imo State Ministry of Women's Affairs and Social Development stating that the petitioner and his wife fulfilled "all the requirements stipulated in the provisions towards the adoption process."

As noted previously, [REDACTED] stated in her December 9, 2009 letter that although the petitioner and his wife were not living in Nigeria at the time the adoption was granted, and had not lived with the beneficiary for three consecutive months prior to the adoption, the Ministry of Women's Affairs and Social Development, was aware that the petitioner and his wife were not living in Nigeria. [REDACTED] stated that the judge who issued the adoption order was also aware of the petitioner's residence in the United States and that, as such, "we must assume that the judge waived this

² U.S. Department of State, Office of Children's Issues, Intercountry Adoption, *Nigeria Country Information*, <http://adoption.state.gov/country/nigeria.html> (July 2009)(accessed June 2, 2010).

requirement since he granted the adoptions.” In her February 15, 2010 letter submitted on appeal, [REDACTED] states that the petitioner spent more than one month in Nigeria, and counsel states on the Form I-290B that the petitioner and his wife were in Nigeria from July 15, 2009 until August 12, 2009. [REDACTED] states that the judge and the Ministry of Women’s Affairs and Social Affairs were obviously satisfied that the petitioner met all legal adoptive requirements; otherwise, the adoption decree would not have been issued. Counsel states in his February 18, 2010 letter that because the Nigerian court issued the adoption order all requirements were either met or waived.

Upon review, the AAO finds that the petitioner has failed to establish that the adoption of the beneficiary took place in accordance with the laws of Nigeria. Although the adoption decree names the Social Welfare Department (SWD) as the respondent, which indicates that the SWD represented the interests of the beneficiary in the proceeding, it does not indicate that other adoption requirements were met. For example, while the DOS website states that Nigerian adoption laws vary from state to state, it does not state which specific requirements vary. For example, the DOS does not state that the duty of a social welfare officer to visit the home of the adoptive parents in order to determine that the child is settled, and that the adoptive parents are capable of providing care, varies from state to state, and the record does not indicate whether such a visit took place in this case. Nor does the adoption decree establish that the petitioner resided with the beneficiary for the period of time required by Imo State, as it makes no reference to the length of time the petitioner spent in Nigeria. Even if the judge was able to waive the residency requirement, as asserted, there is no evidence that the judge in this case did so, as the adoption judgment does not indicate whether he was aware that the petitioner had not spent the requisite three months in Nigeria. Nor does the July 23, 2009 statement from the Imo State Ministry of Women’s Affairs and Social Development establish that the adoption took place in accordance with the laws of Nigeria. As noted, in that document the Ministry stated that the petitioner and his wife had fulfilled “all the requirements stipulated in the provisions towards the adoption process.” However, that statement is not accurate. The petitioner’s case rests on the premise that the legal requirements for a valid adoption in Nigeria, particularly those relating to residency, were waived, not fulfilled. As this document states that those requirements were fulfilled, which the petitioner concedes is not true – rather, they were waived – it is not clear to the AAO that the Ministry was actually aware of the petitioner’s failure to satisfy such requirements. The AAO agrees with the field office director’s determination that the petitioner has failed to establish that his adoption of the beneficiary was in accordance with the laws of Nigeria.

II. Surviving parent incapable of providing proper care and who has in writing irrevocably released the child for emigration and adoption

Beyond the decision of the field office director, the AAO finds that the petition may not be approved for another reason, as the evidence of record fails to establish that the beneficiary’s surviving parent is incapable of providing proper care to the beneficiary, consistent with local standards in Nigeria.

The regulation at 8 C.F.R. § 204.3(b) states specifically that, in all cases, a surviving 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 “unable to provide for the child’s basic needs, consistent with the local

standards of [Nigeria].” 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 Nigeria. Second, the record does not establish the birthmother’s inability to provide proper care to the beneficiary consistent with such standards. The only evidence of record addressing this issue is the birthmother’s July 30, 2008 statement, in which she stated that since the death of her husband, upon whom she and her eight children depended for their food and necessities, she has “no helping hand” and therefore cannot feed her children or provide for their basic needs. However, the birthmother’s vague and brief assertion precludes the AAO from undertaking a meaningful analysis as to whether she is in fact unable to provide proper care to the beneficiary consistent with local standards in Nigeria. Moreover, the AAO notes that, according to the petitioner’s statement on the Form I-600,³ the beneficiary’s birthmother currently has legal custody of another child that the petitioner seeks to adopt. If the birthmother is in fact unable to care for her own children, it is unclear why legal custody of another child would be entrusted to her by a competent authority.

The petitioner has failed to demonstrate that the beneficiary’s surviving parent is incapable of providing proper care to the beneficiary, consistent with local standards in Nigeria. Accordingly, the petitioner has failed to establish that the beneficiary meets the definition of an “orphan,” as defined at section 101(b)(1)(F)(i) of the Act. For this additional reason, the petition may not be approved.

III. Conclusion

The AAO concurs with the field office director’s determination that the petitioner has failed to establish that the adoption of the beneficiary took place in accordance with the laws of Nigeria pursuant to 8 C.F.R. § 204.3(d)(iv). The petitioner has not overcome the ground for denial on appeal. Beyond the decision of the director, the AAO finds further that the record fails to establish that the beneficiary’s surviving parent is incapable of providing proper care to the beneficiary consistent with local standards in Nigeria. Accordingly, the petitioner has failed to establish that the beneficiary meets the definition of an “orphan,” as defined at section 101(b)(1)(F)(i) of the Act. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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 and the appeal will be dismissed.

³ See Form I-600, A94 075 182, filed concurrently with the instant petition on September 2, 2009 and denied January 20, 2010.

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