U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PROVIDENCE, RHODE ISLAND Date: JUN 03 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 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. Specifically, the field office director found that because the petitioner's adoption of the beneficiary was the result of a direct relinquishment or release, and that the beneficiary had been relinquished or released to a third party for custodial care in anticipation of, or preparation for, adoption, and the third party was not authorized to act in such a capacity under the child welfare laws of the foreign-sending country, the petitioner had failed to establish that the beneficiary had been "abandoned" by both birth parents as that term is defined in the regulation.

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 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.

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, as is the case here, 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)(ii) The orphan's birth certificate, or if such a certificate is not available, an explanation together with other proof of identity and age;

(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. . . .

The petitioner is a fifty-three-year-old citizen of the United States. The beneficiary was born in Cape Verde on October 27, 2000. The record indicates that the petitioner adopted the beneficiary in Cape Verde on December 7, 2007, and that he has been living with the petitioner's mother-in-law in that country since July 2004.

The petitioner filed the instant Form I-600 on November 7, 2008, and the field office director issued a subsequent notice of intent to deny the petition (NOID), to which the petitioner, through counsel, filed a timely response. In her March 4, 2010 decision denying the petition, the field office director, as noted previously, found the evidence of record insufficient to establish that the beneficiary had been abandoned by both of her birth parents and met the definition of 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).

Accordingly, the sole issue before the AAO on appeal is whether the petitioner has established that the beneficiary qualifies for classification as an orphan, as that term is defined in the Act. As noted previously, 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.

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 affirms the field office director's decision. Counsel's claims on appeal fail to overcome the grounds for denial of the petition.

I. Abandonment by both parents

The term "abandonment by both parents" is specifically defined at 8 C.F.R. § 204.3(b), and the petitioner has not established that the beneficiary meets the definition of an orphan as a result of having been abandoned by both of her birth parents. In order for the beneficiary to meet the definition of an orphan under this standard, the petitioner must demonstrate that both of the beneficiary's birthparents 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)." 8 C.F.R. § 204.3(b). The regulation emphasizes further that "relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment." *Id.* Moreover, if the child was relinquished or released to a third party for custodial care in anticipation of, or preparation for, adoption, then a finding of abandonment cannot be made 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. *See id.*

Both of the beneficiary's birthparents are living. According to the May 24, 2006 findings of the Judicial Court for the Second Class District of Brava, in Cape Verde, the beneficiary had spent most of his time as a beggar, in the streets prior to meeting the petitioner and her husband. Although he had lived with his birthparents for the first two years of his life, the beneficiary became sick and was sent to live with family members. After meeting the beneficiary on a trip to Cape Verde, the petitioner and her husband decided to adopt him, and the birthparents agreed, as they had been assured that he would have a more stable life and development. As such, in July 2004, the beneficiary moved into the home of the petitioner's mother-in-law, and adoption proceedings began.

The record also contains a statement from who stated that she found the beneficiary after he had been abandoned on the street by his birthparents. She stated that she kept the beneficiary in her own home for thirty days until she was able to locate the birthparents. Once she found them, the birthmother told her to return the beneficiary to the location where she had found him because, if did not want to keep him herself, someone else would pick him up. stated that she met the petitioner and her husband, and that they agreed to adopt the beneficiary.

In response to the field office director's NOID, counsel argued that the beneficiary was abandoned by his birthparents, and looked to statement as evidence that they did not release the beneficiary directly to the petitioner and her husband. Counsel also argued that because the birthparents did not relinquish the beneficiary to a third party for custodial care in anticipation of his adoption, the fact that the petitioner's mother-in-law is not authorized under the child welfare laws of Cape Verde to act in such a capacity is not relevant.

Upon review of the entire record, the AAO finds the evidence insufficient to establish that the beneficiary was "abandoned by both parents" as that phrase is defined at 8 C.F.R. § 204.3(b). Again, the regulation specifically states that both birth parents must willfully forsake 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 or persons.* 8 C.F.R. § 204.3(b). The regulation further prescribes that "[a] relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment." *Id.* First, the record indicates clearly the birthparents' desire to transfer their parental rights, obligations, and claims, as well as control over and possession of, the beneficiary, directly to the petitioner and her husband. The birthparents were aware that the petitioner and her husband wanted to adopt the beneficiary, and the record is clear that they consented to the adoption.

The May 24, 2006 court findings specifically state that since the beneficiary began to live with the petitioner's mother-in-law, his "biological parents became visitors and friends, and did not have any paternal affection to the minor, only familiar action with the adopters." The court also repeatedly references the beneficiary's birth parents' consent to and desire for the adoption of the beneficiary by the petitioner and her husband.

Second, the AAO agrees with the field office director's finding that the placement of the beneficiary with the petitioner's mother-in-law was in fact "in anticipation of, or preparation for, adoption." *Id.* The record, however, does not establish that the petitioner's mother-in-law is authorized under the child welfare laws of Cape Verde to act in such a capacity. *See id.*

The AAO finds counsel's assertions on appeal unpersuasive. Although counsel cites to the impoverished state of the beneficiary's birthparents, the AAO notes that poverty is not a component of the regulatory definition of abandonment. Nor are counsel's citations to the Cape Verdean court's usage of the term abandonment persuasive: again, "abandonment by both parents" is specifically defined at 8 C.F.R. § 204.3(b). Whether the beneficiary has been "abandoned" pursuant to the laws of Cape Verde is not at issue here. Nor is counsel's citation to *Matter of Del Conte*, 10 I&N Dec. 761 (BIA 1964) persuasive. In that case, the children were deemed abandoned by both parents because, in part, the parents had released them to the International Social Service. Here, the beneficiary was relinquished to the petitioner's mother-in-law pending the finalization of the adoption.

Again, the record indicates clearly that: (1) the birthparents intended to transfer "all parental rights, obligations, and claims to the child, as well as all control over and possession of the child," to the petitioner and her husband; and (2) placement of the beneficiary with the petitioner's mother-in-law was in fact "in anticipation of, or preparation for, adoption," and the record fails to establish that the petitioner's mother-in-law is authorized under the child welfare laws of Cape Verde to act in such a capacity.

Accordingly, the petitioner has not established that the beneficiary was "abandoned by both parents," as the term is defined at 8 C.F.R. § 204.3(b).

II. Death or disappearance of both parents; desertion by both parents; separation from both parents; loss of both parents; and surviving parent incapable of providing proper care and who has in writing irrevocably released the child for emigration and adoption

The record does not indicate that both of the birthparents have died or disappeared, as that term is defined at 8 C.F.R. § 204.3(b). As such, the beneficiary does not meet the definition of an orphan as a result of the death or disappearance of both birth parents.

Nor does the record indicate that the beneficiary has become "become a ward of a competent authority" as the result of his birthparents' desertion. Accordingly, the beneficiary does not meet the definition of an orphan as a result of "the desertion by both parents," as that term is defined in the regulation at 8 C.F.R. § 204.3(b).

Nor does the record indicate that the beneficiary was involuntarily severed from his birthparents by action of a competent authority for good cause and in accordance with the laws of Cape Verde. Accordingly, the beneficiary does not meet the definition of an orphan as a result of "separation from both parents," as defined at 8 C.F.R. § 204.3(b).

Nor does the record indicate that the beneficiary was involuntarily and permanently severed or detached from his birthparents due to a natural disaster, civil unrest, or other calamitous event beyond the control of her birthparents and as verified by a competent authority. Accordingly, the beneficiary does not meet the definition of an orphan as a result of the "loss of both parents," as defined by the regulation at 8 C.F.R. § 204.3(b).

Finally, the record establishes that both of the beneficiary's birthparents are living. As such, neither the beneficiary's birthmother nor birthfather is a "surviving parent," as that term is defined at 8 C.F.R. § 204.3(b). Accordingly, the beneficiary does not meet the definition of an orphan under this standard.

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

The record does not establish that the beneficiary meets the definition of an orphan because he has a sole parent incapable of providing proper care, as this standard is defined at 8 C.F.R. § 204.3(b). The regulation prescribes that the term "sole parent" only applies to children born out of wedlock and that the 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."

The petitioner has submitted no evidence to establish that the laws of Cape Verde distinguish between a child born in or out of wedlock. In *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973), the Board of Immigration Appeals (BIA) held that the law of a foreign country is a question of fact which must be proved by the applicant if he relies upon it to establish eligibility for an immigration benefit. The petitioner makes no argument and submits no evidence regarding the legitimacy laws of Cape Verde. Moreover, even if the petitioner had established that the laws of Cape Verde distinguish between a child born in or out of wedlock, the record would still not establish that the beneficiary has a sole parent, as the record does not establish that the beneficiary was himself born out of wedlock. For both of these reasons, the record fails to establish that the birthmother is the beneficiary's sole parent. Accordingly, the beneficiary does not meet the definition of an orphan under this standard.

IV. Conclusion

As set forth in the previous discussion, the petitioner has failed to establish that the beneficiary meets the definition of an "orphan," as that term is defined at section 101(b)(1)(F)(i) of the Act and the director properly denied the petition. The petitioner has not overcome the grounds for denial on appeal.

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 and the appeal will be dismissed.

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