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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

FILE:

Office: ATLANTA

Date: JUN 18 2010

IN RE:

Petitioner:
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:

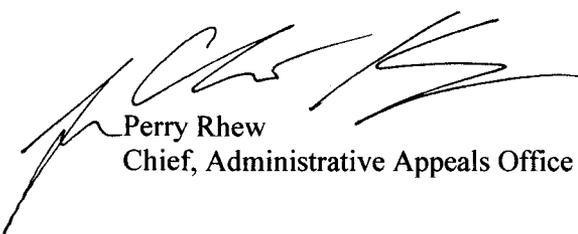
SELF-REPRESENTED

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 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 defined at section 101(b)(1)(F)(i) of the Act. Specifically, the field office director found that the petitioner had failed to establish that the beneficiary had been "abandoned" by both parents.

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) 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:

* * *

- (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. . . .

- (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 adoptive 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 twenty-seven-year-old citizen of the United States. The beneficiary, who is the petitioner's biological nephew, was born in Nigeria on July 29, 1996, and the record indicates that the petitioner adopted him in Nigeria on April 9, 2008. The field office director approved the Form I-600A, Application for Advance Processing of Orphan Petition, on behalf of the petitioner and his wife on September 10, 2009.

The petitioner filed the instant Form I-600 on April 17, 2009. The field office director issued a subsequent request for additional evidence, to which the petitioner filed a timely response. In her September 25, 2009 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 birthparents and met the definition of an "orphan," as defined at section 101(b)(1)(F)(i) of the Act.

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. Whether the petitioner has established that the beneficiary meets the definition of an orphan as a result 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.

On the Form I-600, the petitioner stated that the beneficiary "has only one parent who is the sole or surviving parent." The evidence of record fails to establish that the beneficiary is an orphan under that circumstance or for any of the other reasons stated in section 101(b)(1)(F)(i) of the Act.

A. 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 his birthparents. 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) (emphasis added). 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.*

Both of the beneficiary's birthparents are living. The record contains two statements from the beneficiary's birthmother consenting to the adoption of the beneficiary by the petitioner, and two statements from the beneficiary's birthfather consenting to the adoption of the beneficiary by the petitioner. The record in this case indicates clearly the beneficiary's 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 his wife.

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).

B. 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 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 Nigeria. 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 his 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.

C. *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." 8 C.F.R. § 204.3(b) (defining "sole parent"). While it does appear as though the laws of Nigeria distinguish between children born in and out of wedlock, the record does not indicate that the beneficiary was himself born out of wedlock.

Nor does the evidence of record establish that the beneficiary's birthmother is incapable of providing proper care to the beneficiary, consistent with local standards in Nigeria. First, the petitioner has submitted no evidence whatsoever regarding local living standards in Nigeria. Second, the AAO finds the record insufficient to meet the petitioner's burden of proof regarding the birthmother's inability to provide proper care to the beneficiary consistent with such standards. Although Affiong Usimkah, an attorney retained by the petitioner in Nigeria, stated that the birthmother has lost her job and does not have a house, and the birthmother herself stated that she is "battling sickness and bad health," the petitioner submitted no further evidence to support their assertions. The preponderance of the evidence does not establish that the birthmother is incapable of providing proper care to the beneficiary consistent with local standards in Nigeria.

Accordingly, the beneficiary does not meet the definition of an orphan as a child for whom the sole parent is incapable of providing the proper care.

D. *The beneficiary does not meet the definition of an orphan*

As set forth above, 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 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 petitioner has not overcome the grounds for denial on appeal.

III. *Conclusion*

The petitioner has failed to demonstrate that the beneficiary is an orphan, as defined at section 101(b)(1)(F)(i) of the Act. 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.

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