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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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FILE:

Office: HOUSTON, TX

Date:

MAR 05 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:



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)(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 (1) the petitioner had failed to submit an original adoption decree, as specifically requested by the field office director; and (2) that the petitioner had failed to establish that the petitioner's adoption of the beneficiary in Nigeria was in accordance with the laws of Nigeria. Accordingly, 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, 8 U.S.C. § 1101(b)(1)(F)(i), 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:

- (1) *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 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 an eighty-one-year-old citizen of the United States. The beneficiary was born in Nigeria on October 31, 1992. The petitioner filed the instant Form I-600 on August 21, 2007. The field office director issued a request for additional evidence on August 29, 2007. The petitioner responded on October 1, 2007. The field office director issued a second request for additional evidence on February 13, 2008. The petitioner submitted a response on August 15, 2008. Finally, the field office director issued a notice of intent to deny (NOID) the petition on January 28, 2009, which notified the petitioner of deficiencies in the record and afforded him additional time to submit evidence to establish eligibility for the benefit sought. In particular, the field office director requested the following: (1) evidence that the petitioner's adoption of the beneficiary was in accordance with the laws of the foreign-sending country; (2) evidence that the beneficiary's surviving parent is incapable of providing proper care to the beneficiary, consistent with local standards in Nigeria; (3) evidence that the surviving parent has irrevocably released the beneficiary for emigration and adoption; (4) an adequate birth certificate for the beneficiary; (5) additional fees for fingerprinting; and (6) the beneficiary's father's death certificate.

The petitioner sought, and was granted, two extensions of time during which to submit a response to the NOID: (1) on March 5, 2009, the field office director extended the deadline for submission of a response to April 27, 2009; and (2) on May 15, 2009, the field office director extended the deadline for submission of a response to July 14, 2009.

The petitioner responded to the NOID on July 13, 2009. The field office director found the petitioner's response insufficient, and denied the petition on October 14, 2009. The field office director denied the petition on the basis of her determination that the petitioner had failed to establish that the petitioner had completed an adoption of the beneficiary in accordance with the laws of Nigeria. Counsel submitted a timely appeal.

Upon review of the entire record of proceeding, 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. Beyond the decision of the director, the AAO finds further that the petitioner has further 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)(1)(iv) requires the petitioner to demonstrate that his adoption of the beneficiary was in accordance with the laws of Nigeria. When he filed the Form I-600, the petitioner indicated that he had adopted the beneficiary on May 9, 2002.

The field office director raised this issue in her January 28, 2009 NOID. Citing to the *Foreign Affairs Manual*, the field office director noted that adoptions in Nigeria are very rare, and that the adoptive parent must be a resident of Nigeria during the adoption process, and that the adoptive child must have been in the custody of the adoptive parent during that entire period. The field office director noted that there was no evidence of record indicating that the petitioner has been

residing in Nigeria. The field office director stated further that adoptions in Nigeria are completed under the auspices of the Ministry of Social Services, and that the record did not contain evidence of a full and final adoption initiated through that agency.

The petitioner responded to the NOID on July 13, 2009. With regard to the issue of whether the adoption was in accordance with the laws of Nigeria, the petitioner submitted the following:

- A May 23, 2009 letter from [REDACTED] who is, according to the petitioner, the “royal highness of our town”;
- A May 22, 2009 letter from [REDACTED] of [REDACTED], in Nigeria;
- A July 3, 2009 letter from [REDACTED] of Nigeria, Office of the Executive Chairman; and
- The petitioner’s July 8, 2009 cover letter.

The field office director found the petitioner’s submission insufficient, and denied the petition on October 14, 2009. On appeal, the petitioner submits the following with regard to the issue of whether his adoption of the beneficiary was in accordance with the laws of Nigeria:

- An original adoption decree, issued by the Magistrate’s Court of Imo State, in Nigeria, on May 9, 2002.
- A birth certificate for the beneficiary, dated December 11, 2009, which names the petitioner and his wife as the parents of the beneficiary;
- A December 5, 2000 affidavit from the beneficiary’s birth mother;
- Copies of entry and exit stamps from the passports of the beneficiary and his wife;
- An undated letter from the petitioner’s daughter;
- An undated letter from the petitioner; and
- The assertions of counsel on the Form I-290B.

The petitioner has failed to establish that the petitioner’s adoption of the beneficiary was in accordance with the laws of Nigeria. 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:

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:

¹ U.S. Department of State, Nigeria Reciprocity Schedule, available at http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3640.html (accessed February 16, 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

The AAO does not find the May 9, 2002 adoption decree persuasive in establishing that the petitioner's adoption of the beneficiary was in accordance with Nigerian law. As specifically noted by the DOS, any adoption not done "under the auspices" of the Ministry of Social Services is not valid, and this adoption decree makes no reference whatsoever to that agency. Rather, it appears as though the adoption was indeed performed "directly with the court by the adoptive parents," as the DOS specifically warns against. Nor does it indicate whether a guardian ad litem was assigned to represent the interests of the beneficiary. Nor does it indicate whether a social welfare officer visited the home of the adoptive parents in order to determine whether the beneficiary was "settled." Nor does this decree establish that the petitioner resided with the beneficiary for the requisite period of time.

Nor does the other evidence of record establish that the adoption was performed "under the auspices" of the Ministry of Social Services. Although [redacted] states that the adoption of the beneficiary was "initiated at the Social Welfare Office," and that the Social Welfare Office "exists at the Local Governments, State Level i.e. Ministry of Social Development and National Level," such generalized assertions, which are not supported by any documentary evidence, fail to establish that the adoption of the beneficiary was "done under the auspices of the Ministry of Social Services." None of the other assertions of record, including those of the

² U.S. Department of State, Office of Children's Issues, Intercountry Adoption, Nigeria Country Information, available at <http://adoption.state.gov/country/nigeria.html> (accessed February 16, 2010).

petitioner on appeal, that the adoption was performed under the auspices of the Ministry of Social Services are backed by any documentary evidence. The petitioner has failed to establish that the adoption of the beneficiary was done under the auspices of the Ministry of Social Services.

Nor does the other evidence of record demonstrate that a guardian ad litem was assigned to represent the interests of the beneficiary. Nor does it indicate whether a social welfare officer visited the home of the adoptive parents in order to determine whether the beneficiary was "settled."

Finally, the AAO turns to the issue of whether the evidence of record establishes that the petitioner resided with the beneficiary for the requisite period of time. As noted previously, the DOS states that "[f]or 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." At the time the petition was filed, the record contained no evidence that the petitioner had maintained a residence in Nigeria. Rather, the petitioner stated on the Form G-325A that he had lived in Adelphi, Maryland from March 1998 until February 2007, and in Katy, Texas from February 2007 through the present time. He stated further that he had worked for Value Village in Annapolis, Maryland as a supervisor from March 1998 until February 2007, and for the DPL Realty Group in Stafford, Texas as a manager from February 2007 through the present time. No mention was made of any residence in Nigeria during that time. The home study preparer made similar statements in the home study. Again, no residence in Nigeria was mentioned.

However, after the field office director raised this issue in the August 29, 2007 request for additional evidence and January 28, 2009 NOID, the petitioner stated that he and his wife had in fact resided in Nigeria prior to their adoption of the beneficiary. In response, the petitioner submitted letters from [REDACTED] and [REDACTED] as well as his own letter, in which they stated that the petitioner had resided in Nigeria with the beneficiary. On appeal, the petitioner repeats this assertion, and submits copies of entry and exit stamps from his and his wife's passports. However, the petitioner has not explained why this purported residence in Nigeria was not disclosed until the issue was raised by the field office director. Nor has he explained why such residence was not disclosed to the home study preparer. These unresolved discrepancies undermine the credibility of the petitioner's claim. Counsel introduces further discrepancies on appeal with her statement that it is "undisputed" that the petitioner currently maintains a residence in Nigeria and that the beneficiary has lived with the petitioner since the time of her birth.

The AAO agrees with the field office director's determination that the petitioner has failed to establish that he and his wife resided with the beneficiary for the requisite period of time prior to their adoption of the beneficiary. As noted previously, the adoption decree makes no reference to such residence, nor did the petitioner's evidence at the time the petition was filed indicate that such residence took place. Although the petitioner now claims that he did in fact reside with the beneficiary prior to the adoption, his testimony conflicts with his previous evidence.

Upon review of the entire record of proceeding, 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. The petitioner has failed to demonstrate that the adoption took place "under the auspices" of the Ministry of Social Services; that a guardian ad litem was assigned

to represent the interests of the beneficiary; that a social welfare officer visited the home of the petitioner in order to determine whether the beneficiary was “settled”; or that the petitioner resided with the beneficiary for the requisite period of time. As such, the AAO will not disturb the field office director’s denial of this petition.

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 “a sole or surviving parent is 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 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. Although there are several assertions of record that the birth mother is “sickly,” unemployed, disabled, and incapable of supporting her children, the record lacks any evidence to support such assertions. For example, there is no evidence supporting the assertions of record that the birth mother is “sickly,” or that she is disabled. With regard to her unemployment, there is no explanation as to why she is unable to secure employment. There is no explanation or evidence as to why the factors identified by the petitioner would preclude the birth mother from providing proper care consistent with local standards. 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. For this additional reason, the petition may not be approved.

III. Conclusion

The AAO concurs with the 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)(1)(iv). Beyond the decision of the director, the AAO finds further that the record of proceeding fails to establish that beneficiary’s surviving parent is incapable of providing proper care to the beneficiary consistent with local standards in Nigeria pursuant to section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i). Accordingly, 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, 8 U.S.C. § 1101(b)(1)(F)(i), and the field office director properly denied this petition. 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. See 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 appeal will be dismissed and the petition denied 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.