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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

F1

FILE: [redacted] Office: GUATEMALA CITY, GUATEMALA Date: JAN 26 2011

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:

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 $630. 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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and affirmed its decision to deny the petition on five separate occasions in response to subsequent motions to reopen or reconsider. The matter is again before the AAO on a sixth motion to reopen or reconsider. The motion to reconsider will be dismissed. The motion to reopen will be granted and the prior decision of the AAO will be affirmed.

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 petitioner filed the Form I-600 on June 2, 2008, and the field office director denied the petition on July 22, 2008. On February 5, 2009, the AAO dismissed the petitioner's subsequent appeal. We affirmed that decision, in response to subsequent motions to reopen or reconsider, on May 11, 2009, October 19, 2009, March 4, 2010, July 14, 2010, and October 21, 2010. As the facts and procedural history of this case have been adequately documented in our previous decisions, we will only repeat certain facts here as necessary.

In our February 5, 2009 decision, we dismissed the petitioner's appeal on the basis of our determination that (1) because the identity of the beneficiary had not been established, the record lacked conclusive evidence to establish that the beneficiary meets the definition of an orphan; and (2) the record lacked sufficient evidence regarding the parentage of the beneficiary to establish that the biological mother was a "sole parent" or that the beneficiary was an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents.

In our May 11, 2009 decision, we found that the petitioner had again failed to resolve these issues and, in our conclusion, found that the record still contained multiple, and unresolved, contradictions and inconsistencies. We noted that the petitioner had not submitted a valid birth certificate or any other credible documentation to resolve the contradictory evidence in the record regarding the circumstances of the beneficiary's birth. Moreover, the contradictory statements by the beneficiary's birth mother regarding whether she consents to the emigration and adoption of her child had not been explained. We noted further that the record lacked evidence that the beneficiary's biological father had severed his parental ties or irrevocably released the beneficiary for emigration and adoption. In the alternative, the record also lacked any documentary evidence that the beneficiary's mother, if she were to be considered a "sole parent," was incapable of providing for the beneficiary's basic needs in a manner consistent with local standards in Guatemala. We found that in light of such unresolved inconsistencies and lack of evidence, there were questions as to whether either or both parents had abandoned the beneficiary or irrevocably released him for emigration and adoption. Accordingly, we found that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan, as that term is set forth at section 101(b)(1)(F)(i) of the Act, and we affirmed our February 5, 2009 decision dismissing the appeal.

In our October 19, 2009 decision, we rejected previous counsel's request to delay adjudication of the motion pending the outcome of a hearing that was to take place in October 2009, and affirmed our February 5, 2009 decision. In our decisions of March 4 and July 14, 2010, we again rejected

previous counsel's request to delay adjudication of the motion, and affirmed our February 5, 2009 decision. In our October 21, 2010 decision, we dismissed the petitioner's motion to reopen or reconsider pursuant to 8 C.F.R. § 103.5(a)(4) because his submission failed to meet the requirements of a motion to reopen or reconsider.

In the present motion to reopen or reconsider, the petitioner[1] submits a three-page appellate brief dated November 17, 2010. Although this brief is substantially similar to the April 5, 2010 brief submitted by previous counsel in support of the petitioner's fourth motion and the August 20, 2010 brief submitted by the petitioner in support of his fifth motion, both of which were considered fully before we issued our decisions of July 14 and October 21, 2010, the petitioner makes several new statements we have not previously considered. First, the petitioner refers to an October 7, 2009 judgment by [redacted] of the First Court for Childhood and Adolescence in Guatemala, which we considered fully in our July 14, 2010 decision. As we noted in that decision, Guatemalan Central National Authority has appealed [redacted] decision declaring the beneficiary "adoptable" under the law of Guatemala. On motion, the petitioner argues that the appeal of [redacted] decision was improper. The petitioner also states that he and his wife met with a representative from the Guatemalan Department of Foreign Ministry. According to the petitioner, this representative is taking the necessary steps to resolve pending Guatemalan adoptions. Finally, the petitioner requests that the AAO order the Guatemala City Field Office to "stay its determination in this case until we are able to fully document our case."

The petitioner's submission does not qualify as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part the following:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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[1] The petitioner stated in his November 17, 2010 appellate brief that his appearance in these proceedings was *pro se*. He also submitted a Form G-28I, Notice of Entry of Appearance of Attorney in Matters Outside the Geographic Confines of the United States signed by an individual claiming to be an attorney licensed to practice law in Guatemala. However, pursuant to 8 C.F.R. § 292.1(a)(6) and the instructions to the Form G-28I, *available at* http://www.uscis.gov/files/form/g-28i.pdf (accessed January 7, 2011), the individual who signed the G-28I has not established that he is eligible to represent the petitioner in this proceeding. As set forth at 8 C.F.R. § 292.1(a)(6), an attorney who is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he or she resides, and who is engaged in such practice of law, is eligible to represent persons only in matters outside the geographical confines of the United States. As the proceedings before the AAO do not take place outside the geographical confines of the United States, the individual who signed the Form G-28I is not eligible to represent the petitioner before us. As the petitioner stated that he was filing the instant motion *pro se*, and the individual who signed the Form G-28I has not established that he is authorized to represent the petitioner pursuant to 8 C.F.R. § 292.4(a), we consider the petitioner self-represented.

The petitioner's motion is dependent upon evidence not yet in existence at the time the decision he seeks to have reconsidered was issued and therefore does not establish that our prior decisions were incorrect based upon the record before us at the time we issued them. Nor does the petitioner cite any pertinent precedent decisions to establish that our previous decisions were based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. Accordingly, his submission does not qualify as a motion to reconsider.

The petitioner's submission does, however, meet the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we affirm our prior decision. The petitioner's claims on motion fail to overcome the grounds for dismissal of the appeal and denial of the petition

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. . . .

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." However, the petitioner's assertions on motion fail 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.

In his [redacted] brief, the petitioner cites [redacted] judgment, which was made on the basis of a hearing that had taken place two days previously. In her decision, [redacted] found that the beneficiary's birthmother demonstrated no interest in recovering the beneficiary; that the birthmother wishes for the adoption to proceed; that the beneficiary may be adopted pursuant to the laws of Guatemala; that the Guatemalan National Adoption Council (NAC) must start adoption proceedings, considering the petitioner and his wife as the adoptive parents; and stated that the petitioner and his wife should appear before the NAC to file the appropriate paperwork related to the adoption.

However, [redacted] decision does not address the inconsistencies regarding the identity and parentage of the beneficiary catalogued fully in our February 5 and May 11, 2009 decisions. For example, while [redacted] found that [redacted] also known as [redacted] the individual identified by counsel and the petitioner as the beneficiary's birthmother, now consents to the adoption, she did not address why she has now changed her mind, given that she had previously withdrawn such consent. Nor did [redacted] address [redacted] misrepresentation of her age and identity throughout the adoption process; her failure to divulge the identity of the birthfather or that she and the birthfather were living together; her failure to notify the birthfather that she was placing the beneficiary for adoption; her usage of fraudulent identification documentation and a fraudulent birth report to register the beneficiary's birth; or her previous testimony that she had been promised money in exchange for the adoption. Thus, irrespective of whether [redacted] decision rendered the beneficiary "adoptable" under the laws of Guatemala, it did not resolve the matters at issue here with respect to the inconsistencies and discrepancies of record with regard to the identity of the beneficiary's birthmother and the beneficiary's parentage, as [redacted] made no mention of such inconsistencies and discrepancies in her decision. The failure to resolve those inconsistencies and discrepancies renders it impossible for the AAO to determine whether the beneficiary meets the definition of an orphan under section 101(b)(1)(F)(i) of the Act.

However, even if the identify of the birthmother and the beneficiary's parentage were no longer in question, the evidence of record would still not establish 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. For the sake of argument, in our analysis of this issue we will consider [redacted] also known as [redacted] the birthmother.

A. Abandonment by both parents; death or disappearance of both parents; desertion by both parents; separation from both parents; and loss of 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. . . ." Although [redacted] found that the beneficiary's birthmother has now willfully forsaken all parental rights, obligations, and claims to the beneficiary, as well as all control over and possession of the beneficiary, she did not indicate whether the beneficiary's birthfather had also forsaken such rights. Nor does the record contain any evidence of the birthfather's severance of his parental ties to the beneficiary. As such, the beneficiary does not meet the definition of an orphan as a result of having been abandoned by both parents.

The record does not indicate that both of the birthparents have died or disappeared; that the beneficiary has become "become a ward of a competent authority" as the result of his birthparents' desertion; that the beneficiary was subject to the "separation from both parents" by involuntarily severance from his birthparents by action of a competent authority for good cause and in accordance with the laws of Guatemala; or that the beneficiary suffered the "loss of both parents" from having been 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 under any of these terms, as defined by the regulation at 8 C.F.R. § 204.3(b).

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

As noted previously, the petitioner stated on the Form I-600 that the beneficiary qualifies for classification as an orphan because he "has only one parent who is the sole or surviving parent." However, if both birthparents are living, as indicated by the record, neither his 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.

Nor does the record establish that the beneficiary has a sole parent. The regulation prescribes that the term "sole parent" only applies to the mother of a child born out of wedlock who has not acquired another parent. The regulation further states that the term "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 such children are considered to be legitimate." 8 C.F.R. § 204.3(b) (defining "sole parent"). The Board of Immigration Appeals (BIA) has held that all children born in Guatemala are legitimate from birth. *See Matter of Hernandez*, 17 I&N Dec. 7 (BIA 1979) (determining that, pursuant to Article 86 of the 1965 Constitution of Guatemala and Article 209 of the Civil Code of Guatemala, all children born in Guatemala are legitimate). As the laws of Guatemala do not distinguish between children born in or out of wedlock, and 8 C.F.R. § 204.3(b) specifically states that the definition of a sole parent is not applicable to children born in countries that make no such distinction, a determination that the beneficiary has a sole parent is not possible.

Moreover, even if it were established that [redacted] is the beneficiary's sole parent, as that term is defined in the regulation, the beneficiary would still not meet the definition of an orphan under that standard, as the record does not demonstrate that [redacted] is incapable of providing proper care to the beneficiary, consistent with local standards in Guatemala. As noted previously, the phrase "incapable of providing proper care" is specifically defined at 8 C.F.R. § 204.3(b) as "mean[ing] 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." The petitioner has submitted no evidence whatsoever regarding local standards in Guatemala. Nor does the record contain any evidence beyond generalizations that [redacted] is incapable of providing proper care to the beneficiary consistent with such standards. For all of these reasons, the beneficiary does not meet the definition of an orphan as a child whose sole or surviving parent is incapable of providing proper care.

C. 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.

II. The petitioner's request to withhold adjudication

We will not delay adjudication of this matter, as requested by the petitioner. In his brief, the petitioner requests that we "require USCIS in Guatemala to stay its determination in this case until [the petitioner and his wife] are able to fully document our case." However, the petitioner cites no authority permitting USCIS to withhold adjudication of pending cases. To the contrary, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO lacks authority to withhold adjudication of the present motion, and the petitioner's request is denied.[2]

III. Concerns over child-buying

As noted in our February 5, 2009 decision, the field office director completed an I-604 investigation prior to adjudicating the instant petition. As noted by the field office director in his June 20, 2008 Notice of Intent to Deny (NOID), at a March 24, 2008 interview conducted as part of the I-604 investigation, [redacted] stated that she had been promised the equivalent of nearly $2,000 by an individual referred to as "Sandra" in an effort to convince her to place her child for adoption and emigration to the United States. The regulation at 8 C.F.R. § 204.3(i) states the following:

[2] The AAO notes that 8 C.F.R. § 103.5(a)(1)(i) allows for the filing of a motion to reopen beyond the 30-day time limit when the petitioner demonstrates to the satisfaction of USCIS that the delay in filing was both reasonable and beyond the control of the petitioner.

> *Child-buying as a ground for denial.* An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. . . .

As noted in our July 14, 2010 decision, the March 24, 2008 testimony of [redacted] raises questions with regard to whether this petition is subject to the child-buying prohibition described at 8 C.F.R. § 204.3(i), and we stated that if the petitioner ultimately overcomes the grounds of the previous decisions of the field office director and the AAO, the issue of whether the beneficiary was purchased must be considered before this petition may be approved.

IV. Conclusion

The petitioner's assertions on motion fail to overcome the grounds for denial or establish that any of our previous decisions or the decision of the field office director were issued in error. As we have no authority to review Guatemalan court procedures, we will accord no weight to the petitioner's assertion that the CNA's appeal of [redacted] decision was improper. Nor does the fact that the petitioner met with a representative of the Guatemalan Foreign Ministry overcome any of the grounds for denial discussed above.

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. The prior decision of the AAO will be affirmed.

ORDER: The October 21, 2010 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed and the petition remains denied.