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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

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**U.S. Citizenship
and Immigration
Services**

[REDACTED]

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FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date:

JAN 28 2011

IN RE:

Petitioner:

[REDACTED]

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:

[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 \$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 initially approved the Form I-600, Petition to Classify Orphan as an Immediate Relative. However, upon receipt of correspondence from the United States Embassy in Addis Ababa, Ethiopia, the field office director issued a notice of intent to revoke, and ultimately revoked, approval of the petition. 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 revoked approval of the petition on the basis of his 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 the record absent of evidence that the beneficiary has a sole parent who is incapable of providing proper care to the beneficiary, consistent with local standards in Ethiopia. On appeal, counsel submits a letter reasserting the beneficiary's eligibility and additional evidence.

Applicable Law

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.

* * *

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.

* * *

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 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)(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 regulation at 8 C.F.R. § 204.3(k)(1) states, in pertinent part, the following:

An I-604 investigation must be completed in every orphan case. The investigation must be completed by a consular officer except when the petition is properly filed at a Service office overseas, in which case it must be completed by a Service officer. An I-604 investigation shall be completed before a petition is adjudicated abroad. When a petition is adjudicated by a stateside Service office, the I-604 investigation is normally completed after the case has been forwarded to visa-issuing post abroad. However, in a case where the director of a stateside Service office adjudicating the petition has articulable concerns that can only be resolved through the I-604

investigation, he or she shall request the investigation prior to adjudication. In any case in which there are significant differences between the facts presented in the approved advanced processing application and/or orphan petition and the facts uncovered by the I-604 investigation, the overseas site may consult directly with the appropriate Service office. In any instance where an I-604 investigation reveals negative information sufficient to sustain a denial or revocation, the investigation report, supporting documentation, and petition shall be forwarded to the appropriate Service office for action. Depending on the circumstances surrounding the case, the I-604 investigation shall include, but shall not necessarily be limited to, document checks, telephonic checks, interview(s) with the natural parent(s), and/or a field investigation.

Pertinent Facts and Procedural History

The petitioner is a [REDACTED] citizen of the United States, and the record indicates that she adopted the beneficiary in Ethiopia in 2007. The petitioner filed the instant Form I-600 on January 8, 2008, and it was approved on May 29, 2008.

The petitioner stated on the Form I-600 that the beneficiary "has only one parent who is the sole or surviving parent," that the beneficiary was abandoned by the other parent ten years ago, and that the remaining parent is not capable of providing for the beneficiary's support.

After conducting its I-604 investigation, the United States Embassy in Addis Ababa, Ethiopia, returned the petition for further review and possible revocation, and the field office director issued a notice of intent to revoke (NOIR) approval of the petition on March 23, 2009. In his NOIR, the field office director relayed the concerns of the U.S. Consulate in Addis Ababa to the petitioner, and afforded him thirty days during which to address those concerns. As noted by the field office director in the NOIR, the I-604 investigation indicated that the beneficiary's birthfather is capable of providing proper care to the beneficiary consistent with local standards in Ethiopia and, as such, the beneficiary could not be considered an orphan as a result of having a sole parent incapable of providing proper care consistent with such standards.

The petitioner, through counsel, disputed that conclusion, and submitted a timely response to the NOIR. The field office director found counsel's response to the NOIR inadequate, and revoked approval of the Form I-600 on November 20, 2009. The petitioner filed an untimely appeal, which we rejected on May 3, 2010, but returned to the field office director for treatment as a motion to reopen or reconsider. The field office director dismissed the petitioner's motion on September 15, 2010, and the matter is again before the AAO on appeal.

On appeal, counsel contends that the field office director's decision should be reversed because the evidence of record clearly establishes the birthmother's incapability of providing proper care to the beneficiary.

At the time of the field office director's May 29, 2008 decision to approve the petition, the record contained minimal information regarding the alleged incapability of the beneficiary's alleged sole parent to provide proper care consistent with local standards.

As noted previously, the I-604 investigation revealed derogatory information regarding the birthfather's alleged inability to provide proper care consistent with local standards. Such derogatory information included, in relevant part, the following:

- The beneficiary's [REDACTED] is in good mental and physical health.
- The [REDACTED] is not employed. His two primary sources of income are from his brother, with whom he lives and who is employed, and from the petitioner. According to the I-604 investigation, in Ethiopia it is very common for income to be supplemented, or even supplied entirely, by foreign remittances.
- The house in which the [REDACTED] lives with the beneficiary is constructed of wood and mud, contains more than one room, and has electricity and a television. According to the consular officer, the home is above average Ethiopian standards.
- The beneficiary appeared healthy, well-fed, well-dressed, and well-educated by Ethiopian standards. He stated that he attends a [REDACTED] to which the petitioner pays his tuition, and that his education has never been interrupted, due to a lack of money or because his [REDACTED] needs him to work.
- There is little evidence that the [REDACTED] is unable to care for the beneficiary.

The field office director relayed the specific concerns of the U.S. Embassy that arose during the course of the I-604 investigation to the petitioner in his NOIR. Counsel submitted a timely response to the NOIR, and submitted two documents from Ethiopia: (1) a letter from [REDACTED] Administration Office, dated October 20, 2008; and (2) a letter from [REDACTED] dated October 27, 2008.

The WAO prepared its letter based upon the testimony of the beneficiary's [REDACTED]. According to this letter, the [REDACTED] told the WAO that he has no capacity to foster and educate the beneficiary and that the beneficiary's [REDACTED] disappeared more than ten years ago. The WAO stated further that three witnesses, whose names and relationship to the [REDACTED] it did not provide, confirmed that the [REDACTED] is unemployed and lacks the knowledge and capability to work; that he is "an old-aged person" who cannot care for the beneficiary; that he is "leading a distorted kind of life"; and that he and the beneficiary live together below the poverty line. There is no indication that the WAO independently verified any of the information provided by the [REDACTED] or his three witnesses.

The letter from [REDACTED] is based upon the letter from [REDACTED]. The MOWA stated that according to the letter from the WAO, the beneficiary's birthmother disappeared ten years ago and the birthfather "has no physical and financial capacity to raise" the beneficiary.

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, we find that the petitioner has failed to overcome the field office director's ground for revoking approval of this petition. We agree with the field office director's conclusion that the petitioner has failed to establish that the beneficiary's [REDACTED] is incapable of providing proper care to the beneficiary, consistent with local standards in Ethiopia. On a more basic level, we find further that the beneficiary's [REDACTED] does not qualify as his sole parent and, as such, the beneficiary does not qualify as an orphan as a result of having a sole parent who is incapable of providing proper care consistent with local standards in Ethiopia. Nor does the beneficiary qualify as an orphan under any of the other criteria set forth at section 101(b)(1)(F)(i) of the Act.

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

The regulation at 8 C.F.R. § 204.3(b) 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 [REDACTED] therefore, is not eligible to be classified as a "sole parent" under this regulatory definition. Moreover, the record in this case does not indicate whether the beneficiary was born outside wedlock, which further precludes a finding that he has a sole parent. Nor has the petitioner established that the laws of Ethiopia distinguish between children born to married couples versus those born to unmarried couples. *See Matter of Annang*, 14 I&N Dec. 502 (BIA 1973) (foreign law is a question of fact which must be proved by the petitioner if relied upon to establish eligibility for an immigration benefit). For all of these reasons, the petitioner has failed to establish that the beneficiary's [REDACTED] qualifies as a sole parent, as that term is defined at 8 C.F.R. § 204.3(b). The petitioner has also failed to establish that the beneficiary's [REDACTED] is incapable of providing the proper care. As noted, the I-604 investigation found that the [REDACTED] was capable of providing proper care to the beneficiary.

On appeal, counsel contends that the field office director erred in revoking approval of the petition, and cites the letters from the WAO and the MOWA in support of his argument. Counsel contends that the MOWA made a "specific finding" that the [REDACTED] cannot care for the beneficiary; that he is unemployed; and that he lacks the knowledge and capability to do any work. We disagree. As noted, the letter from the WAO was based upon the testimony of the [REDACTED] and three unnamed "witnesses," and the letter from the MOWA was based upon the WAO's letter. There is no indication that either agency investigated the matter independently. The specific findings of the I-604 investigation were set forth above, and we find the unsupported testimony of the birthfather and three unnamed witnesses insufficient to rebut those findings. Nor has the petitioner submitted any evidence regarding local standards of care in Ethiopia.

Nor is the caselaw cited by counsel on appeal persuasive. Although counsel cites *Rogan v. Reno*, 75 F. Supp. 2d 63, (E.D.N.Y. 1999), that case is neither binding nor persuasive. In contrast to the broad precedential authority of the case law of a United States circuit court of appeals, the AAO is not bound to follow the published decision of a United States district court, even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As the instant petition did not originate within the jurisdiction of the District Court for the Eastern District of New York, which decided *Rogan*, that decision is due no deference.

Nor is counsel's citation to *Matter of Rodriguez*, 18 I&N Dec. 9 (BIA 1980) persuasive. In that case, a social welfare agency in Peru verified that the beneficiary's birthmother was unable to provide proper care. *See id.* at 11. The instant case differs from *Rodriguez* because neither the WAO nor the MOWA investigated the ability of the birthfather to provide proper care to the beneficiary; again, the letter from the WOA was based upon the testimony of the birthfather and three unnamed "witnesses," and the letter from the MOWA was based upon the WOA's letter. Moreover, *Rodriguez* involved legitimation under the laws of Peru, which are not at issue here. As we noted previously, the petitioner has failed to establish that the laws of Ethiopia distinguish between children born in and out of wedlock and has therefore failed to establish that legitimation is an issue.

Nor is counsel's citation to an unpublished AAO decision persuasive. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner has failed to establish that the beneficiary qualifies for classification as an orphan as a result of having a sole parent who is incapable of providing proper care, consistent with local standards in Ethiopia, and counsel's claims on appeal fail to overcome the ground for revocation of the approval of this petition. Nor has the petitioner established that the beneficiary meets the definition of an orphan under any of the other criteria set forth at section 101(b)(1)(F)(i) of the Act.

Abandonment by both parents; 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 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). 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.* The record establishes clearly that the [REDACTED] desires to transfer his parental rights, obligations, and claims, as well as control over and possession of, the beneficiary, directly to the petitioner. The [REDACTED] is aware that the petitioner wanted to adopt the beneficiary, and the record is clear that he consented to the adoption. He clearly wished to transfer "all parental rights, obligations, and claims to the child, as well as all control over and possession of the child," directly to the petitioner. Accordingly, the beneficiary does not meet the definition of an orphan under this standard.

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 involuntarily severed from his birthparents by action of a competent authority for good cause and in accordance with the laws of Ethiopia; that the beneficiary suffered the "loss of both parents" by being 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; or that the beneficiary's [REDACTED] is deceased such that his [REDACTED] is a "surviving parent." Accordingly, the beneficiary does not meet the definition of an orphan under any of these other terms, as defined at 8 C.F.R. § 204.3(b).

Conclusion

The AAO concurs with the field office director's determination that the petitioner has failed to establish that the beneficiary meets the definition of an orphan as a result of having a sole parent who is incapable of providing proper care, consistent with local standards and who has in writing irrevocably released the child for emigration and adoption, and the petitioner has not overcome the ground for denial on appeal. We find additionally that the petitioner has failed to 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 surviving parent is incapable of providing the proper care and who has in writing irrevocably released the child for emigration and adoption. The evidence of record does not establish that the beneficiary meets the definition of an orphan under any of the criteria set forth at section 101(b)(1)(F)(i) of the Act and approval of the petition will remain revoked.

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.