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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

F1

[redacted]

Date: JUL 20 2011

Office: NATIONAL BENEFITS CENTER

File: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, National Benefits Center, revoked approval of the immigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter remanded for further action.

The director revoked approval of the Form I-600, Petition to Classify Orphan as an Immediate Relative, because the beneficiary was not under the age of 16 when the petition was filed. On appeal, the petitioner contends through counsel that the director should have made an exception to the age requirement on humanitarian grounds and on the basis of estoppel. *See Form I-290B, Notice of Appeal*, filed Feb. 8, 2011. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F), 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: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act; or (ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 201(b)[.]

The phrase "[s]urviving 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." 8 C.F.R. § 204.3(b). Further, "*[i]ncapable 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*." *Id.*

The record reflects that the petitioner and his wife are U.S. citizens. The beneficiary was born on November 30, 1992, to . *See Birth Certificate of* The beneficiary's birth father died on August 24, 2006. *See Death Certificate of* The petitioner initiated guardianship proceedings over the beneficiary and his younger sister in Pakistan. *See Order/09.10.2009.* On October 10, 2009, the petitioner was appointed guardian over the beneficiary. *See Guardian Case No. 21/G of 09.10.2009*, issued in the Court of , Civil Judge 1st Class, Multan.

The petitioner filed an Application for Advance Processing of Orphan Petition on August 5, 2008, when the beneficiary was 15 years old. *See Form I-600A.* U.S. Citizenship and Immigration Services (USCIS) approved the Form I-600A on February 9, 2009. *Notice of Favorable Determination Concerning Application for Advance Processing of Orphan Petition.* The petitioner filed the Petition to Classify Orphan as an Immediate Relative on January 30, 2009, when the beneficiary was 16 years old. *See Form I-600.* USCIS approved the Form I-600 on July 15, 2009.

On June 24, 2010, the director issued a Notice of Intent to Revoke (NOIR) the approved petition because the beneficiary did not meet the age requirements of the Act. Specifically, the beneficiary was not under the age of 16 years at the time the Form I-600 was filed. Additionally, the beneficiary's younger sister, who was under the age of 16 years at the time her Form I-600 was filed, was not irrevocably released for emigration and adoption by her mother. Accordingly, the beneficiary could no longer benefit from the expanded age provision set forth in section 101(b)(1)(F)(ii) of the Act. The director determined that the petitioner's response to the NOIR failed to overcome the reasons for revocation, and approval of the petition was revoked on January 21, 2011. The petitioner timely appealed.

Analysis

For intercountry adoptions under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993 ("Convention"), the regulations provide, in pertinent part:

> If the Form I-800A was filed after the child's 15th birthday but before the child's 16th birthday, the filing date of the Form I-800A will be deemed to be the filing date of the Form I-800, provided the Form I-800 is filed not more than 180 days after the initial approval of the Form I-800A.

8 C.F.R. § 204.313(c)(3). The regulations governing orphan petitions at 8 C.F.R. § 204.3, do not directly address the relationship between the separate filing of a Form I-600A and the statutory requirement to file the "petition" while the child is under the age of 16. To promote consistency with the regulations for Convention adoption cases, USCIS deems the Form I-600A filing date to be the Form I-600 filing date if: (1) the Form I-600A was filed after the child's fifteenth birthday but before the child's sixteenth birthday; and (2) the Form I-600 is filed not more than 180 days after the initial approval of the Form I-600A.

Here, the petitioner filed the Form I-600A after the beneficiary's fifteenth birthday and before his sixteenth birthday. Further, the Form I-600 was filed before the initial approval of the Form I-600A. Accordingly, USCIS will deem the Form I-600A filing date to be the Form I-600 filing date. Because the beneficiary was under the age of 16 at the time the Form I-600A was filed, he meets the age requirement set forth in section 101(b)(1)(F)(i) of the Act. Accordingly, the director's decision to the contrary will be withdrawn.

However, the record reveals an additional ground of ineligibility that the director did not discuss. Specifically, the petitioner has not established that the beneficiary is an orphan under any of the categories listed in section 101(b)(1)(F)(i) of the Act. Although the beneficiary's father is deceased, the petitioner has not shown that the beneficiary's mother is incapable of providing proper care as defined by the regulation at 8 C.F.R. § 204.3(b), and required to establish the beneficiary's eligibility as an orphan.

Here, the beneficiary's mother states that "due to the sickness and very weak financial position," she cannot "look after her children." *Affidavit of* [redacted], dated June 27, 2009. She further states that her children reside with her, and that the petitioner assists the family financially. *Id.* No evidence was submitted regarding her health and the impact of any medical conditions on her ability to provide for her son. The record also includes a copy of a financial account statement in the name of the beneficiary's birth parents, but no explanation is provided to support the claimed "weak financial position." Further, the guardianship papers in the record do not state that the beneficiary's mother is incapable of providing for her son's basic needs consistent with the local standards in Pakistan. *See Application for Custody of Guardian (Minor).* According to the Application for Custody, the reason for guardianship was to "look after and to take abroad U.S.A. for the better growth and protection of future." *Id.* In sum, the record contains no evidence showing that the beneficiary's mother is incapable of providing for his care consistent with the local standards in Pakistan. *See* 8 C.F.R. § 204.3(b); (d)(1)(iii)(C). Accordingly, the petitioner has not shown that the beneficiary meets the definition of an orphan.

Conclusion

Although the petitioner has overcome the ground for revocation, the petitioner has failed to establish 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. Accordingly, the petition will be remanded to the director for further proceedings, including issuance of a second NOIR.

ORDER: The director's January 21, 2011 decision is withdrawn. The petition is remanded to the director for further action in accordance with this decision.