

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

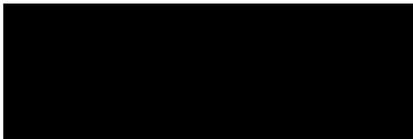
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

F₁



DATE: OFFICE: NATIONAL BENEFITS CENTER

FILE:



JUL 29 2011

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:

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 New York City 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 Port-au-Prince, Haiti, the director of the National Benefits Center 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. Approval of the petition will remain revoked.

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 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 director found the record absent evidence that the beneficiary's biological father is no longer living, as asserted by the petitioner. On appeal, counsel submits a letter.

Applicable Law

Section 205 of the Act, 8 U.S.C. § 1155, states the following:

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2(a) states, in pertinent part, the following:

Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 [for automatic revocation] when the necessity for the revocation comes to the attention of [U.S. Citizenship and Immigration Services].

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 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)(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 fifty-nine-year-old citizen of the United States. The evidence of record indicates that she and her husband adopted the beneficiary in Haiti in 2004. The petitioner filed the instant Form I-600 on October 13, 2005, and it was approved on June 5, 2006.

The petitioner stated on the Form I-600 that the beneficiary "has only one parent who is the sole or surviving parent." In his cover letter to the Form I-600, counsel stated that the other parent is "deceased," 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 Port-au-Prince, Haiti returned the petition for further review and possible revocation. The director of the National Benefits Center issued a notice of intent to revoke (NOIR) approval of the petition on February 8, 2011, pursuant to the regulation at 8 C.F.R. § 205.2(b). In his NOIR, the director relayed the concerns of the U.S. Embassy in Port-au-Prince to the petitioner, and afforded her 30 days during which to address those concerns. In the NOIR, the director stated that the beneficiary's birthmother appeared at the U.S. Embassy for interviews on three separate occasions. On June 5, 2007, she claimed that the birthfather died in 2001. However, she did not provide a copy of his death certificate. During her second interview, which took place on August 7, 2007, the beneficiary's birthmother stated that she could not provide a copy of the birthfather's death certificate because she was not living with him. Finally, on November 21, 2007, she stated that she could not remember the last time she saw the birthfather. The director also notified the petitioner that the director of the Haitian National Archives told the Embassy that the death certificate submitted as proof of the birthfather's death had never been registered with that agency.

The petitioner, through counsel, filed a timely response to the NOIR. In his NOIR response, counsel submitted a May 21, 2010 document consisting of statements from [REDACTED] who stated that the beneficiary was born on March 27, 1989, and that the beneficiary's birthmother "has been without any ideas as to the whereabouts" of the birthfather

since the time of the beneficiary's October 8, 1989 baptism. The director found the response to the NOIR inadequate, and revoked approval of the Form I-600 on March 21, 2011.

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 director's ground for revoking approval of this petition.

The petitioner stated on the Form I-600 that the beneficiary "has only one parent who is the sole or surviving parent." However, the relevant evidence fails to establish that the beneficiary qualifies for classification as an orphan under that circumstance or for any of the other reasons stated in 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; 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. . . ." The record contains no evidence or information regarding the birthfather's severance of his parental ties to the beneficiary. However, even if it did, the beneficiary would still not qualify for classification as an orphan because the birthmother clearly desired for the petitioner to adopt the beneficiary, and the regulation at 8 C.F.R. § 204.3(b) specifically states that a relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Nor does the record indicate that both birthparents have died or disappeared; that the beneficiary has become "become a ward of a competent authority" as the result of both of her birthparents' desertion; that the beneficiary was subjected to the "separation from both parents" by involuntarily severance from her birthparents by action of a competent authority for good cause and in accordance with the laws of Haiti; or that the beneficiary suffered the "loss of both parents" from having been involuntarily and permanently severed or detached from her 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. Accordingly, the beneficiary does not meet the definition of an orphan under any of these criteria.

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 she "has only one parent who is the sole or surviving parent." However, the petitioner has not established that the birthfather is no longer living. The regulation at 8 C.F.R. § 204.3(d)(1)(iii)(B) specifically requires submission a copy of the birthfather's death certificate. However, as noted, the death certificate submitted as proof of the birthfather's death, which was purported to have been registered with the Haitian National Archives, was in fact not registered with that agency as claimed. Nor was the birthmother's October 7, 2005 statement that the

birthfather died on May 20, 2001 supported by any other evidence. Nor does the May 21, 2010 statement by [REDACTED] that the birthmother “is without any ideas as to the whereabouts of [the birthfather]” establish that the birthfather is no longer living absent documentary evidence. On appeal, counsel argues that the May 21, 2010 statement by these three individuals “is the equivalent of a death certificate under Haitian laws.” However, he offers no support for that assertion and, given the statement by the United States Department of State that death certificates in Haiti are available from the National Archives,¹ we are not persuaded his assertion. The petitioner has failed to establish that the beneficiary’s birthfather is no longer living and, as such, she has failed to establish that the beneficiary’s birthmother is her surviving parent.

Nor does the record establish that the beneficiary has a sole parent, as counsel argues implicitly when he states that the beneficiary qualifies for classification as an orphan “for the simple reason that nobody knows about the whereabouts of the father.” 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”). While the laws of Haiti appear to distinguish between children born in and out of wedlock,² the record indicates that the birthfather’s acknowledgement of his paternity of the beneficiary after her birth served to legitimate her.

Moreover, even if it had been established that the beneficiary’s birthmother is her sole or surviving parent, the beneficiary would still not meet the definition of an orphan under either standard, as the record does not demonstrate that her birthmother is incapable of providing her with the proper care, consistent with local standards in Haiti. 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 regarding local standards in Haiti. Nor does the record contain any evidence, beyond generalizations, that she is incapable of providing proper care to the beneficiary consistent with such standards. For example, the record does not address why the birthmother’s salary as a kindergarten teacher is inadequate to support the beneficiary.

¹ See U.S. Department of State, Bureau of Consular Affairs, Haiti Reciprocity Schedule, Death Certificates, http://travel.state.gov/visa/fees/fees_5455.html?cid=9152 (accessed July 11, 2011).

² See, e.g., *Matter of Richard*, 18 I&N Dec. 208 (BIA 1982), which explains that the Civil Code of Haiti separates children into three groups: (1) legitimate children; (2) natural children; and (3) illegitimate children. Children born in wedlock are classified as legitimate children; children born out of wedlock are classified as natural children; and children who were conceived and born under adulterous or incestuous circumstances are classified as illegitimate children. *Id.* at 211. The beneficiary falls within the category of “natural children.” The beneficiary’s birthfather acknowledged paternity of the beneficiary to the Haitian National Archives on July 10, 1990. See also *Matter of Cherismo*, 19 I&N Dec. 25 (BIA 1984) (1959 Presidential Decree eliminated all legal distinctions between legitimate and natural children acknowledged by biological father but excluded children falling into the “illegitimate” category).

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.

Conclusion

The petitioner has failed to overcome the director's grounds for revocation of the petition and 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. The petitioner's failure to meet that statutory criterion provided good and sufficient cause for revocation of the petition's approval, pursuant to section 205 of Act and 8 C.F.R. § 205.2(a).

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. Approval of the petition remains revoked.