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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

DATE: JUN 0 8 2011

Office: NATIONAL BENEFITS CENTER

FILE: [redacted]

IN RE: Petitioner: Beneficiary: [redacted]

APPLICATION: 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 APPLICANT:

[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 Director, National Benefits Center, 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 director issued a request for additional evidence in support of the Form I-600. *See Request for Evidence*, dated Sept. 21, 2010. The petitioner failed to submit all of the requested evidence, and the petition was denied accordingly. *See Notice of Decision*, dated Jan. 3, 2011.[1] The petitioner, through counsel, filed a timely appeal. On appeal, the petitioner contends that the director erred in denying this petition because the requested evidence was submitted before the director's decision was issued, and the beneficiary meets the definition of an orphan. *See Form I-290B*, Notice of Appeal, filed Feb. 23, 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)(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 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.*

An orphan petition filed concurrently with an advanced processing application, as is the case here, must contain the advanced processing documentation required by 8 C.F.R. § 204.3(c), as

[1] The record reflects that the Notice of Decision was mailed on January 26, 2011.

well as the orphan petition documentation required by 8 C.F.R. § 204.3(d)(1) (except for evidence of approval of the advanced processing application). 8 C.F.R. § 204.3(d)(3).

The record reflects that the petitioner is a married U.S. citizen, residing in New York. *See Marriage Confirmation.* The petitioner is separated from his spouse, who resides in Yemen. *See Form I-600*; *Marital History Affidavit*, dated Jan. 29, 2009; *Separation Agreement*, dated Sept. 28, 2009. The beneficiary was born in Yemen on December 12, 1992, to Mohamed Taha Yahya and Anisa Ali Alkhawlani. *See Birth Certificate for Baligh Mohamed Taha Yahya.* The beneficiary's birth father died on June 10, 1994. *See Death Certificate for Mohamed Taha Yahya.* The beneficiary's step-father died on January 7, 2007. *See Death Certificate for Abdo M. Ali.*

The petitioner and his wife filed the instant Form I-600 on November 11, 2009. The director issued a request for the following: (1) evidence that the beneficiary meets the definition of an orphan, including a death certificate for [redacted] proof that the beneficiary's sole or surviving parent is unable to provide for his basic needs consistent with the standards of Yemen, and a written irrevocable release; (2) proof that the prospective adoptive parent has secured custody of the beneficiary in accordance with the laws of Yemen; (3) a valid, original home study; and (4) a copy of the home study preparer's license. *See Request for Evidence (RFE)*, dated Sept. 21, 2010.

The director reviewed the petitioner's response and determined that the petitioner failed to provide a death certificate for [redacted], proof that the sole or surviving parent is unable to provide for the child's basic needs consistent with the local standards of the foreign sending country; proof that the prospective adoptive parent had secured custody of the beneficiary in accordance with the laws of Yemen; and a signed original home study. *See Notice of Decision.* The petition was denied accordingly. *Id.*

On appeal, the petitioner contends that the director erred in denying this petition because he submitted the death certificate for [redacted], the beneficiary's birth mother executed an irrevocable release explaining that she was unable to provide for the beneficiary's basic needs, and "the Service . . . has acknowledged the validity of the Home Study re-submitted in . . . response [to the] Request for Evidence since the Service misplaced the original, submitted with the initial I-600 filing." *Form I-290B*, Notice of Appeal.

The evidence of record is insufficient to overcome the director's denial of the petition. First, 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. Here, the beneficiary's father and step father are deceased. *See* 8 C.F.R. § 204.3(b); *Death Certificate for* [redacted] However, the petitioner has not shown that the beneficary'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.

Second, the petitioner has not provided proof that he has "custody of the orphan for emigration and adoption in accordance with the laws of" Yemen, as required by 8 C.F.R. § 204.3(d)(1)(iv). When relevant to the beneficiary's eligibility, the application of foreign law is a question of fact, which must be proved by the petitioner. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008). Here, the record contains a translation of a document from the Al-Shaer Primary Court indicating that the petitioner is the "sole sponsor and family provider of the children of his deceased son." *See Document*, dated Dec. 4, 2010. However, the petitioner has not provided any evidence regarding the laws of emigration and adoption in Yemen. Nor has he shown that the document from the Al-Shaer Primary Court meets the applicable requirements under Yemeni law. Accordingly, the petitioner has not met all of the requirements for an orphan petition under 8 C.F.R. § 204.3(d)(1).

Third, the statute encompasses single petitioners over the age of 25 and married petitioners who have or will jointly adopt the beneficiary, but the statute does not extend eligibility to a married petitioner who is separated, but not divorced, to adopt individually, apart from his or her spouse. Section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i). For married petitioners who intend to adopt the orphan in the United States, the statute also requires both spouses to "have . . . complied with the preadoption requirements, if any, of the child's proposed residence." *Id.; see also* 8 C.F.R. § 204.3(d)(1)(iv)(B)(3). Here, the petitioner and his spouse are married, but living separately. *See Form I-600.* The petitioner states that he has been separated from his wife for ten years, and that they have not divorced because it "would bring shame to [his] children." *Marital History Affidavit.* Further, the parties have entered into a Separation Agreement which provides for, among other things, their separate residences, spousal support, and the division of property. *See Separation Agreement.* The agreement also states that the parties are in the process of adopting their grandchildren, and that the petitioner "shall have custody of the . . . children and that he shall be entirely responsible for their support." *Id.* Although the petitioner and his spouse both executed the Form I-600, they have not shown that they will be adopting together as a married couple. Additionally, only the petitioner has obtained an order from the New York Surrogate's Court Certifying him as a Qualified Adoptive Parent. *See Order (Certification as a Qualified Adoptive Parent)*, dated Apr. 22, 2009. Accordingly, the petitioner has not shown that he and his spouse intend to jointly adopt the beneficiary, or that both prospective adoptive parents have complied with the relevant preadoption requirements.

Fourth, the home study submitted by the petitioner does not meet all of the requirements set forth in 8 C.F.R. § 204.3(e). Specifically, the home study does not satisfy all of the requirements for personal interviews and assessments. According to the regulation, the "home study preparer must conduct at least one interview in person . . . with the prospective adoptive couple." 8 C.F.R. § 204.3(e)(1). Here, the home study preparer did not interview the petitioner's wife. Additionally, "[e]ach additional adult member of the prospective adoptive parents' household must also be interviewed in person at least once." *Id.* While the home study indicates that the three additional adult members of the household were present during the petitioner's interview, and states that they support the adoption plan, the home study does not explicitly state that all three of these adults were interviewed by the home study preparer.

The home study preparer also must assess the capabilities of the prospective adoptive parents to properly parent the orphan. 8 C.F.R. § 204.3(e)(2). Here, the parenting capabilities of the petitioner's wife have not been assessed. Further, the home study does not assess the capabilities of the additional adult members of the household in light of the regulatory requirements at 8 C.F.R. § 204.3(e)(1), (2)(i), (iii), (iv), and (v).

Finally, an original signed copy of the home study is not contained in this record, or in the alien files of the beneficiary's siblings. The petitioner claims that U.S. Citizenship and Immigration Services acknowledged the validity of the re-submitted home study. *See Form I-290B*. However, the petitioner has failed to present evidence that an original home study was filed or received. *See Counsel's Letter Regarding I-600 Applications*, dated Dec. 4, 2009 (listing exhibits, without mention of home study); *Counsel's Letter Regarding Request for Evidence*, dated Nov. 8, 2010 (referencing submission of a copy of the petitioner's home study).

Conclusion

Here, the petitioner has failed to satisfy all of the requirements for an orphan petition set forth in 8 C.F.R. § 204.3(d)(1), and he has not met the requirements for advanced processing in 8 C.F.R. § 204.3(c). The petition will be denied and the appeal dismissed 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 and the appeal will be dismissed and the petition will remain denied.

ORDER: The appeal is dismissed.