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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 22 2011 OFFICE: GUATEMALA CITY, GUATEMALA FILE: [redacted]

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:

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 six separate occasions in response to subsequent motions to reopen or reconsider. The matter is again before the AAO on a seventh 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, October 21, 2010, and January 26, 2011. 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 our January 26, 2011 decision, we again rejected the petitioner's request to delay adjudication of the motion.

In the present motion to reopen or reconsider, the petitioner[1] submits a brief dated February 24, 2011 and several documents pertaining to the petitioner's pursuit of the adoption in the Guatemalan court system. The petitioner first argues that because the "judicial status" of the beneficiary has not yet been resolved, our prior decision was inappropriate and a violation of his due process rights. He then discusses the procedural history of the adoption proceedings in Guatemala in detail and concludes by stating that because those proceedings remain ongoing, the instant petition should not have been denied.

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.

Because the petitioner's motion is dependent upon evidence not yet in existence at the time the decision he seeks to have reconsidered was issued, it 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 prior 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*,

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[1] The petitioner stated in his February 24, 2011 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 June 13, 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.

381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we affirm our prior decisions. 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.
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> * * *
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> *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)(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 adoption 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. The Beneficiary Does Not Meet the Definition of an Orphan

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.

Although the record contains a copy of an October 7, 2009 decision by [redacted] finding that the beneficiary could be adopted pursuant to the laws of Guatemala, that decision has been reversed.

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[2] As we noted in our January 26, 2011 decision, [redacted] October 7, 2009 ruling did not address the inconsistencies regarding the identity and parentage of the beneficiary we catalogued 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, consented to the adoption, she did not address why she had 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 before us with respect to the inconsistencies and

Evidence submitted into the record since our last decision indicates that the *Procuradura General de la Nacion* (PGN) in Guatemala appealed [redacted] decision, and that the Court of Appeals of Childhood and Adolescence reversed her decision on April 5, 2010 and ordered the beneficiary returned to his birthmother. The evidence of record indicates further that although the petitioner appealed that decision to the Supreme Court of Justice, Chamber of Appeals and Impeachment in Guatemala (the "Supreme Court of Justice"), the Supreme Court of Justice dismissed his appeal on November 29, 2010 as "notoriously inadmissible." The Supreme Court also stated that the beneficiary's birthmother desired the beneficiary "at [her] side" so that she could "give him [her] support [and] love," and that she had requested "the [petitioner's] appeal to be denied."

Accordingly, even if we set aside the issues of the identify of the birthmother and the beneficiary's parentage,[3] the 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 we will consider [redacted], also known as [redacted], as 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

In order for the beneficiary to meet the definition of an orphan due to "abandonment by both parents," 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. . . ." 8 C.F.R. § 204.3(b).

Although [redacted] found that the beneficiary's birthmother had willfully forsaken all parental rights, obligations, and claims to the beneficiary, as well as all control over and possession of the beneficiary, her decision has been reversed and the Supreme Court of Justice indicated in its November 29, 2010 decision that she in fact wishes to assert her parental rights, obligations, and claims to the beneficiary. Nor does the record contain any evidence or information regarding 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 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

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discrepancies of record with regard to the identity of the beneficiary's birthmother and the beneficiary's parentage. The petitioner's failure to resolve those inconsistencies and discrepancies rendered it impossible for us to determine whether the beneficiary met the definition of an orphan under section 101(b)(1)(F)(i) of the Act.

[3] The petitioner does not address these issues on motion.

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).

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 had been 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.

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.

II. Evidence of Adoption Abroad

The regulation at § 204.3(d)(1)(iv) requires the petitioner to submit evidence of the adoption

abroad, or evidence that the petitioner has, or a person or entity working on his behalf has, custody of the beneficiary for emigration and adoption in accordance with the laws of the foreign-sending country.

In that the Supreme Court of Justice has reversed [redacted] October 7, 2009 decision finding the beneficiary adoptable, the petitioner has failed to satisfy this criterion.

III. The petitioner's request to withhold adjudication

We will not delay adjudication of this matter as requested by the petitioner. 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.

IV. Guatemalan Legal Process

On motion the petitioner asserts that the decisions of the Court of Appeals of Childhood and Adolescence and the Supreme Court of Justice were improper and violated the Guatemalan constitution. However, that argument is not properly before the AAO, as we have no authority to review Guatemalan court procedures.

V. 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:

> *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 and January 26, 2011 decisions, the March 24, 2008 testimony of [redacted] raises questions as to whether this petition is subject to the child-buying prohibition at 8 C.F.R. § 204.3(i), and 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 can be approved.

VI. 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.

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 January 26, 2011 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed and the petition remains denied.