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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

**PUBLIC COPY**



U.S. Citizenship  
and Immigration  
Services

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DATE: **MAY 17 2011**

OFFICE: NEW DELHI, INDIA

FILE: 

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:

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 and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and reconsider. The motion will be granted. Upon reopening and reconsideration, the appeal will remain 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 denied the petition on the basis of her determination that the petitioner's adoption of the beneficiary in India had satisfied the requirements of neither the Hindu Adoptions and Maintenance Act of 1956 nor the Juvenile Justice Act of 2000 and that, as such, the petitioner had failed to demonstrate that his adoption of the beneficiary took place in accordance with applicable laws in India. Accordingly, the director found that the petitioner had failed to establish that the beneficiary meets the definition of an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act.

The petitioner filed a timely appeal, which we dismissed on October 19, 2009. On motion to reopen and reconsider, the petitioner submits a brief 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[.]

#### *Pertinent Facts and Procedural History*

The petitioner filed the Form I-600 on December 16, 2008 in New Delhi, India. The beneficiary, who was born on September 12, 1991, was therefore over the age of sixteen on the date the petition was filed. The beneficiary, therefore, was statutorily ineligible for classification as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act. However, despite the beneficiary's statutory ineligibility for the benefit sought, the field office director nonetheless reviewed the petition on its

merits and, in her January 13, 2009 decision, found that the petitioner's adoption of the beneficiary in India satisfied the requirements of neither the Hindu Adoptions and Maintenance Act of 1956 nor the Juvenile Justice Act of 2000. She therefore denied the petition on the basis of her determination that the petitioner had failed to demonstrate that the adoption of the beneficiary took place in accordance with applicable laws in India.

In our October 19, 2009 decision on appeal we found that the beneficiary's statutory ineligibility for classification as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act rendered moot the question of whether the substantive issues raised by the field office director in her decision were analyzed correctly, and stated that issuing a full decision on those issues would serve no purpose. We noted that even if we were to find that the field office director's analysis had in fact been erroneous, and were to remand the petition to the field office director for entry of a new decision, she would still be compelled to deny the petition because the beneficiary reached the age of sixteen before the petition was filed.

The petitioner filed the instant motion on November 16, 2009. The AAO reviews these matters on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon reopening and review of the entire record, we find that the petitioner has failed to overcome our prior decision.

*Whether the beneficiary's age on the date the instant petition was filed precludes its approval*

The beneficiary reached sixteen years of age on September 12, 2007, and the instant petition was filed more than one year later on December 16, 2008. The petitioner argues on motion to reopen that his adoption of the beneficiary in India was completed prior to her sixteenth birthday, and submits additional documents into the record supporting his assertion. However, we did not question whether the petitioner's adoption of the beneficiary in India occurred before her sixteenth birthday. Rather, we found that because the Form I-600 was not filed before her sixteenth birthday, the beneficiary is not eligible for classification as an immediate relative under section 101(b)(1)(F)(i) of the Act.

The petitioner argues further that section 101(b)(1)(F)(i) of the Act does not state that a petition should be denied if it was filed after the beneficiary reaches the age of sixteen. The petitioner is incorrect, as that section of the Act states specifically that the petition must have been filed before the beneficiary reaches the age of sixteen.

The petitioner's arguments on motion regarding preference immigration status of children are not relevant, as he did not file a Form I-130, Petition for Alien Relative, seeking preference immigration status on behalf of the beneficiary under section 101(b)(1)(E) of the Act. As noted, he filed a Form I-600 seeking classification of the beneficiary as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act.

The petitioner also argues on motion that the Government of India considers the beneficiary to be a citizen of the United States. Even if we assume, *arguendo*, that India does in fact consider such to be the case, that mistaken assumption would not override the beneficiary's statutory ineligibility for

classification as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act as a result of the failure to file the petition before her sixteenth birthday.

Nor do we find the petitioner's arguments regarding derivative United States citizenship persuasive, as a Form I-600 seeking classification of the beneficiary as an immediate relative pursuant to section 101(b)(1)(F)(i) of the Act is not an application for citizenship on behalf of the beneficiary under sections 320 or 322 of the Act. If the petitioner seeks derivative citizenship on behalf of the beneficiary, he may file an application for a certificate of citizenship on her behalf.

The petitioner also suggests that the 16-year age cutoff contained in section 101(b)(1)(F)(i) of the Act operates as a statute of limitations subject to equitable tolling. When determining whether a time limitation is a statute of limitations that may be subject to equitable tolling, or whether it is jurisdictional, the United States Supreme Court has recognized that the main purpose of the inquiry is to discover Congressional intent behind the statute. *See Id.*, at 1095 (citations omitted). In determining Congressional intent, it is necessary to interpret the language of a statute in accordance with Congress's intent in passing it. *Id.*, 1096. The current definition of "orphan" (with several amendments over the years) was adopted in 1965. In enacting this legislation, Congress was primarily concerned with family unity and the welfare of children. In establishing the definition of "orphan" with this goal in mind, a statutory age limit was first set at fourteen years of age. The maximum qualifying age for adopted children under section 101(b)(1)(E) and for orphans under section 101(b)(1)(F)(i) of the Act was increased from fourteen to sixteen years of age in 1981. In order to keep families intact, Congress again amended those provisions to include older siblings of such children, allowing the older siblings between the age of sixteen and eighteen to qualify as adopted children or as orphans. Congress has thus spoken clearly, and when it deemed necessary, on the issue of age requirements for these categories of children. Where the plain meaning of a statute's language is clear, the sole function of the courts is to enforce the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

A child who meets the definition of "orphan" contained in section 101(b)(1)(F)(i) of the Act is eligible for classification as an immediate relative under one of the definitions of "child" under the Act. The definition of the term "child" in section 101(b)(1) of the Act is particularly exhaustive. *See Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976) (in light of the history of the age restriction for adopted children, that provision must be given a literal interpretation). Even if [a relationship] closely resembles a parent-child relationship, Congress, through the statute's plain language, precluded the functional approach to defining the term "child." *INS v. Hector*, 479 U.S. 85 (1986) (examining the respondent's relationship with her nieces). The Supreme Court has noted:

With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to [some] who share strong family ties. . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress. *Fiallo v. Bell*, 430 U.S. 787, 798 (1977).

*INS v. Hector*, 479 U.S. at 90.

In light of the clear statutory language in the Act regarding age cutoffs for children, including in the definition of an “orphan” set forth at section 101(b)(1)(F)(i), and Congressional intent to establish such age cutoffs for orphans and other children, the statutory cutoff age of sixteen years to meet the definition of “orphan” is a limitation period that operates as a jurisdictional prerequisite. It involves a threshold condition for eligibility under section 101(b)(1)(F)(i) of the Act and is therefore not a time limitation that can be equitably tolled.

USCIS lacks the authority to exercise discretion over a statute of repose such as the one at issue here, as it would be inconsistent with legislative purpose. Neither the statute nor the regulations indicate that such discretion has been delegated to the Secretary of Homeland Security. Absent a change in the statute, a child who is not under the age of sixteen at the time the Form I-600 is filed on his behalf does not meet the definition of an “orphan,” and that cutoff date cannot be tolled.

The statutory limitation contained in section 101(b)(1)(F)(i) of the Act regarding children over the age of sixteen precludes approval of this petition, and neither the field office director nor the AAO possesses the authority to waive that limitation. Because the instant petition was filed after she reached the age of sixteen, the beneficiary cannot meet the definition of “orphan” as set forth at section 101(b)(1)(F)(i) of the Act.

#### *Conclusion*

The petitioner’s motion has been granted and, upon reopening and reconsideration of this matter, we find that the petitioner has failed to establish any error in our prior decision. The statutory limitation contained in section 101(b)(1)(F)(i) of the Act regarding children over the age of sixteen precludes approval of this petition, and the field office director erred in not denying the petition on that ground. The substantive issues raised by the field office director in her January 13, 2009 decision are therefore immaterial, as the petition must be denied due to the beneficiary’s age. The beneficiary does not meet the definition of “orphan” as set forth at section 101(b)(1)(F)(i) of the Act.

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.

**ORDER:** The October 19, 2009 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed. The petition remains denied.