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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



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Date: OCT 12 2011 Office: NATIONAL BENEFITS CENTER File:

IN RE: Petitioner:   
Beneficiary:

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:



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, denied the Petition to Classify Orphan as an Immediate Relative (Form I-600), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded for entry of a new decision.

The petitioner seeks to classify the beneficiary as an orphan pursuant to section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F). The director denied the petition because the evidence failed to demonstrate that the beneficiary's biological mother was incapable of providing proper care to the beneficiary and that she had, in writing, irrevocably released the beneficiary for emigration and adoption. On appeal, counsel provides a statement on the Notice of Appeal (Form I-290B) and an affidavit from the beneficiary's biological mother.

*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 . . . .

The regulation at 8 C.F.R. § 204.3(b) provides definitions for certain terms found at section 101(b)(1)(F) of the Act and states, in pertinent part:

*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. . . . 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. . . .

*Factual and Procedural History*

The petitioner filed the instant Form I-600 with U.S. Citizenship and Immigration Services (USCIS) on December 15, 2010, when the beneficiary was 10 years old. The director issued a Notice of Intent to Deny (NOID) the petition on February 16, 2011 to which the petitioner responded with additional evidence. On May 19, 2011, the director denied the Form I-600 and the petitioner timely appealed. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We are withdrawing the director's stated reasons for denying the petition; however, as the petition is not approvable based upon the evidence presently in the record, we are *remanding the matter for entry of a new decision*.

*Analysis*

The director determined that the evidence failed to demonstrate that the beneficiary's biological mother was incapable of providing proper care to the beneficiary and that she had, in writing, irrevocably released the beneficiary for emigration and adoption. By basing his decision on these reasons, the director found that the beneficiary was the child of a sole parent, as that term is defined at 8 C.F.R. § 204.3(b). The director, however, erred in his conclusion.

The definition of "sole parent" does not apply "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 the term "sole parent" at section 101(b)(1)(F) of the Act). Here, the beneficiary was born out of wedlock in El Salvador, which is a country that places children born out of wedlock in the same legal position as children born in wedlock in all respects. *Matter of Moraga*, 23 I&N Dec. 195, 199 (BIA 2001). Accordingly, the director erroneously concluded that that beneficiary could qualify as an orphan under section 101(b)(1)(F)(i) of the Act if the petitioner could establish that the biological mother met the definition of "sole parent" at 8 C.F.R. § 204.3(b). We therefore withdraw the director's decision.

As the record presently stands, the beneficiary is ineligible to be classified as an orphan under the other alternate definitions at 8 C.F.R. § 204.3(b), which include the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. The beneficiary's birth certificate does not identify her biological father and the record contains no information about his identity or whereabouts. While the biological father has apparently played no role in the beneficiary's life, the petitioner cannot show that the biological mother is deceased or has disappeared; her whereabouts are known as evidenced by the affidavit she has submitted on appeal. In addition, the biological mother did not desert and was not separated or lost from the beneficiary, as those terms are defined at 8 C.F.R. § 204.3(b). The petitioner also cannot show that the biological mother abandoned the beneficiary. The record reflects that the petitioner met the biological mother, who had other children to take care of, and they mutually agreed to the adoption. Although the petitioner states that the beneficiary was living with her friends and not the biological mother while adoption proceedings were ongoing in El Salvador, there is no evidence that the petitioner's friends were authorized under the child welfare laws of El Salvador to provide custodial care to the beneficiary as the definition of "abandonment by both parents" at 8 C.F.R. § 204.3(b) requires. That definition also prohibits a biological mother from releasing her child to a specific person for adoption, which occurred in this matter.

*Conclusion*

Based upon the above discussion, we withdraw the director's discussion regarding the ineligibility of the beneficiary to be classified as an orphan under the definition of "sole parent." As the petition is not approvable under the alternate orphan definitions at 8 C.F.R. § 204.3(b), we are remanding the matter for entry of a new 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.

**ORDER:** The director's decision, dated May 19, 2011, is withdrawn. The matter is remanded for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.