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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 0 5 2013 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)(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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the National Benefits Center ("the director") denied the Petition to Classify Orphan as an Immediate Relative (Form I-600). The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The appeal will remain dismissed and the petition will remain denied.

Applicable Law

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F), which defines the term "orphan," in pertinent part, as:

> (i) a child, under the age of sixteen at the time a petition is filed . . . 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; . . . *Provided*, That the [Secretary of the Department of Homeland Security] is satisfied that proper care will be furnished the child if admitted to the United States[.]

Factual and Procedural History

The petitioner is a 50-year-old unmarried U.S. citizen. The beneficiary was born on July 27, 1995 in Guyana, and the petitioner adopted him in that country on July 21, 2011, when the beneficiary was fifteen years old. On June 27, 2012, when the beneficiary was sixteen years old, the petitioner filed the instant Form I-600 on his behalf, seeking to classify him as an orphan pursuant to section 101(b)(1)(F)(i) of the Act.

The director denied the Form I-600 because the beneficiary was not under the age of sixteen when the petition was filed on his behalf. On May 30, 2013, the AAO dismissed the petitioner's appeal.

The AAO reviews these proceedings on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, the AAO finds that the evidence in the record does not demonstrate the beneficiary's eligibility as an orphan.

Analysis

On motion, counsel requests the AAO to hold the Form I-600 timely filed *nunc pro tunc* as the date before the beneficiary's sixteenth birthday because the petitioner is entitled to equitable tolling of the filing deadline and to an exception to the deadline due to extraordinary circumstances. Counsel cites to a Board of Immigration Appeals (BIA) decision involving an order of voluntary departure under section 240B(d)(1) of the Act and a Ninth Circuit Court of Appeals decision involving a motion to reopen deportation proceedings under section 240(c)(6)(B) of the Act. Although Circuit Courts of Appeals have found certain filing deadlines to be statutes of limitations subject to equitable tolling in the context of removal or deportation, counsel cites no case finding visa petition filing deadlines subject to equitable tolling. *Compare Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9th Cir. 2005) (time limit for filing motions to reopen under NACARA is a statute of limitations

subject to equitable tolling) *with Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9th Cir. 2008) (deadline for filing a visa petition to qualify under section 245(i) of the Act is a statute of repose not subject to equitable tolling). The statutory cutoff age of sixteen years to meet the definition of "orphan" involves a threshold condition for eligibility under section 101(b)(1)(F)(i) of the Act. It is therefore not a statute of limitation that can be tolled, but a statute of repose that is not subject to equitable tolling.

On motion, counsel again discusses *Sook Young Hong v. Napolitano*, 772 F.Supp.2d 1270 (D. Haw. 2011), a district court decision involving a child beneficiary of an alien relative petition (Form I-130) filed under section 204 of the Act. The AAO is not bound to follow the published decision of U.S. district courts, even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). *Sook Young Hong* is also inapplicable to these proceedings under section 101(b)(1)(F)(i) of the Act because the issue in that case was whether the beneficiary, who had a retroactive adoption order, met the definition of "child" under section 101(b)(1)(E)(i) of the Act. As explained in the AAO's prior decision, the statutory and regulatory requirements for Form I-130 and Form I-600 benefits are distinct. Section 101(b)(1)(F)(i) of the Act, which applies to the beneficiary of the instant case, specifically requires the filing of an orphan petition prior to a child's sixteenth birthday while section 101(b)(1)(E)(i) requires a child to be adopted while under the age of sixteen years. *Compare* 8 C.F.R. § 204.2(d)(2)(vii) *with* 8 C.F.R. § 204.3(a)(1)(ii). The AAO has no authority to waive the requirements of section 101(b)(1)(F)(i) of the Act.

The record documents the unfortunate circumstances that resulted in the delayed adoption of the beneficiary. However, the fact remains that the beneficiary is not an orphan under the Act, as he was over sixteen years old when the Form I-600 was filed. Accordingly, the beneficiary does not meet the definition of "orphan" as set forth in section 101(b)(1)(F)(i) of the Act.

Conclusion

The beneficiary is ineligible to be classified as an orphan because he does not meet the age requirement specified at section 101(b)(1)(F)(ii) of the Act. Accordingly, the appeal will remain dismissed and the petition will remain denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The decision of the AAO, dated May 30, 2013, is affirmed. The appeal is dismissed and the petition is denied.