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: OCT 1 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") initially approved the Petition to Classify Orphan as an Immediate Relative (Form I-600) but ultimately revoked the approval after proper notice. The director dismissed a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will remain revoked.

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 revoked the petition on the basis of his determination that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as that term is defined at section 101(b)(1)(F)(i) of the Act. Specifically, the director found that because the petitioner's adoption of the beneficiary was the result of a direct relinquishment or release, the petitioner had failed to establish that the beneficiary had been "abandoned" by both birth parents as that term is defined in the regulation.

Applicable Law

Regarding the revocation of approved visa petitions, section 205 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1155, states, in pertinent part:

> The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition[.]

The regulation at 8 C.F.R. § 205.2 governs the procedures for revoking approved visa petitions on notice, and states, in pertinent part:

> (a) *General.* Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in 205.1 when the necessity for the revocation comes to the attention of this Service.
>
> (b) *Notice of intent.* Revocation of the approval of a petition or self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.

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

> 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[.]

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.
>
> * * *
>
> *Competent authority* means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.
>
> *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.

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

* * *

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 pertinent provisions of 8 C.F.R. § 204.3(d) state 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. . . .

Facts and Procedural History

The petitioner is a 43-year-old U.S. citizen who seeks to classify the beneficiary, a national of Bangladesh, as an orphan. The petitioner filed the Form I-600 with U.S. Citizenship and Immigration Services (USCIS) on August 4, 2011. On December 1, 2011, USCIS approved the Form I-600. On April 18, 2012, the U.S. Consulate in Dhaka, Bangladesh returned the approved Form I-600 to the director because it could not issue a visa to the beneficiary. The consular officer determined that the petitioner's guardianship of the beneficiary was never formally documented or granted in accordance with the laws of Bangladesh.

The director issued a Notice of Intent to Revoke (NOIR) approval of the petition on July 20, 2012, notifying the petitioner that the Form I-600 was approved in error because the record failed to establish, in principal part, that the beneficiary had been abandoned by both of his birth parents. The director provided the petitioner a period of 33 days in which to respond to the NOIR. On August 16, 2012, counsel requested additional time to respond to the NOIR, but ultimately failed to submit any other evidence. On October 1, 2012, the director concluded that the beneficiary did not met the definition of an "orphan" under section 101(b)(1)(F)(i) of the Act and revoked approval of the petition. The petitioner, through counsel, filed a motion to reopen and reconsider with additional evidence. The director dismissed the motion, and affirmed the decision to deny the Form I-600.

Counsel filed a timely appeal. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, the record does not demonstrate the beneficiary's eligibility as an orphan.

Analysis

Abandonment by both parents

The term "abandonment by both parents" is specifically defined at 8 C.F.R. § 204.3(b), and the petitioner has not established that the beneficiary meets the definition of an orphan as a result of having been abandoned by both of his birth parents. In order for the beneficiary to meet the definition of an orphan under this standard, 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, without intending to transfer, or without transferring, these rights to any specific person(s)." 8 C.F.R. § 204.3(b). The regulation emphasizes further that "relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment." *Id.* Moreover, if the child was relinquished or released to a third party for custodial care in anticipation of, or preparation for, adoption, then a finding of abandonment cannot be made 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. *See id.*

The record contains the following evidence from court proceedings in Dhaka, Bangladesh over the beneficiary's guardianship: a petition for guardianship filed by the petitioner on May 3, 2007; a request for an expedited hearing; an affidavit from the petitioner; an affidavit from the beneficiary's birth mother and birth father; an affidavit of no objection from the birth parents; a compromised deed of agreement between the petitioner and the birth parents; and an October 26, 2008 court order for guardianship.

The petition for guardianship provides that the beneficiary's birth parents relinquished the beneficiary to the petitioner's mother 11 days after his birth. The petitioner's sister intended to raise the beneficiary, but she returned the beneficiary to her mother when her marriage dissolved in a divorce. During this time the petitioner provided living expenses for the beneficiary. When the petitioner's sister attempted to relinquish the beneficiary to his birth parents they refused to accept him. The beneficiary was then raised by the petitioner's mother, but neither the petitioner's sister nor her mother obtained legal guardianship over the beneficiary. *Petition for Guardianship*, dated May 3, 2007.

The beneficiary's birth parents stated in their affidavit that they relinquished the beneficiary to the petitioner's mother 11 days after his birth. They stated that they refused to take him back because of financial reasons and their concern about the future welfare of the beneficiary. They affirmed that they have no objection to the petition for guardianship if it is settled according to "the deed of compromise." *Affidavit of Amina Begum and Anowar Hossain Sarder*, dated October 26, 2008.

The affidavit of no objection from the beneficiary's birth parents provides that they have "deserted their minor child" to the beneficiary because they are unable to care for him and "[s]o that the child . . . grows up properly in the society." The birth parents stated that they maintained contact with the petitioner and have concluded that she provided care to the beneficiary as her own. *No objection application of Amina Begum and Anowar Hossain Sarder*, dated October 26, 2008. The petitioner reiterated in her affidavit that the beneficiary's birth parents have no objection to her guardianship and physical custody over the beneficiary. She explained that the birth parents submitted a statement of irrevocable release of the beneficiary and executed a deed of compromise. *Affidavit of Shamsun Naher*, dated October 26, 2008.

The "compromised deed of agreement" between the petitioner and the birth parents provides that the birth parents agreed to relinquish their child to the petitioner "for the sake of the child's betterment." The agreement explains that the birth parents understood that the beneficiary would be "better off" under the petitioner's care. *Compromised Deed of Agreement*, dated October 26, 2008. On October 26, 2008, the District Judge in Dhaka determined that the condition of the deed of compromise was "lawful and proper" and granted legal guardianship to the petitioner. *The Court of the 12th Assistant Judge, Order of Guardianship, dated October 26, 2008.*

The record does not establish that the beneficiary was "abandoned by both parents" as that phrase is defined at 8 C.F.R. § 204.3(b). The affidavits from the beneficiary's birth parents and the petitioner state that the birth parents directly relinquished the beneficiary to the petitioner pursuant to the terms of a deed of compromise. The deed of compromise provides that the birth parents relinquished the beneficiary because they visited the petitioner's residence and determined that the beneficiary would be "better off" under the care of the petitioner. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. 8 C.F.R. § 204.3(b).

The petitioner submitted below a letter from her attorney in Bangladesh, who stated that he represented the petitioner in the guardianship proceedings. Mr. stated that the content of the deed of agreement was partially incorrect because the birth parents never visited the beneficiary nor did they maintain any communication with him. He explained that the agreement "represents the customary language use by legal professional[s] in Bangladesh that is common in guardianship cases." The fact that the petitioner's family law attorney in Bangladesh has indicated that the terms of the agreement were not fully met draws into question whether the deed of compromise was "lawful and proper" for the purposes of granting legal guardianship to the petitioner. Even if the language regarding the birth parents' contact with the beneficiary was removed from the deed of compromise, it remains an agreement between the birth parents and the petitioner for a specific adoption.

On appeal, counsel submits photographs of the beneficiary with the petitioner and the petitioner's family members. Counsel asserts that the adoption is valid pursuant to the Board of Immigration Appeal's (BIA's) holding in *Matter of Mozeb* 15 I&N Dec. 430 (BIA 1975). However, *Matter of Mozeb* involved child beneficiaries of alien relative petitions filed under section 204 of the Act. As

such, it is not relevant to the instant petition for classification of the beneficiary as an orphan under section 101(b)(1)(F)(i) of the Act.

Counsel further asserts that the beneficiary was abandoned because his birth parents relinquished him to the family court in Bangladesh. The petitioner's attorney in Bangladesh, Mr. similarly stated in his letter that the court assumed responsibility over the beneficiary and the petitioner was then granted guardianship "to protect the best interest of the child." However, the legal proceedings show that the birth parents maintained their parental rights over the beneficiary until they consented to the petitioner's custody of the beneficiary. There is no documentation in the file to reflect that the beneficiary ever became a ward of the court or that the birth parents' parental rights were limited or terminated prior to the guardianship proceedings. Nor does the record reflect that the birth parents relinquished or released the beneficiary to a third party authorized under the child welfare laws of Bangladesh to act in the capacity of custodial care. The guardianship order reflects that the court granted the petitioner guardianship only after a deed of compromise between the petitioner and birth parents was executed and deemed "lawful and proper." The deed of compromise and affidavit from the birth parents show the birth parents' desire for and consent to the petitioner's legal guardianship of the beneficiary. Accordingly, the petitioner has not established that the beneficiary was "abandoned by both parents," as the term is defined at 8 C.F.R. § 204.3(b). This deficiency provided the director with good and sufficient cause to revoke approval of the orphan petition.

Beneficiary Is Not An Orphan Under Any Of The Other Criteria

The record does not show that the beneficiary is an orphan under any other criteria delineated at section 101(b)(1)(F)(i) of the Act and defined at 8 C.F.R. § 204.3(b). The record does not indicate that both of the beneficiary's birth parents have died, that they have disappeared, or that the beneficiary has become a ward of competent authority as the result of his birth parent's desertion. The record also does not indicate that the beneficiary was involuntarily severed from his birth parents by action of a competent authority for good cause and in accordance with the laws of Bangladesh. Nor does the record show that the beneficiary was involuntarily and permanently severed or detached from his birth parents due to a natural disaster, civil unrest, or other calamitous event beyond the control of his birth parents and as verified by a competent authority. The record establishes that both of the beneficiary's birth parents are living. As such, neither the beneficiary's birth mother nor birth father is a "surviving parent." Finally, the record does not establish that the beneficiary meets the definition of an orphan because he has a sole parent incapable of providing proper care. The regulation prescribes that the term "sole parent" means the mother of an illegitimate child who has not acquired another parent. The record in this case indicates that the beneficiary was born in wedlock and is the legitimate child of his birth parents.

Conclusion

As set forth in the previous discussion, 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. Consequently, the appeal will be dismissed.

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 appeal is dismissed. Approval of the petition remains revoked.