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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



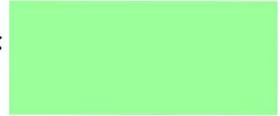
U.S. Citizenship
and Immigration
Services



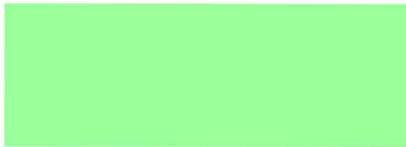
DATE: FEB 06 2014

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:

SELF-REPRESENTED

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), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. 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)(i) of the Immigration and Nationality Act (the Act), 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(a) provides, in pertinent part, the following on eligibility for immigrant classification of alien orphans:

(1) [A] child who meets the definition of orphan contained in section 101(b)(1)(F) of the Act is eligible for classification as the immediate relative of a U.S. citizen if:

(i) The U.S. citizen seeking the child's immigration can document that the citizen (and his or her spouse, if any) are capable of providing, and will provide, proper care for an alien orphan; and

(ii) The child is an orphan under section 101(b)(1)(F) of the Act.

A U.S. citizen may submit the documentation necessary for each of these determinations separately or at one time, depending on when the orphan is identified.

The regulation at 8 C.F.R. § 204.3(e)(2)(D)(v) provides, in pertinent part, the following on home study requirements:

Criminal history. The prospective adoptive parents and the adult members of the prospective adoptive parents' household are expected to disclose to the home study preparer and the Service any history of arrest and/or conviction early in the advanced processing procedure. Failure to do so may result in denial pursuant to paragraph (h)(4) of this section or in delays. Early disclosure provides the prospective adoptive parents with the best opportunity to gather and present evidence, and it gives the home study preparer and the Service the opportunity to properly evaluate the criminal record in light of such evidence. . . .

The regulation at 8 C.F.R. § 204.3(b) provides, in pertinent parts, the following definitions:

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.

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*.

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.

Facts and Procedural History

The petitioner is a 66-year-old married U.S. citizen. The petitioner adopted the beneficiary, who is his niece, in Tonga on October 1, 2013. The petitioner submitted the Form I-600 to U.S. Citizenship and Immigration Services (USCIS) on March 19, 2013, and sought to classify the beneficiary as the child of a sole parent who is incapable of providing for her basic needs. On April 22, 2013, the director issued a Request for Evidence (RFE) of: a home study that meets the requirements of 8 C.F.R. § 204.3(e); that the birth mother is unable to provide for the beneficiary's basic needs; information regarding local standards in Tonga; the birth mother's irrevocable release of the beneficiary for emigration and adoption; a copy of the investigative summary from the court appointed Guardian Ad Litem; proof that the beneficiary has resided with the petitioner and his wife for six months prior to filing the adoption application; and the adoption order issued by the Supreme Court in Tonga.

On May 20, 2013, the director issued a Notice of Intent to Deny (NOID) and requested that the petitioner submit: a home study with a detailed financial assessment and information about the petitioner's criminal history; the petitioner's criminal records; a statement from the petitioner regarding mitigating circumstances about each offense; evidence that the birth mother is unable to

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provide for the beneficiary's basic needs; information regarding local standards in Tonga; and evidence that the petitioner submitted fees for his biometrics. The petitioner responded with additional evidence, which the director found insufficient to establish the petitioner's eligibility. The director denied the petition on July 16, 2013 and the petitioner timely appealed.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to establish the petitioner's eligibility. The decision to dismiss the appeal will be affirmed for the following reasons.

Analysis

In the denial notice, the director stated that the petitioner failed to provide: evidence that he attended his biometric appointment; a personal statement describing his criminal offenses and the mitigating circumstances surrounding the offenses; proof that he has a full and final adoption or legal custody/guardianship of the beneficiary; and proof that the biological mother is incapable of providing care for the beneficiary. The petitioner had submitted below: irrevocable releases from the beneficiary's birth mother, dated January 10, 2013 and May 9, 2013; the beneficiary's birth certificate; a home study dated May 9, 2013; an addendum to the home study, dated June 12, 2013; an affidavit from the beneficiary's birth mother, dated May 8, 2013; a Utah criminal history report, dated May 10, 2013; an expungement order; and his adoption application. On appeal, the petitioner submits: an appeal statement; the visa pages from his wife's U.S. passport; his criminal records; a statement regarding his criminal history; his financial records; a joint affidavit with his wife, dated May 16, 2013; the petitioner and his wife's biometrics appointment notices, dated stamped August 14, 2013; a letter from the beneficiary's birth mother, dated July 31, 2013; a revised affidavit from the beneficiary's birth mother, dated May 9, 2013; a Guardian Ad Litem report from the Crown Law Office, dated June 7, 2013; an adoption decree (Letters of Adoption) from the Supreme Court of Tonga, dated [REDACTED] 2013; and the beneficiary's post-adoption birth certificate.

A child who meets the definition of orphan contained in section 101(b)(1)(F) of the Act is eligible for classification as the immediate relative of a U.S. citizen if: (1) the U.S. citizen seeking the child's immigration can document that the citizen and his spouse are capable of providing, and will provide, proper care for an alien orphan; and (2) the child is an orphan under section 101(b)(1)(F) of the Act. 8 C.F.R. § 204.3(a). A home study is a process for screening and preparing prospective adoptive parents. See 8 C.F.R. § 204.3(e). The prospective adoptive parents and the adult members of the prospective adoptive parents' household are expected to disclose to the home study preparer and the Service any history of arrest and/or conviction early in the advanced processing procedure. The petitioner disclosed to the home study preparer that he has two criminal incidents on his record. The home study provides:

The Utah Office of Licensing performed a criminal history review and the Utah Child Abuse Registry was also checked. [The petitioner's wife] received clearance from both offices on February 14, 2013. [The petitioner] received clearance from both offices on May 7, 2013. He discloses that in February of 2000 he had a seat belt violation, for which he paid \$17.00

and the case was closed. [He] also reports that in 1983 he was accused of theft and in 1974 he was accused of soliciting sex acts for hire. In these last two incidents [he] reports a case of mistaken identity. He and his wife both state that the offender was her first cousin who was in the United States without a Green Card and gave [the petitioner's] name when he was arrested. Families For Children has documented that [the petitioner] has no criminal/abuse record in Utah as to the above mentioned charges, no cases were filed against him and no charges were filed. On May 3, 2013 he was given a Special Expungement Certificate for both of the above-mentioned instances.

The two expungement orders are from the [redacted] Utah. The respective orders reflect that the charges against the petitioner from July 13, 1974 for soliciting sex acts for hire and February 10, 1983 for theft were expunged from his record in April 2013. The petitioner provided the petitions he filed to expunge his records, which show that the expungement was granted because he was never convicted of the offenses. The petitions also show that the county prosecutor consented to the court's entry of an order of expungement. In his statement regarding these incidents, the petitioner stated that he does not have a criminal history because he was falsely accused of theft and soliciting sex acts for hire. He stated that his identity was mistaken for someone else and he was surprised to be falsely charged. The petitioner recounted that he went to court and was cleared of all charges. The Utah criminal history report, which was conducted with a name search, shows that no criminal record was found for the petitioner. The biometrics results reflect that based upon a fingerprint search no criminal record was found for the petitioner or his wife.

De novo review of the evidence shows that the petitioner has established that proper care will be furnished to the beneficiary if she is admitted to the United States. The petitioner submitted expungement records, which reflect that he was never convicted of any criminal offenses. The Utah criminal history report and biometrics results show no criminal records under name and fingerprint searches. The petitioner's claim of mistaken identity is consistent with the criminal record information contained in the record. The petitioner disclosed his full criminal history to the home study preparer who thereafter approved the petitioner and his wife as adoptive parents. Based upon the totality of the evidence, the petitioner has established that he would be a suitable parent who could provide a proper home environment and care to an adopted child.

The petitioner, however, has not established that the beneficiary meets the definition of "orphan" under section 101(b)(1)(F) of the Act. On the Form I-600, the petitioner stated that he sought to classify the beneficiary as the child of a sole parent who is incapable of providing her with proper care. The regulation at 8 C.F.R. § 204.3(b) states that the term "sole parent" means the mother of an illegitimate child who has not acquired another parent within the meaning of section 101(b)(2) of the Act. Under Tongan law, only illegitimate children may be adopted.¹ The beneficiary's birth

¹ *Intercountry Adoption, Tonga*, U.S. Department of State, http://adoption.state.gov/country_information/country_specific_info.php?country-select=tonga (last viewed January 22, 2014).

certificate only lists her mother's name and states that the beneficiary is an illegitimate child. The Guardian Ad Litem report also confirms that the beneficiary was born as an illegitimate child and states that her adoption is under "The Maintenance of Illegitimate Children Act." The Letters of Adoption from the Supreme Court of Tonga, the country's adoption authority, similarly provide that the petitioner was granted a final adoption of the beneficiary under the Maintenance of Illegitimate Children Act.² Accordingly, the record establishes that the beneficiary's birth mother is a "sole parent."

Although the record shows that the beneficiary has a sole parent, it does not demonstrate that her sole parent is incapable of providing her with the proper care, consistent with local standards in Tonga. 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 regarding local standards in Tonga. Nor does the record demonstrate that the beneficiary's birth mother is incapable of providing proper care to the beneficiary consistent with such standards. The beneficiary's birth mother stated in her revised declaration, dated May 8, 2013, that she does not have the financial means to care for the beneficiary because she is uneducated and has a poor standard of living. In her letter, dated July 31, 2013, the beneficiary's birth mother stated that she resides with her other child, parents and siblings, and they are "really poor." She stated that her father is disabled and she helps support her family by working in "the garden" to get food. She stated that she does not have an education or a job. However, the Guardian Ad Litem report provides that the beneficiary's birth mother is employed as a shopkeeper at a market stall and supports her three-year-old son, parents and siblings. Similarly, the application for Letters of Adoption provides that the beneficiary's birth mother "is the only bread winner of the family." The Guardian Ad Litem report briefly states that the beneficiary's birth mother "barely makes enough in her wages to support her family," but offers no details on her wages and standard of living.

On appeal, the petitioner asserts that the beneficiary's mother is unable to support the beneficiary since this is her second child out of wedlock. He contends the beneficiary's birth mother is in extreme poverty and is emotionally unable to provide for the beneficiary. The petitioner reiterates that the beneficiary's birth mother works in a garden to provide for her other child, parents and siblings. The petitioner's assertions have been taken into account, but the record does not contain detailed, probative information of the birth mother's emotional health, earnings and living conditions to establish that she is unable to provide for the beneficiary's basic needs, consistent with the local standards in Tonga. Moreover, his assertion that the beneficiary works in a garden is inconsistent with the Guardian Ad Litem report, which provides that the beneficiary's birth mother is employed as a shopkeeper at a market stall. The petitioner has offered no explanation to resolve this inconsistency. Accordingly, the petitioner has not established that the beneficiary's sole parent is unable to provide for the beneficiary's basic needs, consistent with the local standards of Tonga.

² See *Id.*

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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. The petition remains denied.