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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: JAN 10 2014 OFFICE: NATIONAL BENEFITS CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

Applicable Law

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 41-year-old married U.S. citizen. The petitioner and her husband adopted the beneficiary in Nigeria on January 26, 2012. The petitioner submitted the Form I-600 to U.S. Citizenship and Immigration Services (USCIS) on May 14, 2012. The petitioner indicated on the Form I-600 that the beneficiary was born on March 6, 2006 and is an orphan because he has no parents. The petitioner initially submitted: a medical death certificate for the petitioner's sister-in-law, [REDACTED] issued on December 8, 2011; a Nigerian court order granting the petitioner and her husband adoption of the beneficiary; and a post-adoption birth certificate for the beneficiary registered on January 23, 2012, which lists the petitioner and her husband as the parents.

On May 28, 2012, the director issued a Request For Evidence (RFE) to the petitioner for the following: the beneficiary's registered birth certificate listing the beneficiary's birth parents, or affidavits from individuals who have personal knowledge of the beneficiary's birth; the beneficiary's birth mother's registered death certificate; evidence that the beneficiary's surviving parent (birth father) is unable to provide for the beneficiary consistent with local standards in Nigeria; written proof that the beneficiary's birth father irrevocably released the beneficiary for adoption and emigration; a copy of the Nigerian social welfare office adoption report; and a home study report prepared in accordance with 8 C.F.R. § 204.3(e). In response, the petitioner submitted: affidavits from her sister-in-law, [REDACTED] and her mother-in-law, [REDACTED] the beneficiary's Certificate of Baptism, listing [REDACTED] as his parent; and a registered death certificate for [REDACTED]

On July 11, 2012, the director issued a Notice of Intent to Deny (NOID) the petition because the petitioner failed to provide: a birth certificate for the beneficiary listing his birth parents' names; evidence that the beneficiary meets the definition of orphan; and a home study report prepared in compliance with the regulation. In response, the petitioner submitted: a birth certificate for the beneficiary, registered on March 8, 2012, which lists [REDACTED] as his mother; an affidavit from [REDACTED] letters attesting to [REDACTED] custody of the beneficiary; a copy of the petitioner's home study contract; and a letter from [REDACTED] Executive Director, [REDACTED]

On October 2, 2012, the director denied the Form I-600 because the petitioner failed to submit a home study report in compliance with 8 C.F.R. § 204.3(e). On appeal, the petitioner submitted the requested home study report. In its June 18, 2013 decision, the AAO found that the petitioner complied with 8 C.F.R. § 204.3(e), but determined, beyond the decision of the director, that she failed to establish that the beneficiary qualified for classification as an orphan as defined in section 101(b)(1)(F)(i) of the Act.¹ On motion, the petitioner submits a statement and additional evidence. The motion will be granted.

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 its June 18, 2013 decision, the AAO determined that the petitioner failed to establish by a preponderance of the evidence that the beneficiary qualified for classification as an orphan. The AAO's detailed discussion of the relevant evidence is incorporated here by reference. In sum, the

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

affidavits in the record contained contradictory information in regard to whether the beneficiary is the adopted or biological son of [REDACTED]. Documentary evidence in the record also failed to clarify or establish the beneficiary's parentage. The record did not contain any evidence to show that Ms. [REDACTED] legally adopted the beneficiary in Nigeria. The beneficiary's two birth certificates show that his birth was registered after Ms. [REDACTED] death, when he was approximately six years old. The first birth certificate shows the petitioner and her husband as the beneficiary's parents and the second birth certificate shows Ms. [REDACTED] as the beneficiary's mother with no information regarding the beneficiary's father. The AAO stated that even if the evidence had established that Ms. [REDACTED] was the beneficiary's birth mother, the record did not show her marital status at the time of the beneficiary's birth and the identity of the beneficiary's birth father. The record did not show that the beneficiary's birth father severed parental ties, or in writing, released the beneficiary for emigration and adoption. Nor did it establish that the beneficiary's birth father is incapable of providing proper care to the beneficiary according to local standards in Nigeria, as required under the definition of surviving parent in 8 C.F.R. § 204.3(b). The record also did not show that the beneficiary is an orphan because of the death or disappearance of, desertion or abandonment by, or separation of loss from both of his birth parents, as those terms are defined in the regulation. The AAO concluded that the record lacked sufficient evidence to establish that the beneficiary met the definition of an orphan defined in section 101(b)(1)(F)(i) of the Act, and dismissed the appeal.²

On motion, the petitioner asserts that [REDACTED] adopted the beneficiary while she was separated from her husband. The petitioner states that Ms. [REDACTED] husband requested in writing for a release of his parental obligations over the beneficiary. She states that she and her husband adopted the beneficiary after Ms. [REDACTED] death because her mother-in-law is elderly and can no longer take care of him. The petitioner submits as additional evidence: a copy of a Nigerian Magistrate court order granting Ms. [REDACTED] and her husband, [REDACTED] adoption of the beneficiary; two letters to Ms. [REDACTED] from her husband's attorney stating that the beneficiary was adopted without Mr. [REDACTED] consent and requesting that Mr. [REDACTED] be released of parental obligations over the beneficiary; and a copy of Ms. [REDACTED] will, dated January 12, 2011, which states that she is separated from her husband and names the beneficiary and the petitioner's husband as the recipients of her assets.

De novo review of the record fails to establish that the beneficiary meets the definition of an "orphan" as set forth in section 101(b)(1)(F)(i) of the Act. The court order submitted on motion shows that [REDACTED] adopted the beneficiary in Nigeria on February 28, 2008, three years prior to Ms. [REDACTED] death. Although the record shows that Mr. [REDACTED] subsequently requested a release of his parental obligations over the beneficiary, there is no evidence that his parental rights were terminated. In order for the beneficiary to meet the definition of orphan as a child with a "surviving parent," the petitioner must demonstrate that the surviving parent is incapable of providing proper care. 8 C.F.R. § 204.3(b). The term "incapable of providing proper care" means that the surviving parent is unable to provide for the child's *basic needs*,

² The AAO further stated that because the beneficiary did not meet any of the definitions for an orphan as set forth in section 101(b)(1)(F)(i) of the Act, the AAO would not analyze whether the evidence established that the adoption of the beneficiary was in accordance with the laws of Nigeria, as required by 8 C.F.R. § 204.3(d)(1)(iv).

consistent with the local standards of the foreign-sending country. *Id.* The petitioner has not provided any information to demonstrate that Mr. [REDACTED] is unable to meet the beneficiary's basic needs in Nigeria.

Moreover, the record still does not establish the beneficiary's identity and parentage, as required by 8 C.F.R. § 204.3(d)(1)(ii). Under Section 101(b)(2) of the Act, the term "parent" means a parent "only where the relationship exists by reason of any of the circumstances" set forth in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(2). Section 101(b)(1) of the Act defines a "child" as an unmarried person under twenty-one years of age who is either: born in wedlock; a stepchild; a legitimated child; or a child born out of wedlock through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to his/her natural mother or father. The record does not contain a birth certificate for the beneficiary listing his birth parents' names, or an explanation as to why this information is not available with other proof of the beneficiary's identity. Nor does the record contain affidavits from individuals who have personal knowledge of the beneficiary's birth, in lieu of primary or secondary evidence. *See* 8 C.F.R. § 103.2(b)(2)(i). The two Nigerian adoption orders in the record do not provide any information regarding the beneficiary's birth parents' identities and the circumstances of their relinquishment of the beneficiary.

The record does not indicate that both of the beneficiary's birth parents have died, that they have disappeared, abandoned him, 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. 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 parents and as verified by a competent authority. Finally, the record does not establish that the beneficiary meets the definition of an orphan because he has a sole or surviving birth parent incapable of providing proper care. Accordingly, the petitioner has not shown that the beneficiary is an orphan under any of the criteria delineated at section 101(b)(1)(F)(i) of the Act and defined at 8 C.F.R. § 204.3(b).

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. 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 and the appeal will remain dismissed.

ORDER: The motion is granted. The June 18, 2013 decision of the Administrative Appeals Office is affirmed. The petition remains denied.