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 24 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:

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be 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 51-year-old divorced U.S. citizen. The beneficiary was born on January in Ethiopia, and the petitioner adopted her in that country on December 15, 2010, when the beneficiary was fourteen years old.[1] On April 7, when the beneficiary was eighteen years old, the petitioner filed the instant Form I-600 on her behalf, seeking to classify her as an orphan pursuant to section 101(b)(1)(F)(i) of the Act.

The director denied the Form I-600 on June 16, 2014 because the beneficiary was not under the age of sixteen when the petition was filed on her behalf. On July 16, 2014, the petitioner filed a timely appeal.

We review these proceedings on a *de novo* basis. A full review of the record, including the evidence submitted on appeal, fails to establish the beneficiary's eligibility for classification as an orphan. Counsel's claims and the evidence submitted on appeal do not overcome the director's ground for denial and the appeal will be dismissed for the following reasons.

Analysis

On appeal, counsel asserts that the record establishes a claim for ineffective assistance of counsel, and that the petitioner is entitled to equitable tolling of the filing deadline because of previous counsel's errors. An appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the aggrieved respondent setting forth in detail the

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[1] The petitioner claims to be the beneficiary's natural father as he was in a committed relationship with the mother when the beneficiary was born. A blood test taken at the request of the U.S. Department of State excluded the petitioner as the beneficiary's biological father.

agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In support of the ineffective assistance of counsel claim, the petitioner submits an affidavit stating that previous counsel advised him that he would file an I-600 on behalf of the beneficiary before she turned 21 years old.[2] The petitioner did not submit a copy of the legal services retainer agreement between the petitioner and previous counsel, despite counsel's specific acknowledgement that the petitioner received the agreement.

In order to satisfy the first element under *Matter of Lozada*, the petitioner must submit an affidavit of the aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. *Matter of Lozada*, 19 I&N Dec. at 639. The petitioner failed to meet the first element under *Matter of Lozada*, as the retainer agreement is not in the record and the petitioner's affidavit fails to set forth in any detail the agreement that was entered into with former counsel with respect to filing a Form I-600 petition on behalf of the beneficiary.[3] In *Matter of Lozada*, the Board of Immigration Appeals (BIA) explained the necessity of a detailed affidavit in evaluating claims of ineffective assistance of counsel:

> A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. In the case before us, that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard . . .
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> The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such claim. In the instant case, for-example, the respondent has not

[2] The affidavit details his interactions with previous counsel in connection with previous counsel's filing of Form I-130 Petition for Alien Relative on behalf of the beneficiary. Previous counsel's representation of the petitioner in connection with the Form I-130 petition is not before us.

[3] Previous counsel states in his affidavit that he decided to file the Form I-600 instead of a new Form I-130 in order to avoid the physical and legal custody requirements of the Form I-130. He did not state that he had been retained to file the Form I-600.

> alleged, let alone established, that former counsel ever agreed to prepare a brief on appeal or was engaged to undertake the task.

Id. at 639.

The petitioner's affidavit, and previous counsel's response, lack specific factual information as to the actual agreements and representations former counsel made or did not make with respect to filing the Form I-600. Counsel states that ineffective assistance of counsel is proven by previous counsel's admission of error. We disagree. While it is clear that previous counsel did not file the Form I-600 until after the beneficiary turned 16, the facts are not sufficiently developed in this record for us to find that the petitioner retained him to file the Form I-600 in this case. Thus, the petitioner has not established ineffective assistance of counsel with respect to the delayed filing.

Equitable tolling is also not an available remedy. Although some United States 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. We have no authority to waive the requirements of section 101(b)(1)(F)(i) of the Act.

Beyond the decision of the director, the petitioner has not established that the beneficiary meets any of the requirements for classification as an orphan under any criteria delineated at section 101(b)(1)(F)(i) of the Act and defined at 8 C.F.R. § 204.3(b).[4]

The petitioner seeks to classify the beneficiary as an orphan because she is the child of a sole parent who, according to the petitioner, cannot care for the child. The record does not establish that the beneficiary is the child of a sole parent, or that the biological mother is incapable of providing proper care to the beneficiary according to the local standards in Ethiopia, as both of those terms are defined in the regulations. The record establishes only that the petitioner is not the biological father. We cannot conclude based on the current record of proceeding that the beneficiary has no biological father, or that her biological father has abandoned, deserted, become lost from or disappeared from the beneficiary's life. 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. The record also does not indicate that the beneficiary was involuntarily severed

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[4] 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).

from her biological parents by action of a competent authority for good cause and in accordance with the laws of Ethiopia. Nor does the record show that the beneficiary was involuntarily and permanently severed or detached from her biological parents due to a natural disaster, civil unrest, or other calamitous event beyond the control of her birth parents and as verified by a competent authority. The record does not establish the death of the beneficiary's biological father. As such, neither the beneficiary's birth mother nor birth father is a "surviving parent." As the beneficiary does not meet any definition of an orphan, for this additional reason, the appeal must be dismissed.

Conclusion

The beneficiary is ineligible to be classified as an orphan because she does not meet the age requirement specified at section 101(b)(1)(F)(i) of the Act, and because she does not meet the requirements for classification as an orphan under any criteria delineated at section 101(b)(1)(F)(i) of the Act and defined at 8 C.F.R. § 204.3(b). Accordingly, the appeal will be 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 appeal is dismissed and the petition remains denied.