



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF B-O-J-

DATE: JUNE 17, 2016

APPEAL OF NATIONAL BENEFITS CENTER DECISION

APPLICATION: FORM I-600A, APPLICATION FOR ADVANCE PROCESSING OF ORPHAN PETITION

The Applicant, a U.S. citizen, seeks advance processing of an orphan petition. *See* Immigration and Nationality Act (the Act) section 101(b)(1)(F)(i), 8 U.S.C. § 1101(b)(1)(F)(i); 8 C.F.R. § 204.3. U.S. citizens who plan to adopt an orphan from a country that is not a party to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, but who have not identified a specific child, may apply for a preliminary determination of their suitability and eligibility as prospective adoptive parents prior to filing Form I-600, Petition to Classify Orphan as an Immediate Relative.

The Director, National Benefits Center, denied the application. The Director concluded that the Petitioner did not establish that her spouse is residing in the United States in lawful immigrant status.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director erred in denying her application, as her spouse is residing in the United States in lawful immigrant status.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking advance processing to classify an orphan as an immediate relative. Section 101(b)(1)(F)(i) of the Act provides, in pertinent part:

[A] child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b) of this title, 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; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United

States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That the Attorney General [now Secretary of the Department of Homeland Security] is satisfied that proper care will be furnished the child if admitted to the United States . . . .

8 C.F.R. 204.3(c) provides for the submission of a Form I-600A before an orphan is identified, in order to secure the necessary clearance to subsequently file a Form I-600, Petition to Classify Orphan as an Immediate Relative.

8 C.F.R. § 204.3(c)(1) lists the documentation required in a Form I-600A submission at the time of filing, including evidence of the petitioner's U.S. citizenship and, if the petitioner is married and the married couple resides in the United States, evidence of the spouse's U.S. citizenship or lawful immigration status.

## II. ANALYSIS

The issue in the Applicant's case is whether she is eligible to adopt a child from Nigeria when her spouse, the prospective adoptive father, does not have lawful immigration status and is residing in the United States. On appeal, the Applicant states that her spouse is in lawful immigration status in the United States, as he is in removal proceedings before the Executive Office of Immigration Review (EOIR); the Immigration Judge has not rendered a final judgment in those proceedings; and she has filed a pending Form I-130, Petition for Alien Relative, on his behalf. In the alternative the Applicant asserts that if her spouse is found to be in unlawful immigration status, then she would like to proceed without him on the Form I-600A application.

The evidence in the record does not establish that the Applicant's spouse is in lawful immigration status. Further, the evidence in the record does not establish that a pending Form I-130 petition is a form of lawful status or that she may proceed without her spouse.

### A. Eligibility

As stated above, the Applicant has been found ineligible for advance processing of an orphan petition under section 101(b)(1)(F)(i) of the Act and the regulation at 8 C.F.R. § 204.3.

The Applicant asserts that she is eligible to proceed with the adoption, as both she and her spouse are in lawful immigration status. As mentioned, the regulation at 8 C.F.R. § 204.3(c)(1) provides that if the Applicant is married and residing in the United States, evidence of the spouse's U.S. citizenship or lawful immigration status must accompany an advance processing application at the time of filing.

The Applicant's spouse entered the United States with a B-2 visitor visa in 2004, and his authorized period of stay expired in February 2005. The Applicant's spouse is currently in removal proceedings. According to his Form I-862, Notice to Appear (NTA), the Applicant's spouse is "not a citizen or national of the United States" and is a native and citizen of Nigeria. The NTA alleges

the Applicant's spouse was admitted into the United States as a nonimmigrant visitor and remained in the United States beyond the period of authorized stay, "without authorization from the Immigration and Naturalization Service or its successor the Department of Homeland Security."

The Applicant asserts that since her spouse is in removal proceedings with a pending Form I-130, he is in lawful immigration status and therefore is eligible to proceed with the Form I-600A. The Applicant did not provide documentary evidence to show that her spouse maintained valid immigration status after his visitor status expired in 2005. The Board of Immigration Appeals has found that "[a] nonimmigrant alien has the obligation either to depart at the expiration of his authorized stay, or to obtain a proper extension of that stay." *Matter of Teberen*, 15 I&N Dec. 689, 690 (BIA 1976). Thus, the Applicant's spouse was under an obligation either to depart the United States before his visa expired or to extend his stay lawfully. The record includes no evidence indicating that he either departed the United States or extended his stay lawfully.

We now will address the Applicant's assertion that the pending Form I-130 bestows lawful immigration status to her spouse. The purpose of Form I-130 is to classify the intending immigrant or beneficiary as a relative of the petitioner. Similarly, in the regulations that define eligibility for adjustment of status, the phrase "lawful immigration status" does not include any period during which a Form I-130 is pending. The regulations at 8 C.F.R. § 245(d)(1) state, in relevant part, that "lawful immigration status" describes the immigration status of an individual who is in (1) lawful resident status; (2) refugee status under section 207 of the Act; (3) asylee status under section 208 of the Act; or (4) parole status which has not expired, been revoked or terminated. A pending Form I-130 is not listed as evidence of lawful immigration status.

Thus, we conclude that the Applicant's spouse does not have valid immigration status by virtue of having been issued an NTA and placed into removal proceedings. Moreover, a pending Form I-130 does not provide the Applicant's spouse, the intended beneficiary of that petition, with valid immigration status for purposes of the Form I-600A.

Finally, the Applicant asserts that if we do not find her spouse to be in lawful immigration status, she would like to proceed without him on the Form I-600A. The Applicant has not provided any authority to support her ability to change her application at this stage. An applicant must establish eligibility at the time of filing the requested benefit and must continue to be eligible through adjudication. *See* 8 C.F.R. § 103.2(b)(1). Therefore, we will not be able to exclude the Applicant's spouse from the Form I-600A.

Accordingly, because she has not shown that her spouse is in the United States in lawful immigration status, the Applicant has not established that all the necessary requirements under 8 C.F.R. § 204.3 have been met in order to secure clearance to file a Form I-600.

### III. CONCLUSION

In application proceedings, it is an applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of B-O-J-*, ID# 18083 (AAO June 17, 2016)