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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
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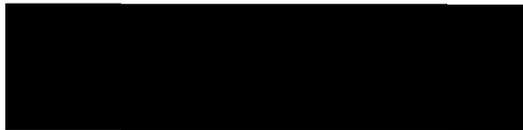


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DATE: **MAY 24 2010** OFFICE: NAIROBI, KENYA

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:

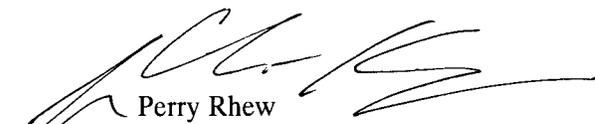
SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. Do not file any motion directly with the AAO. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Nairobi, Kenya Field Office Director (“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), 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 in his behalf . . . 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[.]

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. . . .

* * *

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.

* * *

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.

Facts and Procedural History

The petitioner is a 43-year-old U.S. citizen who adopted the beneficiary in the Democratic Republic of Congo ("DRC") pursuant to an adoption judgment issued by a court in June 2011.¹ The petitioner filed the Form I-600 with the U.S. consulate in Kinshasa, DRC on September 19, 2011, seeking to classify the beneficiary as an orphan. The U.S. consulate determined that the Form I-600 was not clearly approvable and forwarded it to the director for adjudication in accordance with the regulation at 8 C.F.R. § 204.3(h)(11). On December 15, 2011, the director issued a Notice of Intent to Deny (NOID) the petition because the U.S. consular investigation revealed that the beneficiary had been living with both of his biological parents and, therefore, the beneficiary did not meet any of the orphan definitions provided at 8 C.F.R. § 204.3(b). The petitioner responded to the NOID, in part, with a letter from a representative of the Salvation Army in Kinshasa, DRC, who stated that the biological mother relinquished the beneficiary to its care because she was unable to care or provide for him. After considering the evidence in the record, the director denied the petition because the beneficiary was not an orphan as described at section 101(b)(1)(F)(i) of the Act, and

¹ The Mayor of Ngaliema Kinshasa, DRC, issued an Act of Adoption to the petitioner on September 28, 2011.

because the petitioner had not provided the beneficiary's birth certificate.² The director noted further that the petitioner had submitted several documents in the French language that were not accompanied by certified English translations as required by the regulation at 8 C.F.R. § 204.3(d).³

On appeal, the petitioner asserts that until a determination is made about legitimation under DRC law, the beneficiary should be classified as an orphan. The petitioner states that although the beneficiary's biological father is living, he does not live in the home with the biological mother and children, and the biological parents never married each other. The petitioner asserts that he adopted the beneficiary's younger sister approximately five years ago under the same circumstances and that he is capable of providing for the beneficiary as his son.

Analysis

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

On appeal, the petitioner asserts that the U.S. consular office in Kinshasa may have misinterpreted the law of the DRC in regards to legitimation of children born out of wedlock such that the beneficiary qualifies as an orphan whose mother meets the definition of a sole parent. The petitioner, however, provides no legal authority for his assertions, such as a copy of the DRC's Family Code or any other DRC law governing legitimation. When the petitioner relies on a foreign law to establish eligibility for the beneficiary, the application of the foreign law is a question of fact, which must be proved by the petitioner. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973)).

Even if the petitioner had shown that the beneficiary was considered illegitimate under the law of the DRC, the beneficiary would still not meet the definition of an orphan from a sole parent as the record lacks evidence that the beneficiary's biological mother is incapable of providing him with proper care consistent with the local standards of the DRC, as required by the regulations. *See* 8 C.F.R. § 204.3(b) (definitions of *sole parent* and *incapable of providing proper care*). The petitioner submitted a letter from the Salvation Army representative in Kinshasa, DRC, who stated that the biological mother placed the beneficiary in the Army's care because she "is unable to care or provide from him." However, the biological mother's statement to the Salvation Army representative is insufficient in light of her statement to the U.S. consular official that she was working and deriving an income. Absent further evidence demonstrating the biological mother's incapability of providing proper care to the beneficiary consistent with the local standards in the DRC, the beneficiary could not be

² The petitioner has not addressed the lack of a birth certificate on appeal. As a birth certificate is a required document under 8 C.F.R. § 204.3(d)(1)(ii) unless the petitioner explains its unavailability and provides alternative identity and age documents, we shall affirm, but not further discuss, this basis for denying the Form I-600.

³ Certified English translations of non-English language documents are also required under the general regulation at 8 C.F.R. § 103.2(b)(3).

classified as the child of a *sole parent* as that term is defined at 8 C.F.R. § 204.3(b) even if the petitioner could establish that the beneficiary had not been legitimated under DRC law.

The record also fails to demonstrate that the beneficiary meets any of the remaining definitions of an orphan at section 101(b)(1)(F)(i) of the Act. The petitioner has presented no evidence that a competent authority under the laws of the DRC has determined that the beneficiary is an orphan due to the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. The petitioner must establish that the beneficiary was eligible to be classified as an orphan when he filed the Form I-600 in September 2011. 8 C.F.R. § 103.2(b)(1). The record shows that as of the filing date of the Form I-600, the beneficiary's biological parents were living at the same address in Kinshasa, as evidenced by their executions of a "Statement of Consent" to the beneficiary's adoption before the court and interviews by a U.S. consular officer. Thus, when the Form I-600 was filed, the beneficiary had two living biological parents who had not disappeared, and had not been lost or separated from him or had deserted him. Regarding whether he was abandoned as of September 2011, the record indicates that the petitioner had a previous relationship with the beneficiary's family, as he had adopted the beneficiary's sister several years earlier and would periodically visit the family when he was visiting the DRC. The record of the beneficiary's adoption indicates that the biological parents relinquished their parental rights specifically to the petitioner for the adoption in contravention of the definition of *abandonment by both parents* at 8 C.F.R. § 204.3(b).

The Salvation Army letter does not indicate when the biological mother brought the beneficiary into its care; however, the petitioner indicates on appeal that this occurred in October 2011, after the filing of the Form I-600. In addition to this event occurring after the filing of the Form I-600, there is no evidence that the Salvation Army is considered a competent authority under the laws of the DRC for adoption matters, and the Salvation Army representative who wrote the letter does not address the whereabouts of the biological father and provides minimal information about the biological mother's situation. Consequently, this letter does not constitute evidence that the beneficiary was abandoned by his parents so that he may be classified as an orphan under section 101(b)(1)(F)(i) of the Act.

In addition, the beneficiary is ineligible for classification as an orphan as a child of a *surviving parent*. The record clearly establishes that both of the beneficiary's biological parents are living, as each parent signed a "Statement of Consent" to the beneficiary's adoption and was interviewed by U.S. consulate personnel. Accordingly, the beneficiary is not an orphan as the child of a *surviving parent* as that term is defined at 8 C.F.R. § 204.3(a) because neither biological parent is deceased.

Conclusion

The record lacks sufficient evidence to establish that the beneficiary meets the definition of an orphan at section 101(b)(1)(F)(i) of the Act. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied.