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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: TAMPA, FLORIDA Date: JAN 10 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Tampa, Florida district office denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the matter will be remanded to the director for further action.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director on July 29, 2002. The petitioner is a 64-year-old married citizen of the United States. The beneficiary is 11 years old at the present time and was born in Nigeria on January 19, 1991. The record indicates that the petitioner and his spouse adopted the beneficiary under the laws of Nigeria on April 24, 2002.

The director denied the petition because the petitioner failed to establish that the beneficiary is an orphan as defined at section 101(b)(1)(F) of the Immigration and Nationality Act (the Act).

On appeal, the petitioner submits a brief statement.

8 C.F.R. 204.3(h)(12) states:

> *Orphan petition denied: petitioner fails to establish that the child is an orphan.* If the director finds that the petitioner has failed to establish that the child is an orphan who is eligible for the benefits sought, the applicable provisions of 8 CFR part 103 regarding a letter of intent to deny and notification of appeal rights shall govern.

The record as it is presently constituted contains an undated denial letter. As noted below, the OIC was required by 8 C.F.R. 103.2(b)(8) to serve the petitioner with a request for evidence before denying the petition. The record does not include evidence that the OIC did so. As the OIC failed to comply with the regulation at 8 C.F.R. 204.3(h)(12), this case shall be remanded back to the OIC for issuance of a request for evidence as described at 8 C.F.R. 103.2(b)(8). The request should contain a discussion of the issues described below that bear on the beneficiary's eligibility for orphan classification.

The petitioner claimed on the I-600 petition that the biological father was deceased. He further claimed that the biological mother was the surviving parent who had remarried and given birth to three children with her second husband. According to a letter that the petitioner wrote to a welfare worker in Nigeria, the biological mother and her second husband were not interested in raising the beneficiary and for this reason, the petitioner and his spouse were seeking to adopt the beneficiary.

Section 101(b)(1)(F) of the Act, 8 U.S.C. 1101(b)(1)(F), defines

orphan in pertinent part as:

> 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), 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 petitioner has not submitted a death certificate for the biological father or evidence of the biological mother's remarriage. Without this evidence the Service cannot determine whether the beneficiary has only one surviving parent or two parents. When initial evidence is missing, the OIC must request the initial evidence and accord the petitioner a period of 12 weeks to provide the evidence. 8 C.F.R. 103.2(b)(8).

If the biological father is deceased and the biological mother has not remarried, the biological mother would be considered a surviving parent. The petitioner would need to establish that the biological mother is incapable of providing proper care for the beneficiary according to the local standards in Nigeria. See. 8 C.F.R. 204.3(b). Such evidence may consist of, but is not limited to, a detailed explanation about why the biological mother is unable to provide for the beneficiary's care. If the biological mother's inability to care for the beneficiary is related to the biological mother's financial situation, the petitioner should submit information about the biological mother's annual income, the source of that income, and whether that income is sufficient to meet the beneficiary's basic needs. If the biological mother's inability to care for the beneficiary is related to the biological mother's health (e.g., physical, mental and/or emotional ailments), the petitioner should submit evidence of the biological mother's ailment(s). Such evidence should include a letter from the physician who is treating the biological mother that contains information about the biological mother's ailment(s), her long-term prognosis for recovery, and how her ailment(s) affects her ability to care for the beneficiary.

If the biological father is deceased and the biological mother has remarried, the Service would likely find that the beneficiary is the child of two parents - the biological mother and the stepfather.[1] If so, the petitioner would, therefore, need to

[1]The stepfather became the beneficiary's other parent upon his marriage to the biological mother while the beneficiary was still under 18 years of age. Section 101(b)(2) of the Act, 8 U.S.C. 1101(b)(2).

establish that the beneficiary was an orphan due to the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. These terms are defined at 8 C.F.R. 204.3(b).

In addition, the record does not contain a home study report, as described at 8 C.F.R. 204.3(e). This report is essential in establishing that the petitioner and his spouse are suitable parents and can provide to the beneficiary a proper home environment.

The OIC may raise in his request for evidence any additional issues that bear on the beneficiary's eligibility for orphan classification. The petitioner should be prepared to address all issues raised therein. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The OIC's decision is withdrawn. The case is remanded to the OIC for entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.