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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

JUN 16 2003

FILE: [redacted] OFFICE: SAN FRANCISCO, CALIFORNIA DATE:

IN RE: Petitioner:
Beneficiary: [redacted]

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)

ON BEHALF OF APPLICANT:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the San Francisco district office denied the visa petition to classify the beneficiary as an immediate relative, and the matter is now before the Administrative Appeals Office on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the director on October 29, 2001. The petitioner is a 40-year-old married citizen of the United States. The beneficiary is 17 years old at the present time and was born in Teneto, Eritrea on March 10, 1986. The record reflects that the petitioner and his spouse have not adopted the beneficiary.

The director denied the petition on the grounds that: (1) the beneficiary does not meet the definition of orphan; (2) the petitioner did not submit evidence that he and his spouse have secured custody of the beneficiary in accordance with the laws of Eritrea; and (3) the petitioner's spouse is not in a lawful immigration status.

On appeal, counsel submits a brief and additional evidence.

Bureau regulations require a director to apply the provisions of 8 C.F.R. § 103.2(b)(8) regarding a letter of intent to deny and notification of appeal rights, if the director finds that the petitioner has not established a child's eligibility for the benefit sought. 8 C.F.R. § 204.3(h)(12).

A review of the record reveals that the director issued a denial letter to the petitioner on July 12, 2002. As noted previously, the director 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, however, does not include evidence that the director did so. As the director failed to comply with the regulation at 8 C.F.R. § 204.3(h)(12), this matter shall be remanded to him for issuance of a request for evidence as described at 8 C.F.R. § 103.2(b)(8). To assist the director in preparing the request, this decision shall discuss the grounds upon which the denial was based. The director should be prepared to address the relevant issues in the request for evidence.

The first issue to be discussed is the director's finding that the beneficiary is not an orphan. Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F), defines an 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.

In the denial letter, the director reviewed some background information regarding the petitioner and his relationship to the beneficiary. According to the director, the petitioner was displaced from his homeland in 1982 and resided in Sudan as a refugee until 1985, after which time he came to the United States. The director noted that, at the time of the petitioner's naturalization interview in 1994, the petitioner claimed that he did not have any children.

The director also noted that in 1999, the petitioner filed four immigrant visa petitions on behalf of four boys whom he claimed were his biological children and the children of the same woman. Two of these boys, who were the youngest of the four, were the beneficiary of this petition and his twin brother. According to the director, the results of DNA tests revealed that the petitioner was the biological father of only the two older boys, not the beneficiary or his twin brother. The director noted that the conception of the two older boys, both of whom were born in Eritrea, would have occurred when the petitioner was allegedly living in Sudan and married to his first wife.

Although not explicitly stated, the director challenged the petitioner's credibility because he fathered two children out-of-wedlock while married to his first wife. The director noted that the petitioner had submitted a death certificate of the beneficiary's mother and DNA tests results showing that the petitioner was not the beneficiary's biological father. The director concluded: "As it is claimed that you are not the biological father of the beneficiary, the beneficiary therefore has a biological father. Simply because the biological father may not be known to the petitioner, as claimed in the petition, the [Bureau] cannot assume that the beneficiary is an orphan."

The director cited the definition of *disappearance of both parents* found at 8 C.F.R. § 204.3(b), and stated that, without any information about the beneficiary's biological father or evidence that a competent authority has made a reasonable effort to locate the biological father, the Bureau could not determine if the beneficiary was an orphan. In addition, the director noted that the evidence did not indicate whether the biological mother was married at the time of her death. According to the director, if the biological mother had been married, then a step-parent/step-child relationship would have been created between the beneficiary and the biological mother's husband. For these reasons, the director denied the petition, in part, on the basis that the beneficiary is not an orphan.

On appeal, counsel states that the beneficiary's biological father has never been known and the biological mother was never married. According to counsel, the biological mother's death certificate indicates that she was single at the time of her death. Additionally, counsel submits affidavits from the petitioner's biological sons, each of whom testifies that his mother was never married. Counsel notes that the beneficiary's birth certificate contains the name of the petitioner, although he is not the beneficiary's biological father, and that the beneficiary has always believed the petitioner to be his father. Counsel also states that the petitioner has assumed responsibility for the beneficiary, and that the beneficiary has been living with the petitioner's father since the death of the biological mother. Finally, counsel responds to the director's allegations that the petitioner is not credible because he fathered two sons with another woman while married to his first wife, and believed that he had fathered the beneficiary and his twin brother. Counsel asserts on appeal that the director's discussion of this issue has no relevance to these proceedings.

Counsel correctly asserts on appeal that the director's reasons for questioning the petitioner's credibility were inappropriate. Neither the petitioner's relationship with the beneficiary's biological mother during his marriage to another woman, nor his ability to travel between Eritrea and the Sudan, has any relationship to the petitioner's ability to properly parent an orphan. *See* 8 C.F.R. §§ 204.3(e)(2)(i) and (iii). Accordingly, the director's comments as they relate to the petitioner's credibility are withdrawn.

The director's reference to the definition of *disappearance of both parents* at 8 C.F.R. § 204.3(b) was also inappropriate given the facts in the record. The definition cited by the director only applies when both parents are living and both parents have inexplicably disappeared from a child's life. According to the record, the biological mother died on December 1, 1997. Therefore, the biological mother did not "disappear." When one biological parent dies, the other biological parent, if living, becomes a surviving parent. The term *surviving parent* is defined at 8 C.F.R. § 204.3(b). However, that term also does not apply to the facts in the record.

There is no evidence that the beneficiary has an identifiable biological father or a step-father whom the Bureau could consider a surviving parent. Although the beneficiary's birth certificate and baptismal record indicate the petitioner is the biological father, the beneficiary's DNA test results confirm that this information is not true.[1] Additionally, no evidence in the record suggests that a

[1]The Bureau notes that the petitioner's father registered the beneficiary's birth on May 4, 1998 after the death of the biological mother. Absent the accompanying baptismal certificate, this birth certificate may have been insufficient to

step-parent/step-child relationship was established. The biological mother's death certificate does not indicate that she was married, and the petitioner's two sons, who are also the beneficiary's half-brothers, each testify that the biological mother was never married.

Prior to her death, the biological mother would have been considered a sole parent under U.S. immigration law because the beneficiary was born out-of-wedlock and he did not acquire another parent. 8 C.F.R. § 204.3(b). The biological mother's death, therefore, rendered the beneficiary eligible for orphan classification. Accordingly, the director's decision on this issue is withdrawn. The beneficiary meets the definition of an orphan.

The second issue to be discussed is whether the petitioner and his spouse have secured custody of the beneficiary in accordance with the laws of Eritrea.

Pursuant to 8 C.F.R. § 204.3(d)(1)(iv), a petitioner must submit evidence of an adoption abroad, or evidence that he and his spouse have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country. As previously stated, the petitioner and his wife seek to adopt the beneficiary in the United States, as no adoption has been sought under the laws of Eritrea.

In the denial letter, the director stated that the petitioner failed to submit evidence that he and his spouse had custody of the beneficiary. The director noted that the petitioner indicated that his father had custody of the beneficiary; however, the director found that the petitioner's father did not have the authority to irrevocably release the beneficiary for emigration and adoption. The director stated that only a competent authority could make such a release.

On appeal, counsel does not specifically address this issue in her brief. Counsel does, however, submit a letter from the petitioner's father, in which he releases the beneficiary to the petitioner for travel to the United States. Counsel also submits: (1) an April 8, 1998 court order from the Court of Central Region, State of Eritrea, which designates the petitioner's father as a "tutor" (guardian) over the beneficiary; and (2) an April 17, 2003 court order from the Regional Court of Zoba Mackel, State of Eritrea, which rescinds the petitioner's father's guardianship over the beneficiary, and designates the petitioner as the beneficiary's guardian.

The April 17, 2003 guardianship order is insufficient evidence that the petitioner has complied with the regulation at 8 C.F.R.

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establish the facts of the beneficiary's birth. *See Matter of Richard*, 18 I&N Dec. 208 (BIA 1983).

§ 204.3(d)(1)(iv). First, the court order does not specify that the petitioner and his spouse have custody over the beneficiary in accordance with the laws of Eritrea. The order states that the petitioner only is the beneficiary's legal guardian. As the petitioner is married and is seeking to adopt the beneficiary jointly with his spouse, both the petitioner and his wife must have secured custody of the beneficiary under the laws of Eritrea. Second, no language in the court order indicates that the petitioner and his spouse have custody of the beneficiary for emigration from Eritrea and adoption in the United States. Accordingly, based upon evidence in the record at the present time, the petitioner has not overcome this basis of the director's denial.

The third and final issue to be discussed is the director's assertion that the petitioner's spouse is not in a lawful immigration status.

Pursuant to 8 C.F.R. § 204.3(c)(1)(i), a petitioner must submit evidence of his United States citizenship and evidence that his spouse is either a United States citizen or in a lawful immigration status. According to the director:

> [A] visa in [the petitioner's spouse's] passport reveals that she was simply admitted as a nonimmigrant visitor (B2) on July 29, 1995. She later filed for an extension of stay and was approved for a stay only until January 28, 1996. A closer review of [the petitioner's spouse's] record also indicates that the I-130 immigrant visa petition you filed was denied on September 18, 2001. The denial of the I-130 immigrant visa petition is currently on appeal with the Board of Immigration Appeals. Neither the copy of the visitor's visa in her passport, an approval for an extension of stay, nor a pending appeal of a decision on an immigrant visa petition are indicative of [the petitioner's spouse's] "lawful immigration status" as required in 8 CFR 201.33(c)(1)(i) [sic] . . . .

On appeal, counsel states that the petitioner has "cleared a record" by obtaining his divorce records from Eritrea, which was the basis upon which the I-130 petition was denied. Counsel states that on September 18, 2002, the petitioner filed a second I-130 petition on behalf of his wife at the advice of a supervisory adjudications officer at the district office. Counsel submits a copy of the second I-130 petition and implies that the petitioner's spouse is in a lawful immigration status based upon the filing of this petition.

Counsel has not persuaded the Bureau that the petitioner's spouse is in a lawful immigration status. The filing of a petition does not, by itself, confer a lawful immigration status to the petitioner's spouse. *See* 8 C.F.R. § 245.1(d)(1). Accordingly, as

the record is presently constituted, the petitioner has also not overcome this basis of the director's denial.

Although the evidence submitted on appeal has not overcome all of the director's objections to the approval of the petition, because the director failed to comply with the regulation at 8 C.F.R. § 204.3(h)(12), the Bureau may not enter a final decision in this matter until the petitioner is afforded an opportunity to present additional evidence pursuant to 8 C.F.R. § 103.2(b)(8). The director should request evidence that relates to: (1) whether the petitioner and his spouse have secured custody of the beneficiary for emigration and adoption as stipulated in 8 C.F.R. § 204.3(d)(1)(iv); and (2) the petitioner's spouse's immigration status. As stated earlier in this decision, the petitioner has established that the beneficiary meets the definition of an orphan; therefore, this issue does not need to be addressed any further.

ORDER: The director's July 12, 2002 decision denying the petition is withdrawn. The matter is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.