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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEW YORK

Date:

AUG 25 2010

IN RE:

Petitioner:
Beneficiary:

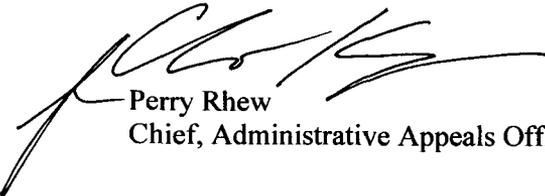
PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

on behalf of the United States
Department of Justice
Washington, D.C. 20530
Yours truly,
[Signature]

DISCUSSION: The district director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative and the matter is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the matter remanded for further processing.

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). The district director denied the petition on the basis of her determination that the petitioner had failed to establish that the beneficiary qualifies for classification as an orphan as that term is defined at section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i).

Section 101(b)(1)(F)(i) of the Act defines an orphan, in pertinent part, as:

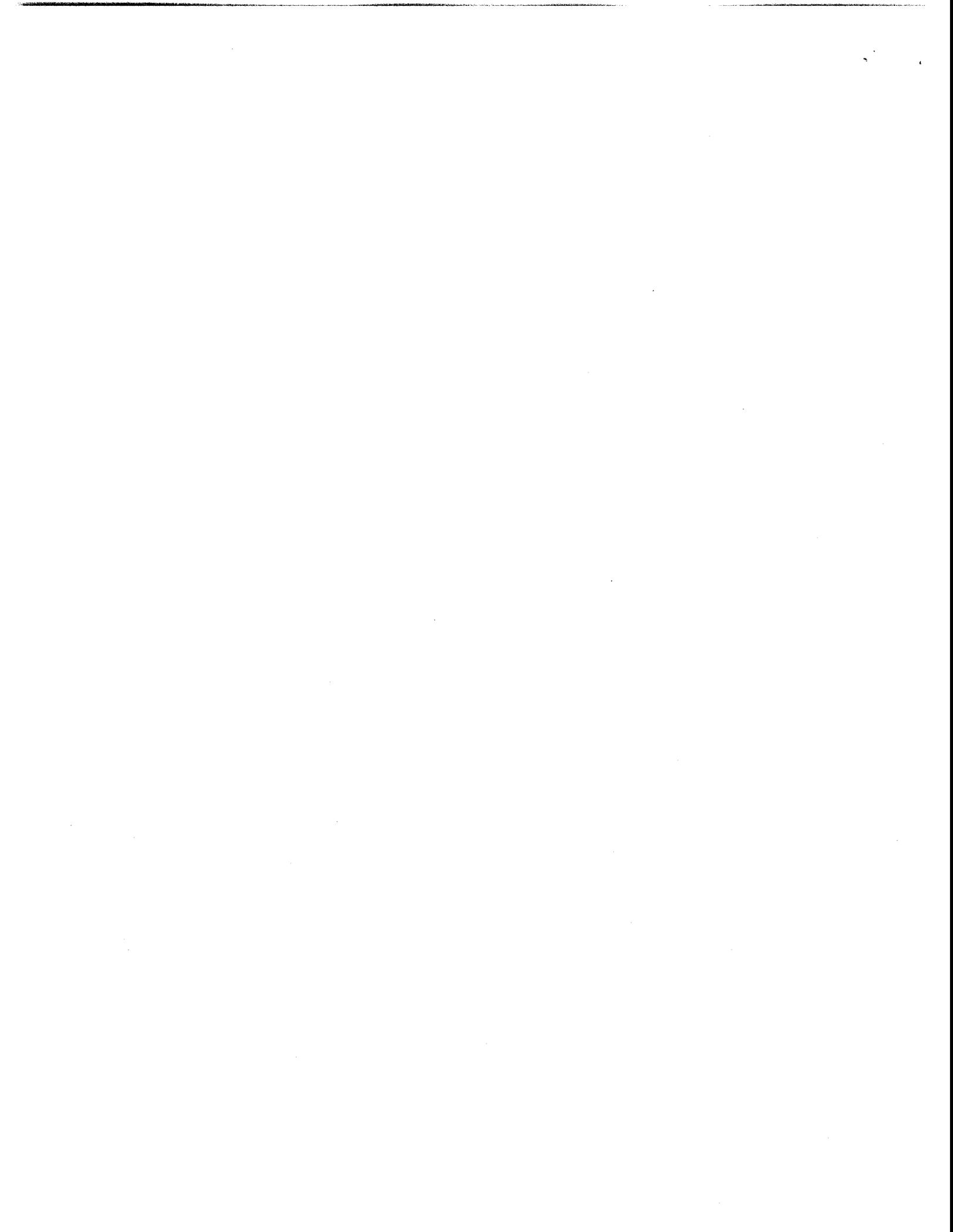
a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or 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 is satisfied that proper care will be furnished the child if admitted to the United States[.]

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

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*.

* * *

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.





The regulation at 8 C.F.R. § 204.3 states, in pertinent part, the following:

- (d) *Supporting documentation for a petition for an identified orphan . . .* An orphan petition must be accompanied by full documentation as follows:

* * *

- (iii) Evidence that the child is an orphan as appropriate to the case:

* * *

- (C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption. . . .

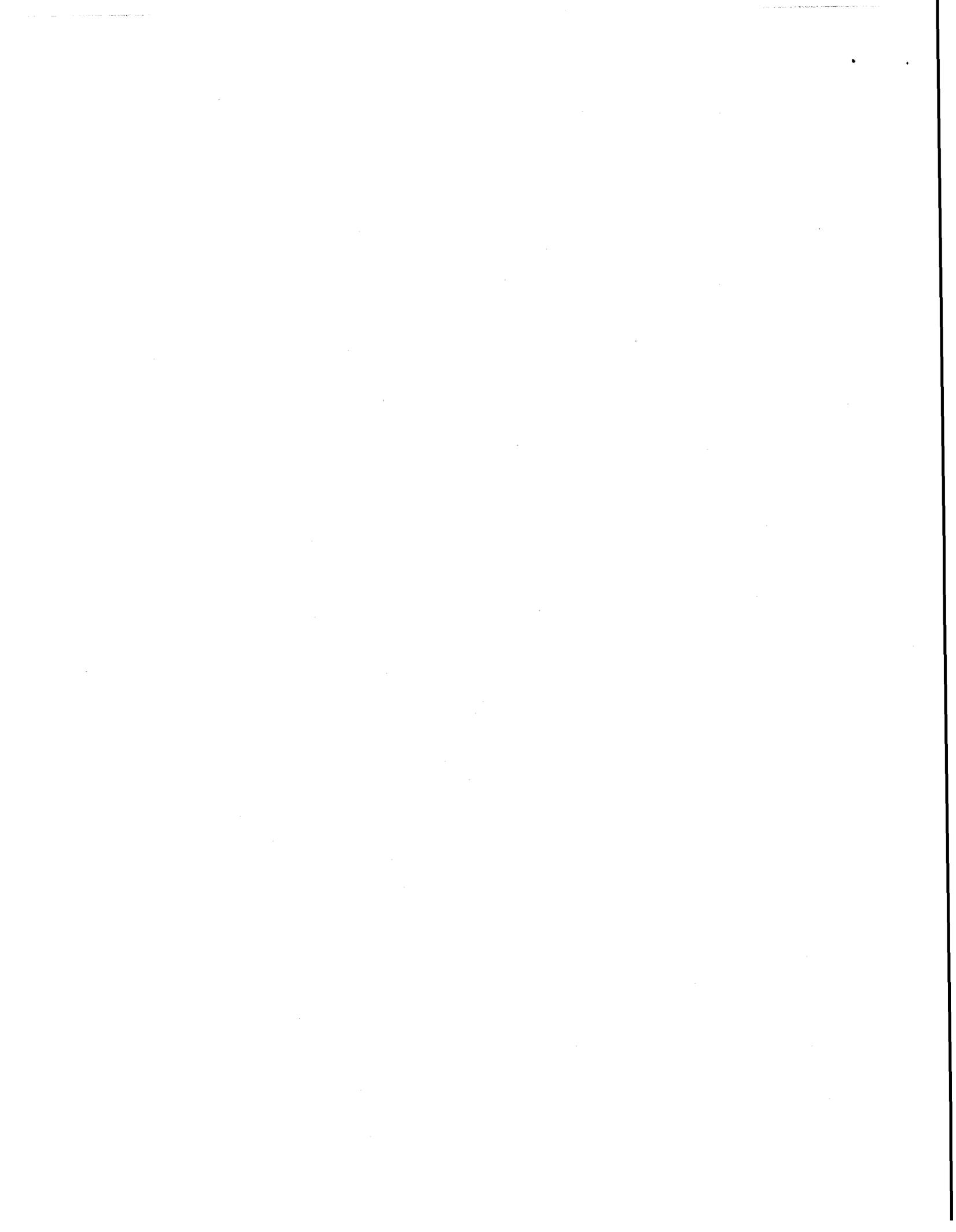
The petitioner is a forty-eight-year-old citizen of the United States. The beneficiary was born in Guyana on September 22, 2002, and the petitioner adopted her there on July 8, 2005. The petitioner filed the instant Form I-600 on March 25, 2008. The petitioner stated on the Form I-600 that the beneficiary "has only one parent who is the sole or surviving parent," and the record indicates that although both of the beneficiary's birthparents are living, they never married.

In her June 3, 2010 decision, the district director found that the petitioner had failed to establish that the beneficiary meets the definition of an orphan under any of the criteria set forth at section 101(b)(1)(F)(i) of the Act. The district director found that the petitioner had failed to establish the disappearance of, abandonment or desertion by the beneficiary's birth parents, or separation or loss from both birthparents, and that because both birthparents are living, she does not meet the definition of an orphan as a result of having a surviving parent who is incapable of providing proper care. Although the district director acknowledged counsel's assertion in her March 3, 2008 letter that the petition should be adjudicated under the "sole parent" standard, the district director's decision contained no analysis under that standard. On appeal, counsel contends that the district director erred in failing to analyze the petitioner's eligibility for classification as an orphan under the "sole parent" standard.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, the AAO withdraws the district director's decision and remands the petition for further processing and analysis under the "sole parent" standard.

At the outset, the language of section 101(b)(1)(F)(i) of the Act specifically defines, in relevant part, an orphan as a child:

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 [emphasis added]. . . .



While the AAO agrees with the district director that the beneficiary qualifies as an orphan under neither the first half of this definition nor the "surviving parent" portion of its second half, the district director should have considered the issue of whether the beneficiary qualifies as an orphan as a result of having a sole parent who is incapable of providing proper care, and who has in writing irrevocably released the child for emigration and adoption. As the petitioner is entitled to a full adjudication under the relevant statutory and regulatory criteria at issue here, the director's decision will be withdrawn and the matter remanded for further processing in accordance with this decision.

The terms "sole parent" and "incapable of providing proper care" are both defined at 8 C.F.R. § 204.3(b), and these were the criteria under which the petitioner sought eligibility for immigrant classification on behalf of the beneficiary. In order to establish eligibility under this criterion, the petitioner must establish: (1) that the birth mother satisfies the definition of a "sole parent"; (2) that the birth mother is incapable of providing proper care to the beneficiary, consistent with local standards in Guyana; and (3) that the birth mother has, in writing, irrevocably released the child for emigration and adoption.

The evidence of record satisfies the third requirement: that the birthmother has, in writing, irrevocably released the child for emigration and adoption. The record contains ample documentation of her consent to the adoption sufficient to establish the requisite irrevocable release in writing.

Having made that determination, the AAO turns next to the questions of whether the birthmother satisfies the definition of a sole parent and, if so, whether the record contains evidence establishing that she is incapable of providing proper care to the beneficiary consistent with local standards in Guyana.

The first element in assessing whether the beneficiary's birth mother meets regulatory definition of a "sole parent" pursuant to 8 C.F.R. § 204.3(b), is determining whether the laws of Guyana distinguish between a child born in or out of wedlock, as the regulation specifically states that the definition of a sole parent "is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all children are considered to be legitimate." If that element is satisfied, the AAO must then determine whether the beneficiary "is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act." *Id.*

The Board of Immigration Appeals (BIA) has held that the laws of Guyana do distinguish between children born in and out of wedlock. *See In re Lawrence Rowe*, 23 I&N Dec. 962, 967 (BIA 2006). As determined by the BIA in that case, "the marriage of the parents of a child born out of wedlock is the sole means of legitimation under Guyanese law." As such, because the record indicates that the birthparents never married, the beneficiary's paternity has not been established through legitimation. The beneficiary is therefore "illegitimate" as that term is used at 8 C.F.R. § 204.3(b). Nor has she acquired a father within the meaning of section 101(b)(2) of the Act. The beneficiary's birthmother, therefore, meets the definition of a sole parent.



Although the birthmother meets the definition of a “sole parent,” the current record fails to demonstrate that she is incapable of providing proper care to the beneficiary, consistent with local standards in Guyana. Although the AAO acknowledges the petitioner’s submission of evidence that the beneficiary’s birthmother has tested positive for Human Immunodeficiency Virus (HIV), that diagnosis is, alone, insufficient to establish that she is incapable of providing proper care to the beneficiary, consistent with local standards in Guyana. Although the AAO does not discount the serious nature of an HIV infection, the petitioner in this case has not established a causal link between the birthmother’s HIV-positive status and her inability to obtain employment that would support the beneficiary.¹ Moreover, while the testimonial evidence of record indicates that the birthmother has not been providing proper care to the beneficiary, that testimony does not establish that she is incapable of doing so. An unwillingness to provide proper care is not synonymous with the incapability of doing so. As currently constituted, the record does not establish that the birthmother, who is the beneficiary’s sole parent, is incapable of providing proper care to the beneficiary. To the contrary, the petitioner’s Affidavit in Support of Summons (submitted in the course of the adoption proceedings in Guyana) states that the beneficiary’s birthmother cares for her seven other children who all reside with her.

The district director’s decision will be withdrawn and the petition will be remanded for consideration of the eligibility of the beneficiary for classification as an orphan as the child of a “sole parent” who is incapable of providing proper care. The district director shall afford the petitioner time to submit additional evidence and/or information prior to entering a new decision. The district director shall then render a new decision based on the evidence of record as it relates to the relevant statutory and regulatory requirements for eligibility.

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.

ORDER: The district director’s June 3, 2010 decision is withdrawn. The petition is remanded to the district director for further action and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

¹ For example, the record lacks evidence regarding both: (1) the state of health care for HIV-infected individuals in Guyana; and (2) information regarding the status of the birthmother’s infection.

