



U.S. Department of Justice

Immigration and Naturalization Service

FA

OFFICE OF ADMINISTRATIVE APPEALS  
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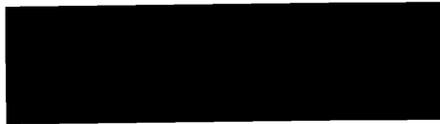
Date: FEB 21 2001

IN RE: Applicant:



Application: Application for Advance Processing of Orphan 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)

IN BEHALF OF APPLICANT:



identification data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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. Weimann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The application for advance processing of an orphan petition was denied by the District Director, Baltimore, Maryland. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The Application for Advance Processing of Orphan Petition was filed on October 5, 1999. The applicant is a 49 year old married citizen of the United States. The applicant plans to adopt two children. The children have not been identified by the applicant. The district director denied the application because the applicant and his spouse failed to disclose their criminal histories to the home study preparer and to the Service in accordance with federal regulations.

On appeal, counsel states that the arrest histories of the prospective adoptive parents were not intentionally withheld from the Service. Counsel states that the prospective adoptive parents' alcohol-related incidents are not equivalent to a history of substance abuse.

The regulation at 8 C.F.R. 204.3(e)(2)(iii)(A) states:

(2) Inquiring about abuse and violence.

The home study preparer must ask each prospective adoptive parent whether he or she has a history of substance abuse, sexual or child abuse, or domestic violence, even if it did not result in an arrest or conviction....

As a result of the applicant's fingerprint check, the Federal Bureau of Investigation furnished the Service with a report. The report indicates that on November 6, 1985, the applicant's spouse was arrested in [REDACTED] and charged with homicide-negligence vehicular manslaughter and driving under the influence of liquor. This charge was dismissed on January 6, 1986. She was fined \$250 on June 1, 1987 for the lesser charge of driving under the influence of liquor.

In a letter dated March 9, 2000, the attorneys representing the applicant stated that in [REDACTED] on May 29, 1981, the applicant was charged with driving while impaired and "driving over 80 mg." Counsel states that on September 4, 1981, the applicant plead guilty to one of the two charges and the other charge was withdrawn. Counsel also states that the court imposed a fine of \$150, or in default of payment, 15 days in jail. The applicant states in his letter dated May 11, 2000 that he was convicted only of the latter charge and the charge of driving while impaired was dropped.

The applicants explain that their reasons for not reporting these convictions during the home study was because they thought one

isolated incident did not amount to having a history of substance abuse. The applicant also explains that he thought his conviction was classified as a traffic violation under the law in [REDACTED], and therefore, he did not have to list it. The applicant's spouse believed that she was never actually arrested since she presented herself to the police, and thereafter, was charged with the offense. Therefore, it does not appear that the applicants intentionally withheld information concerning their criminal history. However, as stated in the previous regulation, any incidents involving substance abuse, even if it does not lead to an arrest, must be addressed in the home study.

In this particular case, the home studies that were conducted on October 6, 1998 and December 9, 1999 did not address these issues. The applicant submitted a letter dated May 10, 2000 from the previous home-study preparer, [REDACTED] stating in pertinent part that "...and I, therefore, continue to recommend her and her husband as adoptive parents." However, the applicant's home study has not been updated and amended to reflect this current recommendation by the home-study preparer. A letter cannot be substituted for a favorable home study as it does not comply with the requirements contained in 8 C.F.R. 204.3(e) regarding the information that must be included in the home study once there is a significant change in the household of the prospective adoptive parents such as a change in criminal history. Consequently, the prospective adoptive parents have not established that proper care will be provided for the orphan.

Further, the processing and adjudication of orphan cases is a Service priority. The advance processing application focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination is based primarily on a home study and fingerprint checks which are essential for the protection of the orphan.

The facts are that the applicants were arrested, charged and each convicted for one of their offenses. In accordance with the regulations at 8 C.F.R. 204.3(e), the prospective adoptive parents are expected to disclose to the home study preparer and the Service any history of arrest and/or conviction early in the advanced processing procedure. The home study report must contain an evaluation of the suitability of the home for adoptive placement of an orphan in light of the petitioner's past criminal history. A certified copy of the documentation showing the final disposition of each incident, which resulted in arrest, indictment, convictions and/or any other judicial or administrative action must accompany the home study. The applicant has not submitted a final disposition from the court regarding his arrest. Additionally, the prospective adoptive parent must submit a signed statement giving details including mitigating circumstances, if any, about each incident. The home study preparer must ask each prospective

adoptive parent about their substance abuse and include each prospective adoptive parent's response to the questions regarding such abuse in the home study. Absent the submission of a updated and amended home study, and the final disposition from the court regarding the applicant's arrest, this case cannot be approved.

The burden of proof is on the applicant to establish the beneficiary's eligibility for classification as an orphan. Matter of Annang, 14 I&N Dec. 502 (BIA 1973); Matter of Brantigan, 11 I&N 493 (BIA 1966); Matter of Yee, 11 I&N Dec. 27 (BIA 1964); Section 291 of the Act, 8 U.S.C. 1361. The applicant has not sustained that burden. Accordingly, the previous decision of the district director will be affirmed.

**ORDER:** The appeal is dismissed.