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AUG 02 2007

FILE:

OFFICE: EL PASO, TX

DATE:

IN RE:

Applicant:

Beneficiary:

APPLICATION: Application for Advance Processing of Orphan Petition Pursuant to 8 C.F.R. § 204.3(c).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, El Paso, Texas, denied the Form I-600A, Application for Advance Processing of an Orphan Petition (Form I-600A application). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application will be approved.

The applicant filed the Form I-600A application on January 12, 2006. The applicant is a 35-year-old married citizen of the United States, who together with her spouse, seeks to adopt an orphaned child from Mexico.

The district director determined that the applicant's husband [REDACTED] had failed to disclose his criminal history, and that the applicant's home study report failed to address or analyze [REDACTED]'s criminal history (record of arrest) information. The Form I-600A application was denied accordingly.

On appeal, the applicant submits a statement from her husband and an updated home study report addendum addressing [REDACTED] prior arrest record. The applicant also submits police report and court disposition information relating to her husband's October 23, 1999, arrest for the offense of Assault Causes Bodily Injury. The applicant requests that her Form I-600A application be approved.

The regulation provides in pertinent part at 8 C.F.R. § 204.3(e)(2)(iii)(D), that:

[F]ailure to disclose an arrest . . . by the prospective adoptive parents or an adult member of the prospective adoptive parents' household to the home study preparer and to the Service [now U.S. Citizenship and Immigration Services, CIS], may result in the denial of the advance processing application . . . pursuant to paragraph (h)(4) of this section.

The regulation provides in pertinent part at 8 C.F.R. § 204.3(e)(2)(v) that:

The prospective adoptive parents and the adult members of the prospective adoptive parents' household are expected to disclose to the home study preparer and the Service [CIS] any history of arrest and/or conviction early in the advanced processing procedure. Failure to do so may result in denial pursuant to paragraph (h)(4) of this section or in delays. Early disclosure provides the prospective adoptive parents with the best opportunity to gather and present evidence, and it gives the home study preparer and the Service the opportunity to properly evaluate the criminal record in light of such evidence. When such information is not presented early in the process, it comes to light when the fingerprint checks are received by the Service.

The regulatory provisions discussed above permit, but do not require denial of a Form I-600A application, based on an applicant's failure to disclose an arrest, conviction, or other adverse information. Whether to deny the application is a matter entrusted to CIS discretion. An orphan petition cannot be approved unless CIS makes a favorable determination on the Form I-600A, advance processing application.

Petitioning for an orphan involves a CIS determination of the prospective adoptive parents' ability to provide a proper home environment, and on their suitability as parents. This determination is essential for the protection of the orphan, and is based primarily on the home study report and fingerprint check results. See 8 C.F.R. § 204.3(a)(2). Knowledge of an applicant's arrest and conviction information is clearly essential for a proper CIS decision regarding whether an applicant will provide proper care to an adopted orphan. Thus, although not mandatory, a denial of a Form I-600A, advance processing application is often justified when an

applicant fails to make the required disclosures. An advance processing application should not be approved, if 8 C.F.R. § 204.3(e)(2)(iii)(D) justifies a denial, unless the applicant clearly shows that the information that he or she failed to disclose was immaterial to a determination regarding whether the applicant and his or her spouse can reasonably be expected to provide proper care to an orphan.

In the present matter, the district director's decision found that [REDACTED] failed to disclose his October 23, 1999, arrest by the El Paso, Texas police department for Assault Causes Bodily Injury. The district director's decision found further that the applicant's home study report did not meet regulatory requirements because it failed to address or assess the effect of [REDACTED] arrest. The applicant responded that she and her husband did not believe they **needed to report the October 1999 arrest to CIS or the home study preparer**, because the charges against [REDACTED] were dismissed and because [REDACTED] was never brought to court or convicted of the offense of Assault Causes Bodily Injury.

Under 8 C.F.R. § 204.3(e)(2)(iii), a home study report must assess the capability of a prospective parent to properly parent an orphan:

(A)(2) [T]he 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. . . .

(B) [I]f the petitioner and/or spouse, if married, disclose(s) any history of abuse and/or violence as set forth in paragraph (e)(2)(iii)(A) of this section . . . the home study report must contain an evaluation of the suitability of the home for adoptive placement of an orphan in light of this history. This evaluation must include information concerning all arrests or convictions or history of substance abuse, sexual or child abuse, and/or domestic violence and the date of each occurrence. A certified copy of the documentation showing the final disposition of each incident, which resulted in arrest, indictment, conviction, and/or any other judicial or administrative action, must accompany the home study. Additionally, the prospective adoptive parent must submit a signed statement giving details including mitigating circumstances, if any, about each incident. . . .

An *Addendum to [REDACTED] Adoption Home Study* (Home Study Report Addendum), submitted on appeal addresses [REDACTED] arrest, and states that the home study preparer learned in an October 6, 2006 interview with [REDACTED] that he did not report his arrest previously because no charges were brought against him and he believed that he had no criminal history, and did not need to report the offense. The home study preparer notes that [REDACTED] arrest occurred over five years ago, and that [REDACTED] has no other criminal history. The home study preparer states further that the violence leading up to [REDACTED] arrest consisted of [REDACTED] defending himself when punched. The home study preparer states that [REDACTED] has expressed and demonstrated remorse for the incident. In addition, the home study preparer states that [REDACTED] references describe him as a loving, supportive, committed man who is highly regarded as a father and a husband. The Home Study preparer concludes that, "the suitability of the home, of [REDACTED] remains appropriate, as do they, as prospective adoptive parents despite the arrest of [REDACTED] for Assault in 1999."

The record contains the following evidence relating to [REDACTED] arrest:

An El Paso County Clerk Office criminal misdemeanor record reflecting that an Assault Causes Bodily Injury charge was brought against [REDACTED] on October 27, 1999. The criminal misdemeanor record reflects that the charge against [REDACTED] was dismissed on August 1, 2003.

An August 1, 2003, El Paso County, Texas, Criminal Court order dismissing the Assault Causes Bodily Injury charge against the applicant.

An October 13, 2006 affidavit by [REDACTED] stating that in October 1999, he and his brother-in-law were provoked, threatened, and attacked by three out of uniform U.S. Marshals, and one Navy Seal. [REDACTED] states that he was arrested for Assault Causes Bodily Injury, but that he was not brought to court for the offense and that the charge against him was ultimately dismissed. [REDACTED] states further that he and his wife:

[W]ere not lying on the application for the Advance Process of Orphan Petition, we just misunderstood the Home Study preparer. When the Home Study was done our impression was that if we had ever been found guilty or convicted of any violence and we answered by saying no, because the case was dismissed.

Upon thorough review of the evidence, the AAO finds that the applicant has established that she and her husband did not intentionally withhold information concerning [REDACTED]'s criminal history from CIS or the home study preparer. The AAO finds the explanation that the applicant and her husband did not believe they needed to discuss [REDACTED]'s October 1999 arrest because the charge had been dismissed and [REDACTED] had not been prosecuted, found guilty of, or convicted of the assault charge, to be plausible and supported by the evidence.

The AAO notes that it conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. *See Helvering v. Gowran*, 302 U.S. 238, 245-46 (1937); *see also, Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003.) Likewise, the AAO may approve an application or petition without remand, if the application or petition complies with the technical requirements of the law.

The AAO finds that the home study report addendum submitted by the applicant on appeal complies with the home study report requirements as set forth in 8 C.F.R. § 204.3(e)(2)(iii). The home study report addendum addresses and analyzes [REDACTED] arrest on October 23, 1999, and it addresses the reason that the applicant and her husband failed to mention the arrest to the home study preparer previously. The home study report addendum additionally addresses and analyzes the factors involved in the home study preparer's determination that the applicant and her husband would be suitable parents to an orphaned child, and that they would be able to provide a proper home environment to a child.

The AAO notes the nature of [REDACTED]'s arrest and the AAO notes that the Assault Causes bodily Injury charge against [REDACTED] was dismissed. The incident occurred over five years ago, and [REDACTED] has no other criminal history. Moreover, the AAO notes that an updated home study report addendum

recommending the applicant and her husband as adoptive parents, addresses arrest and its effect on [REDACTED]'s ability to provide a proper home environment and care to a child.

The applicant has the burden of proving eligibility for the benefit sought. *See* section 291 of the Act, 8 U.S.C. 1361. Upon review of the totality of the evidence, the AAO finds that the applicant has established that: 1) she and her husband did not intentionally withhold criminal history information from CIS or the home study preparer; and 2) she and her husband would be suitable parents and would be able to provide a proper home and proper care to an orphaned child. The applicant has therefore met her burden of proof in the present matter. Accordingly, the appeal will be sustained, and the application will be approved.

ORDER: The appeal is sustained. The application is approved.