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U.S. Citizenship
and Immigration
Services

F2

FILE:

Office: ATLANTA, GA Date: MAY 16 2005

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:

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, Director
Administrative Appeals Office

DISCUSSION: The District Director, Atlanta, Georgia denied the application for advance processing of an orphan petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant filed the Form I-600A, Application for Advance Processing of Orphan Petition (Advance Processing Application) on June 29, 2004. The applicant is a fifty-three-year-old married citizen of the United States, who together with his spouse, seeks to adopt a Russian child.

The district director determined that the applicant and his spouse had failed on two occasions to disclose the applicant's criminal history. The advance processing application was denied accordingly.

On appeal, counsel asserts that the applicant did not intentionally deceive U.S. Citizenship and Immigration Services (CIS) or the home study preparer, and that the circumstances surrounding his arrest and criminal history reasonably led him to believe that he had no criminal history or record.

8 C.F.R. § 204.3(e)(2)(iii)(D) states in pertinent part, "failure 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 CIS], may result in the denial of the advance processing application . . . pursuant to paragraph (h)(4) of this section."

8 C.F.R. § 204.3(e)(2)(v) further states in pertinent part that:

(v) 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 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 above regulatory provisions permit, but do not require, denial of an advance processing application based on a applicant's failure to disclose an arrest, conviction, or other adverse information. Whether to deny the application is a matter entrusted to CIS discretion. The AAO notes that 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 based primarily on the home study report and fingerprint check results, and it is essential for the protection of the orphan. 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 an advance processing application is often justified when an applicant fails to make the required disclosures. The AAO notes that an orphan petition cannot be approved unless CIS makes a favorable determination on the advance processing application. The AAO notes further that 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.

The record reflects that the applicant was interviewed for personal history information by home study preparer, ██████████ of Children of the World, on June 2, 2004. The home study report submitted to CIS on July 13, 2004, found that the applicant and his wife were suitable adoptive parents based, in part, on their denial of any criminal arrests or history, and based in part on a review of Alabama Department of Human Resources records demonstrating that the applicant and his wife had no criminal record which would prevent them from adopting children in the State of Alabama.

On July 10, 2004, however, CIS received FBI fingerprint results reflecting that the applicant had been arrested by the Marietta Police Department in Ohio in 1972, and that on January 13, 1972, he was found guilty of disorderly conduct, and sentenced to pay costs and \$50 in fines. Based on the FBI criminal history information, CIS requested that the home study preparer ask the applicant and his wife to disclose the details of all arrests and criminal history. An August 20, 2004, home study addendum submitted by ██████████ Children of the World, re-approved the applicant and his wife as suitable adoptive parents, restating, in pertinent part, that during an interview on June 2, 2004, the applicant and his wife denied any past or present criminal history, including a criminal history that may or may not have resulted in an arrest or conviction, and restating that a review of Alabama Department of Human Resources records demonstrate that the applicant and his wife have no criminal record which would prevent them from adopting children in the State of Alabama..

An October 20, 2004, letter written by home study preparer ██████████ states that she did not re-interview the applicant and his wife about the applicant's arrest and criminal history prior to her August 20, 2004 home study addendum submission to CIS, because Children of the World did not inform her of the applicant's past criminal history record.

A subsequent home study report addendum, dated October 20, 2004 and written by ██████████ Children of the World, reflects that the home study preparer conducted a second interview with the applicant and his wife on September 28, 2004, after the September 22, 2004, CIS denial of the applicant's advance processing application. The October 2004 addendum addresses the applicant's 1972 arrest and conviction record. After reviewing the applicant's criminal history record and re-interviewing the applicant and his wife, the home study preparer discusses the circumstances of the applicant's 1972 criminal history and states that she feels the applicant and his wife have been completely honest throughout the home study process and during the second interview, and that she recommends the applicant and his wife for approval as adoptive parents.

The record contains a ██████████ Municipal Court record, submitted by the applicant on appeal. The court record reflects that on January 15, 1972, ██████████ pled guilty to intoxication and disorderly conduct and that he was fined \$50 and costs. The record reflects no further arrests or convictions. A subsequent January 18, 2005, letter signed by the ██████████ Municipal Court clerk states that the court found an index book with two criminal cases filed against the applicant on January 17, 1972. The clerk states that the offenses court dispositions were not specified and that the court was unable to locate photographs, signatures or fingerprints for the applicant.

The October 20, 2004 home study addendum and an October 18, 2004, statement written by the applicant discuss the applicant's criminal history by stating that in 1972 the applicant celebrated a fraternity occasion by drinking beer and eating pizza and pickled eggs. The applicant and some of his fraternity brothers then walked towards their on-campus housing, but because it was a cold evening, two local police officers they knew offered to drive them home. The applicant vomited in the police car, and the police officers said he was intoxicated and became upset because they were driving a new patrol car without the sheriff's permission. The applicant states that he and his fraternity brothers spent several hours in the cold, cleaning and washing out the patrol car. They subsequently walked back to their campus housing. The following day, the applicant informed a college professor who knew the sheriff and a local judge of the events, and asked if the professor

could "smooth things over" on their behalf. The professor made a few phone calls on his and the other fraternity brothers' behalf. As a result, the applicant and his fraternity brothers had to wash windows at the police department and courthouse the following weekend. The applicant states that he and his fraternity brothers went to the local judge's office the following Monday, and that they were essentially told by the judge to, "make sure nothing like this happens again. . . . forget it. . . .don't worry about the matter anymore boys." The applicant was not notified of a court hearing regarding the incident and he heard no more about the incident.

The applicant states that based on the foregoing series of events, he did not believe any police or court record was generated regarding the incident. In addition, the applicant states that within two years of the event, he obtained a Florida State Petroleum Inspector law enforcement position. The applicant states that he underwent a thorough criminal background check in order to obtain the Petroleum Inspector position, and that he had been informed that he would not be hired if his background revealed any type of criminal record. The applicant states that he has undergone several other job-related criminal background checks, which also revealed no criminal record. Based on all of the above, the applicant states that he was reasonably unaware of a criminal arrest and conviction record.

The AAO finds that the evidence in the record establishes that the applicant was reasonably unaware of his criminal arrest and conviction record and that he did not intentionally withhold information concerning his criminal history from the home study preparer on June 2, 2004. The AAO notes that the home study preparer did not re-interview the applicant regarding his arrest and criminal history record prior to submission of her August 20, 2004, addendum and prior to CIS denial of the applicant's advanced processing application. The AAO notes further that the applicant's arrest and conviction occurred thirty-three years ago, and that the applicant has no criminal history prior to or subsequent to the event. It also appears that Alabama Department of Human Resources records reflect that the applicant has no criminal record that would prevent him from adopting a child in the State of Alabama. In addition, the AAO notes the nature of the offense committed by the applicant, as well as the mitigating circumstances surrounding the applicant's January 1972 criminal record. Upon review of all of the evidence, the AAO finds that the applicant has established that he and his wife are suitable parents who can provide a proper home environment, and that the applicant's January 15, 1972 arrest and criminal record does not materially affect the decision regarding whether the applicant and his spouse can reasonably be expected to provide proper care to an orphan.

The applicant has the burden of proving eligibility for the benefit sought. *See* section 291 of the Act, 8 U.S.C. 1361. The applicant has met his burden, and the appeal will be sustained.

ORDER: The appeal is sustained.