U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: DALLAS, TEXAS Date: JAN 21 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The District Director of the Citizenship and Immigration Services (CIS) Dallas, Texas, district office denied the Application for Advance Processing of Orphan Petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the case will be remanded to the district director for further consideration and entry of a new decision.

The applicant filed the Application for Advance Processing of Orphan Petition (Form I-600A) on January 31, 2002. The applicant is a 30-year old married citizen of the United States who, together with his spouse, seeks to adopt a child.

The district director denied the application on February 20, 2004 after determining that the applicant failed to establish that he and his spouse were able to provide proper care to an orphan. Specifically, the district director found the petitioner failed to provide evidence of rehabilitation after his arrest for domestic violence. Further, the district director noted that the applicant and his spouse had brought a child into the United States and adopted him without approval or authorization from Citizenship and Immigration Services.

The applicant, through counsel, submits a timely appeal with no additional evidence.

The record reflects that the applicant was arrested on November 3, 1997, by the Garland, Texas Police Department and charged with Assault/Family Violence, a Class C offense that is a misdemeanor (ticket 962900). According to the police report, the prospective adoptive mother stated to police that, "the suspect threatened to hunt her down and kill her if he found out she was seeing someone else." The record contains a letter from the Court Clerk of the Municipal Court in Garland, Texas. In her letter, the Court Clerk indicates that the applicant posted a cash bond of $335 to get out of jail and that "the final records shows that [the applicant] paid the case with his bond and the case was final January 29, 1998."

The record reflects that in the applicant's initial home study report, dated August 27, 2002, the applicant revealed to the home study preparer that he had been arrested on one occasion. The initial home study report states:

> [The applicant] reported that he was arrested by the [redacted] police on November 3, 1997 for assault – family violence in an incident involving he and [his spouse] . . . Both [the applicant and his spouse] explained to [the home study preparer] that they were having a disagreement on that date, and [redacted] wanted one of them to leave the house, but Luis wanted them to stay and work through their problem. In the heat of the moment and without thinking the situation through clearly, [the applicant's wife] called the police. Once the police arrived, they told the couple that it was necessary for them to make an arrest even though both [the applicant and his spouse] assured the officers that it was only a misunderstanding, and there was no family violence involved. [The applicant] went willingly with the officers who held him for a few hours before releasing him.

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

> (2) *Assessment of the capabilities of the prospective adoptive parents to properly parent the orphan.* The home study must include a discussion of the following areas:

(i) *Assessment of the physical, mental, and emotional capabilities of the prospective adoptive parents to properly parent the orphan.* The home study preparer must make an initial assessment of how the physical, mental, and emotional health of the prospective adoptive parents would affect their ability to properly care for the prospective orphan. If the home study preparer determines that there are areas beyond his or her expertise which need to be addressed, he or she shall refer the prospective adoptive parents to an appropriate licensed professional, such as a physician, psychiatrist, clinical psychologist, or clinical social worker for an evaluation. Some problems may not necessarily disqualify applicants. For example, certain physical limitations may indicate which categories of children may be most appropriately placed with certain prospective adoptive parents. Certain mental and emotional health problems may be successfully treated. The home study must include the home study preparer's assessment of any such potential problem areas, a copy of any outside evaluation(s), and the home study preparer's recommended restrictions, if any, on the characteristics of the child to be placed in the home. Additionally, the home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

* * *

(iii)(B) *Information concerning history of abuse and/or violence.* If 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, or if, in the absence of such disclosure, the home study preparer becomes aware of any of the foregoing, 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. The home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

(C) *Evidence of rehabilitation.* If a prospective adoptive parent has a history of substance abuse, sexual or child abuse, and/or domestic

> violence, the home study preparer may, nevertheless, make a favorable finding if the prospective adoptive parent has demonstrated appropriate rehabilitation. In such a case, a discussion of such rehabilitation which demonstrates that the prospective adoptive parent is and will be able to provide proper care for the orphan must be included in the home study. Evidence of rehabilitation may include an evaluation of the seriousness of the arrest(s), conviction(s), or history of abuse, the number of such incidents, the length of time since the last incident, and any type of counseling or rehabilitative programs which have been successfully completed. Evidence of rehabilitation may also be provided by an appropriate licensed professional, such as a psychiatrist, clinical psychologist, or clinical social worker. The home study report must include all the facts and circumstances which the home study preparer has considered, as well as the preparer's reasons for a favorable decision regarding the prospective adoptive parent.
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> (D) *Failure to disclose or cooperate.* Failure to disclose an arrest, conviction, or history of substance abuse, sexual or child abuse, and/or domestic violence by the prospective adoptive parents . . . to the home study preparer and to [CIS], may result in the denial of the advanced processing application or, if applicable, the application and orphan petition pursuant to paragraph (h)(4) of this section . . . .

Further, the regulation at 8 C.F.R. § 204.3(e)(6) states:

> *Specific approval of the prospective adoptive parents for adoption.* If the home study preparer's findings are favorable, the home study must contain his or her specific approval of the prospective adoptive parents for adoption and a discussion of the reasons for such approval. The home study must include the number of orphans which the prospective adoptive parents may adopt. The home study must state whether there are any specific restrictions to the adoption such as nationality, age, or gender of the orphan. If the home study preparer has approved the prospective parents for a handicapped or special needs adoption, this fact must be clearly stated.

While the prospective adoptive parent must submit a signed statement regarding each incident, as cited above, to show rehabilitation the home study preparer, not the applicant, is responsible for discussing and evaluating each incident to include the seriousness of the arrest, conviction, or history of abuse, the number of such incidents, the length of time since the last incident, and any type of counseling or rehabilitative programs which have been successfully completed. The home study contained in the record contains no such discussion of the applicant's rehabilitation.

On appeal, counsel for the petitioner states that the applicant "has provided ample evidence that he had been rehabilitated." Counsel does not refer to any particular document to support this statement and does not produce any additional documents on appeal. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533,

534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, as noted previously, the applicant's own self-serving claims of rehabilitation do not meet the requirements of the regulation. It is the responsibility of the home study preparer to make an objective determination as to whether the applicant has, in fact, been rehabilitated.

We note, however, that though the district director made several requests for evidence, the district director did not specifically request evidence of rehabilitation from the applicant or the home study preparer. In the notice of intent to deny, the district director noted discrepancies between the applicant's statement surrounding his arrest and the arrest report provided by the police. The district director did not make any reference to the lack of evidence related to the applicant's rehabilitation. The first time the district director provided the applicant with any notice of the deficiency related to rehabilitation was in the final denial. Therefore, the case must be remanded to the district director to request the home study preparer to submit a new home study in which the preparer addresses the requirements of 8 C.F.R. §§ 204.3(e)(2)(iii)(B) and (C), and 8 C.F.R. § 204.3(e)(6). The district director should request the home study preparer to specifically discuss its decision to approve the applicant and his spouse despite the applicant's admitted history of domestic violence.

The remaining issue as determined by the district director relates to the fact that the "orphan" the applicant intended to bring to the United States, is, in fact, in the United States.

The record reflects that at the time of filing on January 31, 2002, the applicant already knew of the child he intended to adopt as an orphan. The child was born in Mexico on March 23, 2002, two months after the filing of the application. The applicant and his spouse went to Mexico after the baby's birth and returned to the United States in April 2002, prior to the completion of the home study. Though the applicant and his spouse adopted the child in the District Court of Dallas County Texas on November 6, 2002[1], there is no evidence that the child made a legal entry into the United States or that he currently is residing lawfully in the United States.

In his decision, the district director cited 8 C.F.R. § 204.3(k)(3) which states:

> *Child in the United States.* A child who is in parole status and who has not been adopted in the United States is eligible for the benefits of an orphan petition when all of the benefits of sections 101(b)(1)(F) and 204(d) and (e) of the Act have been met. A child in the United States either illegally or as a nonimmigrant, however, is ineligible for the benefits of an orphan petition.

Given the facts as stated above, the applicant's child is clearly ineligible for the benefits of an *orphan petition.* That determination, however, is wholly separate from the instant application in which a determination must be made as to whether the applicant and his spouse are able to provide a suitable home environment and to properly care for a child.

The regulation at 8 C.F.R. § 204.3(a)(2) states:

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[1] No. A-36030 Order of Termination and Granting Adoption, In the District Court W-304th Judicial District, Dallas County, Texas.

> *Overview* . . . Petitioning for an orphan involves two distinct determinations. The first determination concerns the advanced processing application which focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks is essential for the protection of the orphan. The second determination concerns the orphan petition which focuses on whether the child is an orphan under section 101(b)(1)(F) of the Act . . . An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application. However, a favorable determination on the advanced processing application does not guarantee that the orphan petition will be approved.

As noted earlier, without evidence of rehabilitation, we are unable to make a determination on the suitability of the applicant and his spouse and the case is being remanded accordingly.

It is important to note, however, in the event that the applicant overcomes the deficiencies in the home study and the application is ultimately approved, such approval will not cure the apparent illegal entry of the applicant's adopted child. Despite the applicants' belief that their actions in bringing the child to the United States without the appropriate approval was "in the best interest of the child," such actions have had the opposite effect. That the applicants are now "eager to complete the adoption with all the appropriate legal documentation" is dubious as the applicants' actions rendered the child ineligible for future approval as an orphan. Though the applicants may ultimately be approved as adoptive parents, and may then file a Form I-600 once a specific orphan is identified, their current adopted child may not be the recipient of an approved Form I-600 because the child cannot be considered an orphan pursuant to 8 C.F.R. § 204.3(k)(3).

On remand, the district director should reiterate the fact that the current adopted child is ineligible for classification as an orphan under the Act, even if the instant application is ultimately approved. Further, because the applicants were only approved for the adoption of one child, and have now apparently adopted that child, if the applicant's continue to pursue this application and will seek to adopt another child, on remand, the district director should request that the home study preparer properly update the applicants' home study to reflect approval for the adoption of a second child.

The burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The district director's decision is withdrawn. The case is remanded to the district director for action consistent with the above discussion and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.