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FILE: [REDACTED] Office: PHILADELPHIA, PA Date:

AUG 29 2005

IN RE: Applicant: [REDACTED]
Beneficiary: [REDACTED]

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, Director
Administrative Appeals Office

DISCUSSION: The District Director, Philadelphia, Pennsylvania, 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 Application for Advance Processing of Orphan Petition (I-600A application) on April 27, 2004. The applicant is a forty-four-year-old married citizen of the United States, who together with her spouse, seeks to adopt a child from Guatemala.

The district director determined that the applicant and her spouse (the applicants) had failed to fully disclose their criminal history, and that they had failed to establish that they could provide proper care and a suitable household to an adopted orphan. The application was denied accordingly.

On appeal, the applicants assert that their 1989 arrest in the Bahamas for Possession of Lysergide (LSD) was an isolated incident that occurred fifteen years ago. The applicants indicate that although they pled guilty to the possession charge, they were unaware that the LSD was in their luggage. The applicants assert further that the evidence in the record demonstrates that they do not use drugs and that they would provide a stable and loving home for an adopted orphan. In support of their assertions, the applicants submit doctors' reports and three statements regarding their character. The applicants also submit copies of their court dispositions for the 1989 drug possession charge.

Section 101(b)(1)(F)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F)(i) states that CIS may not approve a Form I-600A application unless satisfied that the applicants will provide proper parental care to an adopted orphan.

Title 8 of the Code of Federal Regulations (8 C.F.R.) section 204.3(a)(2) states, in pertinent part, that:

[P]etitioning 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 An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application.

8 C.F.R. § 204.3(e)(2)(v) 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 [now Citizenship and Immigration Services, 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.

“[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 [CIS], may result in the denial of the advance processing application . . . pursuant to paragraph (h)(4) of this section.” See 8 C.F.R. § 204.3(e)(2)(iii)(D).

The statutory and regulatory provisions discussed above permit, but do not require, denial of an advance processing 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. The AAO notes that the CIS determination is based on protective concerns for the orphan. Complete knowledge of an applicant’s arrest and criminal history is clearly essential for a proper determination regarding whether the applicant can provide a suitable home and proper care to an adopted orphan. Accordingly, denial of an I600A application is often justified when an applicant fails to make the required criminal history disclosures.

The record reflects that the applicants were interviewed by home study preparer, DeNese Olson of Adoptions from the Hearth, in March and April of 2004. The Home Study Report (Report) dated July 6, 2004, states that the applicants had no police or child abuse records in the state of Pennsylvania. The Report states further that the applicant [REDACTED] disclosed an August 30, 1986 Drunk Driving arrest, in which she was arrested while sitting in a parked vehicle without any keys. The Report indicates that the matter was ruled nolle prosequere on November 5, 1986, and that [REDACTED]’s record was expunged on February 16, 1989. [REDACTED] disclosed no other criminal history. The Report reflects further that [REDACTED] stated that he had no history of any kind of criminal activity, either with or without a conviction. Based in part on this information, the home study preparer found that the applicants were suitable adoptive parents.

On July 16, 2004, the district director informed the applicants that FBI fingerprint results reflected the applicants had been arrested in Bermuda in 1989 for Possession of Lysergide, LSD. The district director requested the court dispositions relating to the arrests, as well as written statements from the applicants explaining the arrests and why they were not disclosed to the home study preparer. The district director additionally requested that the home study preparer re-evaluate the applicants’ home study in light of the new information.

The record contains copies of the Bermuda Court documents submitted by the applicants on appeal. The court documents reflect that the applicants were taken into custody for the offence of Possession of a Controlled Drug in July 1989, that they were each released on a \$500.00 bail, and that they each paid a \$400.00 fine for the offence.

The record additionally contains two explanatory letters written by the applicants stating that they went to Bermuda on their honeymoon and that upon entry into Bermuda, customs agents found a small amount of LSD and paraphernalia in their luggage. The applicants state that they were unaware that the drugs were in their luggage, and that many people had access to their room during their wedding reception the night before their departure to Bermuda. The applicants state that they paid bail money, appeared in court and pleaded guilty to the Possession of a Controlled Drug charges. The applicants state that they do not have any problems with substance abuse or addiction. The applicants state further that they are sorry that they did not disclose their arrest, and that they foolishly believed the arrest would not be considered when reviewing their application because the arrest occurred outside of the United States.

The July 23, 2004, Home Study Addendum submitted by DeNese Olson of Adoptions from the Heart, re-approves the applicants as suitable adoptive parents. The home study preparer repeats the applicants' explanatory statements that many people had access to their room prior to their departure for Bermuda, that they were unaware that LSD was in their luggage, and that they did not disclose the arrests during the home study evaluation because the arrests occurred outside of the United States. The home study preparer concludes that the applicants continue to qualify as suitable adoptive parents in spite of the failure to disclose their criminal history. The home study preparer's conclusion is based on the fact that the applicants' arrest was an isolated incident that occurred many years ago, and based on the fact that the applicants were unaware of the drugs in their luggage. The home study preparer subsequently re-concludes that the applicants are "intelligent, mature, stable, secure and dedicated to providing a loving home for their family."

The AAO will not consider the assertion that the applicants were unaware of the drugs in their luggage. Nor will the AAO consider or accept an inference that the applicants were innocent of the Possession of a Controlled Drug charge. The evidence in the record reflects that the applicants pled guilty to the Possession of a Controlled Drug charges. The AAO notes that "[c]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of [the applicant's] conviction unless and until the conviction is overturned." *See In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted.) The AAO will therefore not go behind the judicial record to determine the guilt or innocence of the applicants. *See id.*

Moreover, the AAO finds that the evidence in the record establishes the applicants intentionally did not reveal their criminal history to the home study preparer or to CIS until specifically asked about it by the district director. The AAO finds the applicants' explanation that they foolishly believed their criminal history outside of the United States would not be considered by CIS in their review of the applicants' I-600A application to be unpersuasive, as the Home Study Report reflects that the applicants indicated during their home study report interviews that their only criminal history was [REDACTED] 1986 Drunk Driving arrest, and the Home Study Report reflects further that the applicants indicated they had no other history of any kind of criminal activity, either with or without a conviction any criminal history.

As previously noted, the CIS determination regarding whether or not to approve an I-600A application is based on protective concerns for the orphan. In the present matter, the district director was unable to conclude, based on the evidence in the record, that the applicants would be able to provide proper care to an adopted orphan given their deliberate failure to disclose their arrests for a serious drug possession charge.

Unlike the conclusion made by the district director, the AAO finds that, in spite of the applicants' commission of and failure to reveal their 1989 arrest and conviction for possession a controlled drug (LSD), a review of the totality of evidence in the record establishes that the applicants would be able to provide a suitable home and proper care to an adopted orphan, as set forth in section 101(b)(1)(F)(i) of the Act and 8 C.F.R. § 204.3(a)(2).

The AAO notes first that the applicants' arrest and conviction occurred over fifteen years ago, and that the applicants have no criminal history prior to or subsequent to the event. The AAO notes further that the record contains medical letters from the applicants' doctors stating that the applicants are not addicted to drugs and do not have a problems with substance or drug abuse. The Home Study Report information reflects that the applicants have a stable home environment, that they hold responsible jobs (Mrs. Horvat is a psychiatric social worker and Mr. Horvat is a Special Education Visual Support teacher), and that their work and educational backgrounds provide them with skills to further increase their ability to provide proper parental

care to an adopted orphan. In addition, the record contains a Home Study Agency recommendation and letters from friends and co-workers stating that the applicants are honest, responsible, caring individuals who have stable careers who provide a loving and stable home environment to their biological daughter.

The applicant has the burden of proving eligibility for the benefit sought. *See* section 291 of the Act, 8 U.S.C. 1361. In the present matter, the AAO finds that the evidence in the record sufficiently establishes that the applicants can provide a suitable home environment and proper parental care to an adopted orphan. The applicants have therefore met their burden, and the appeal will be sustained.

ORDER: The appeal is sustained.