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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 20 2014 Office: NATIONAL BENEFITS CENTER File: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Determination of Suitability to Adopt a Child from a Convention Country Pursuant to 8 C.F.R. § 204.310

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the National Benefits Center (the director) denied the Application for Determination of Suitability to Adopt a Child from a Convention Country (Form I-800A), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain denied.

The director denied the Form I-800A on the basis that the applicant failed to disclose her 1988 criminal history to the home study preparer and to U.S. Citizenship and Immigration Services (USCIS). The applicant timely appealed the director's decision, and she submits a brief as well as email correspondence between her and the adoption service provider that prepared the home study.

Applicable Law

The regulation at 8 C.F.R. § 204.311(d) provides that:

> The applicant, and any additional adult members of the household, each has a duty of candor and must:
>
> i) Give true and complete information to the home study preparer.
>
> ii) Disclose any arrest, conviction, or other adverse criminal history, whether in the United States or abroad, even if the record of the arrest, conviction or other adverse criminal history has been expunged, sealed, pardoned, or the subject of any other amelioration. . . .

The regulation provides, in pertinent part, at 8 C.F.R. § 204.311(k) that:

> The applicant, and any additional adult members of the household, must also disclose to the home study preparer and USCIS any [criminal] history, whether in the United States or abroad, of any arrest and/or conviction (other than for minor traffic offenses). . . .

After the applicant and any additional adult member of the household's criminal history is disclosed, the home study preparer must then:

> Include 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 for anyone subject to the home study and a written statement submitted with the home study giving details, including any mitigating circumstances about each arrest, signed, under penalty of perjury, by the person to whom the arrest relates.

8 C.F.R. § 204.311(c)(12).

The regulation provides, in pertinent part, at 8 C.F.R. § 204.309(a)(1), that USCIS *must deny* a Form I-800A if:

> The applicant or any additional adult member of the household failed to disclose to the home study preparer or to USCIS, or concealed or misrepresented, any fact(s) about the applicant or any additional member of the household concerning the arrest, conviction . . . or any other criminal history as an offender; the fact that an arrest or conviction or other criminal history has been expunged, sealed, pardoned, or the subject of any other amelioration does not relieve the applicant or additional adult member of the household of the obligation to disclose the arrest, conviction or other criminal history. . . .

(Emphasis added). Under the regulation at 8 C.F.R. § 204.309(c), before denying a Form I-800A for failure to disclose criminal history, USCIS will issue a Notice of Intent to Deny (NOID) the application. Pursuant to the regulation at 8 C.F.R. § 204.309(d), in order to rebut the NOID, an applicant must establish by clear and convincing evidence that:

> (1) The applicant or additional adult member of the household did, in fact, disclose the information; or
>
> (2) If it was an additional adult member of the household who . . . failed to disclose to the home study preparer or to USCIS . . . any fact(s) concerning the arrest, conviction . . . or other criminal history . . . that that person is no longer a member of the household and that that person's conduct is no longer relevant to the suitability of the applicant as the adoptive parent of a Convention adoptee.[1]

Facts and Procedural History

The petitioner is a 49 year old married U.S. citizen. She filed the instant Form I-800A on December 10, 2013. The record reflects that the applicant was arrested in Illinois in December 1988, and charged with two counts of Forgery and one count of Theft. The Forgery charges were dismissed and the Theft charge was reduced to a misdemeanor charge for which the applicant was found guilty. The director issued a NOID on January 27, 2014, informing the applicant of the intent to deny the Form I-800A application based on the applicant's failure to disclose her 1988 criminal history to USCIS and to the home study preparer. The director determined that the applicant's response to the NOID did not overcome the basis for denial. The application was denied accordingly.

On appeal, the applicant admits that she failed to disclose her 1988 criminal history to USCIS and to the home study preparer. She explains that she disclosed her other arrests and criminal history, that her failure to disclose the 1988 arrest and conviction was not intentional, and that she simply forgot about the 1988 arrest; and she asserts that evidence in the record demonstrates

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[1] If USCIS denies a Form I-800A pursuant to 8 C.F.R. § 204.309(a) for failure to disclose criminal history, the applicant will be barred from filing a subsequent Form I-800A for one year after the date on which the decision becomes administratively final. 8 C.F.R. § 204.307(c)(2).

that she is suitable as an adoptive parent. The applicant additionally indicates that the home study preparer was federally mandated to do a nationwide criminal history background check in her case prior to preparing the home study report; her 1988 criminal history would have been revealed if the home study preparer had done a nationwide background check; she would have discussed the arrest if it had been pointed out to her by the home study preparer; and the home study preparer's negligence contributed to her failure to disclose her 1988 criminal history.

Analysis

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We find, upon review, that the evidence in the record does not demonstrate that the applicant disclosed her 1988 criminal history to USCIS or to the home study preparer, as required under 8 C.F.R. § 204.309(d).

We acknowledge the sympathetic facts surrounding the petitioner's intent to adopt her two grandchildren; however, USCIS has no discretion to approve a Form I-800A when an applicant fails to disclose a conviction. 8 C.F.R. § 204.309(a)(1)("USCIS must deny a Form I-800A if the applicant . . . failed to disclose to the home study preparer . . . any fact(s) about the applicant . . . concerning the arrest, conviction . . . or any other criminal history as an offender . . . ."). As noted in the Preamble to the interim rule on Intercountry Adoptions Under the Hague Convention (Hague Rule):

> **New 8 CFR 204.309—Factors Requiring Denial of a Form I-800A or I-800**
> As noted, current 8 CFR 204.3(e)(2)(iii)(D) permits USCIS to deny a Form I-600A or Form I-600 if the prospective adoptive parents conceal material facts or fail to cooperate in the completion of the home study. This principle is carried forward in new 8 CFR 204.309(a). Under the current rule, the question of whether to deny a Form I-600A or Form I-600 based on one of these improprieties is discretionary. New 8 CFR 204.309(a), by contrast, makes denial mandatory. Under section 101(b)(1)(G)(i)(I) of the Act, DHS may approve prospective adoptive parent(s) for intercountry adoption only if DHS is satisfied that any child that may be adopted will receive proper care. DHS is not willing to make this finding in any case in which the prospective adoptive parent(s) has (have) failed to disclose all facts concerning issues that may have a bearing on whether USCIS should find that the prospective adoptive parent(s) is (are) suitable for intercountry adoption.

72 Fed. Reg. 56832-66, 56842 (Oct. 4, 2007). We lack authority to contravene the express language of applicable regulations. *See, e.g., United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (holding that government officials are bound to adhere to the governing statute and regulations).

To establish that she meets statutory requirements for approval of her Form I-800A, the applicant refers to regulations at 8 C.F.R. § 204.3(d) and (e), and 22 C.F.R. § 96.47. The applicant also refers to provisions within California State law and the *Adam Walsh Child Protection and Safety Act of 2006* (P.L. 109-248) pertaining to adoption-related criminal background requirements. The regulatory provisions contained in 8 C.F.R. § 204.3 pertain to non-Hague adoption cases arising

under section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F), and are therefore not applicable here. The regulations at 22 C.F.R. § 96.47, which govern accreditation of agencies under the Intercountry Adoption Act of 2000, and the provisions of California State law and the *Adam Walsh Child Protection and Safety Act of 2006* relating to criminal background checks are similarly inapplicable, as they don't address the issue present on appeal - a prospective adoptive parent's duty of candor to disclose all facts relating to his or her criminal history.

The regulation at 8 C.F.R. § 204.309(a)(1) applies to Hague Adoption Convention cases such as the applicant's, and clearly reflects that USCIS must deny a Form I-800A if the applicant fails to disclose to the home study preparer or to USCIS, any fact concerning an arrest, conviction, or any other criminal history of the applicant. Here it is undisputed that the applicant did not disclose her 1988 criminal history to USCIS on her Form I-800A, and she did not disclose the 1988 criminal history to the home study preparer during her home study interview. The applicant's Form I-800A must therefore be denied.

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. The dismissal of the appeal is without prejudice to the filing of a new Form I-800A no earlier than one year from the date of this decision as provided by the regulation at 8 C.F.R. § 204.307(c)(2), or the filing of an alien relative petition (Form I-130) once the applicant has satisfied section 101(b)(1)(E) of the Act.

ORDER: The appeal is dismissed. The application will remain denied.