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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE

Office: Seattle

Date:

NOV - 4 2002

IN RE: Applicant:

APPLICATION:

Application for Certificate of Citizenship under Section 341(a) of
the Immigration and Nationality Act, 8 U.S.C. § 1452(a)

IN BEHALF OF APPLICANT: Self-represented

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Seattle, Washington, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born in England on November 4, 1945, under the name of [REDACTED]. The applicant was adopted by [REDACTED] in December 1946. The applicant's natural mother, [REDACTED], was born in England in November 1924 and never had a claim to United States citizenship. [REDACTED] died in May 1988. The applicant's natural father, [REDACTED] was born in the United States on August 28, 1922. [REDACTED] died in December 1998. The applicant's parents never married. [REDACTED] is alleged to be the applicant's father through DNA tests.

The applicant seeks a certificate of citizenship, as provided under section 341(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1452(a), based upon the claim that he acquired United States citizenship at birth through his natural father under section 309(b) of the Immigration and Nationality Act, 8 U.S.C. §1409.

The district director determined the applicant had failed to establish he had been legitimated while under the age of 21 years and denied the application accordingly.

On appeal, the applicant discusses his father's military service, the results of DNA testing, and the general logic of the decision. The applicant then states that, had he been born at any time other than between certain dates in 1941 and 1952, he would have been issued a certificate already.

The citizenship of a person born outside the United States is determined by the statutes and law in existence at the time of the person's birth. Matter of B--, 5 I&N Dec. 291 (BIA 1953), overruled on other grounds; Matter of M--, 7 I&N Dec. 646 (BIA 1958); Montana v. Kennedy, 278 F.2d 68 (7th Cir. 1960), aff'd, 366 U.S. 308 (1961).

Section 309(b) of the Act provides, in part, that:

Except as otherwise provided in section 405 of the Act, 8 U.S.C. § 1101, the provisions of section 301(g) shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if paternity of such child is established at any time while such child is under the age of 21 years by legitimation.

The applicant did not acquire U.S. citizenship under § 309 of the Act because he was never legitimated by his natural father.

Section 201(g) of NA 1940 granted citizenship to a legitimate child born abroad to one U.S. citizen and one alien parent and section 205 of NA 1940 granted citizenship to an illegitimate child born abroad to one U.S. citizen and one alien parent only through

subsequent legitimation. Therefore, the applicant does not qualify for citizenship under either of these statutes.

Contrary to assertions on appeal, the applicant's birth between 1941 and 1952 allows the application to be considered under section 201(i) of the Nationality Act of 1940 (NA 1940), 8 U.S.C. § 601(i), the related case law, and Service and Department of State interpretations.

Section 201(i) of NA 1940, was in effect at the time of the applicant's birth. Section 405 of the Act, 8 U.S.C. § 1101, contains savings clauses of applicable statutes which may have a bearing on the preservation of status or of inchoate rights, when the provisions of earlier statutes are more favorable.

The record reflects that [REDACTED] was a member of the U.S. Armed Forces during this period of time and received a discharge on November 6, 1945. In 1946, due to the presence of the United States Armed Forces in many locations abroad, Congress passed an amendment to the 1940 Act. That amendment became section 201(i) of NA 1940. In summary, section 201(i) of NA 1940 provided another means for a child born out of wedlock abroad to a U.S. citizen father and an alien mother to become a U.S. citizen at birth. Such an applicant must prove that he has a "parent" who, prior to the birth of the child:

- (1) served honorably in the Armed Forces during a period subsequent to December 7, 1941, and prior to December 31, 1946, and failed to meet the requirements of section 201(g) of NA 1940; and
- (2) resided in the United States or outlying possession for at least 10 years prior to the child's birth, at least 5 of which were after attaining the age of 12 years, the other parent being an alien.

Section 205 of NA 1940, 8 U.S.C. § 605, provided that a child born abroad out of wedlock could claim citizenship through the child's father if "paternity" was established during minority, by legitimation, or adjudication of a competent court." By its terms, however, section 205 applied only to subsections (c), (d), (e), and (g) of section 201, and made no mention of section 201(i). In an early precedent, the Service concluded that absence from section 205 of a reference to section 201(i) meant that a child born out of wedlock could not claim the benefit of section 201(i), even if legitimated. Matter of G-, 3 I&N Dec. 794 (CO 1949). The Department of State, by contrast, held that a child born out of wedlock was entitled to citizenship under section 201(i) if the child's father had met the service and residence requirements and had legitimated the child. Memorandum from the General Counsel to the Commissioner of Immigration and Naturalization (July 22, 1952) ("the 1952 Memorandum"). The General Counsel recommended that the Service withdraw from Matter of G-, supra, and concur in the Department of State's conclusion that a child born out of wedlock, but legitimated, could claim citizenship under section 201(i). The

General Counsel reiterated this position in a more recent opinion. Memorandum from [REDACTED] (February 9, 1988) ("the 1988 Memorandum").

The 1952 Memorandum does not support the applicant's case, since it does not appear that the applicant was ever legitimated. At least two district courts have held that neither legitimate birth, nor legitimation, is an essential element to a claim under section 201(i).

In C.M.K. v. Richardson, 371 F. Supp. 183 (E.D. Mich. 1974), the court held that section 201(i) of NA 1940 does not implicitly include the legitimacy requirement of section 205 of NA 1940. The court held that section 205 of NA 1940, requiring legitimation before the age of 21, is by its terms not applicable to section 201(i) of NA 1940, which was added several years later.

In Y.T. v. Bell, 478 F. Supp. 828 (W.D. Pa. 1979), the court held that section 201(i) and 205 of NA 1940 remain clear and unambiguous. The court read the section 201(i) proviso requiring the person to reside in the United States for 5 years before reaching majority as the only condition subsequent to attaining or retaining American citizenship where the pre-condition of parentage has been met. (Accordingly, legitimation is not required).

Neither judgement, however, binds the Service in its adjudication of the applicant's case. Matter of K-S-, 20 I&N Dec. 715 (BIA 1993). At least one district court has held that an out of wedlock child must have been legitimated to claim citizenship under section 201(i). Santos v. INS, 525 F. Supp. 655 (S.D.N.Y. 1981).

Moreover, the courts in Bell and Richardson fundamentally misconstrued the effect of section 205 of NA 1940. Early in this century, the administrative view had been that a child born abroad out of wedlock, but legitimated, could be considered the legal child of the biological father, for purposes of the nationality laws. 39 Op. Atty. Gen. 556 (1937); 32 Op. Atty. Gen. 162 (1920). The First and Ninth Circuits, however, each rejected this view. Mason ex rel. Chin Suey v. Tillinghast, 26 F.2d 588 (1st Cir. 1928); Ng Suey Hi v. Weedon, 21 F.2d 801 (9th Cir. 1927). The courts held that a child born abroad out of wedlock could not claim citizenship as the legal child of the biological father unless Congress were to enact a statute to permit this result. In response to these decisions, the Attorney General receded from his earlier opinions, and concluded that children born abroad out of wedlock could not claim citizenship through their fathers. 39 Op. Atty. Gen. 397 (1939).

It is further noted that the court in LeBrun v. Thornburgh, 777 F.Supp, 1204 (D.N.J. 1991), ruled that section 309 of the Act was unconstitutional as applied to illegitimate children because of its requirement that a foreign-born child of a United States citizen be formally "legitimated" by the age of 21. That matter involved a person who was born in France in August 1945 to a father who was a U.S. citizen and to a mother who was a French citizen. The parents

also never married. The father in that matter acknowledged paternity in April 1981 and died in August 1981.

Enactment of section 205 of NA 1940 soon followed, expressly authorizing citizenship for children born out of wedlock, but subsequently legitimated. With deference to the Bell and Richardson courts, holding that section 201(i) does not confer citizenship on a child born abroad out of wedlock, but never legitimated, does not "read into" section 201(i) a requirement that Congress did not intend. Rather, this interpretation of section 201(i) simply follows the general rule of law that would have applied to all children born abroad out of wedlock, absent enactment of section 205. Tillinghast and Weedin, supra. Congress enacted a specific exception to this general rule: a child born out of wedlock could claim citizenship through his or her father only if the father legitimated the child. Congress had the constitutional authority to make this distinction between those children who were born abroad out of wedlock, but legitimated, and those who were not legitimated.

The Administrative Appeals Office notes that the Department of State has elected to follow Bell in adjudicating passport cases. 7 F.A.M. 1134.4-2(e). On legal questions arising within the Executive Branch under the immigration and nationality laws, the Attorney General's opinion is controlling. Section 103(a) of the Act, 8 U.S.C. § 1103(a). The Service is the Attorney General's delegate for purposes of most aspects of the administration of the immigration and nationality laws. 8 C.F.R. § 2.1. The Department of State's decision to follow Bell, therefore, does not bind the AAO. The judgments in Tillinghast and Weedin make it clear that Bell and Richardson were wrongly decided. For this reason, the AAO determines that it should not follow the Department of State.

Since the applicant is not within the scope of section 205's exception, the general rule of law, as stated in Tillinghast and Weedin, governs this case. The applicant has not proven that, before his 21st birthday, [REDACTED] had legitimated him as his son. [REDACTED] was never the applicant's "parent" for the purpose of section 201(i) of NA 1940. Therefore, the appeal will be dismissed.

This decision does not prevent the applicant from seeking to qualify for a U.S. passport at an American Consulate abroad or a Department of State Passport Office in the United States based on the Department of State's more liberal interpretation of Bell in matters involving section 201(i) of NA 1940.

ORDER: The appeal is dismissed.