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U.S. Department of Justice

Immigration and Naturalization Service

EZ

OFFICE OF ADMINISTRATIVE APPEALS
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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

FEB 28 2003

FILE: 

Office: Denver

Date:

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: 

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, Denver, Colorado, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born in Mexico on September 1, 1976. The applicant's father, [REDACTED] was born in the United States in April 1961. The applicant's mother, [REDACTED] was born in Mexico in August 1946 and never had a claim to U.S. citizenship. The applicant's parents never married each other. The applicant seeks a certificate of citizenship under section 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1409.

The district director granted the applicant additional time in which to provide evidence that he had been legitimated pursuant to the statute. The district director also noted that the applicant's father could not meet the physical presence requirements due to his birth in 1961. Failing to receive that evidence, the district director determined that the applicant failed to establish his eligibility for the benefit sought and denied the application accordingly.

On appeal, counsel restates the district director's grounds for denial and asserts that there is no statutory authority for the position that the physical presence requirement cannot be met because the U.S. citizen parent was only 15 years old at the time of the applicant's birth.

Montana v. Kennedy, 278 F.2d 68, affd. 366 U.S. 308 (1961), held that to determine whether a person acquired citizenship at birth abroad, resort must be had to the statute in effect at the time of birth. The statutory authority of section 301(g) of the Act, 8 U.S.C. § 1401(g) was in effect at the time of the applicant's birth. This section specifically requires the applicant to establish that prior to the applicant's birth, the citizen parent must have resided (been physically present) in the United States or in an outlying possession for 10 years, at least 5 of which were after age 14.

Section 309(a) of the Act was amended by Pub. L. 99-653 and was effective as of the date of enactment, November 14, 1986. The old section 309(a) shall apply to any individual who has attained 18 years of age as of the date of the enactment of this Act.

However, pursuant to the Immigration Technical Corrections Amendments of 1988 (Pub.L. 100-525, 102 Stat. 2617), an individual who is at least 15 years of age, but under 18 years of age as of the date of the enactment of this Act, may elect to have the old section 309(a) apply to the individual instead of the new section 309(a). The applicant was 10 years old in November 1986, therefore, the present section 309 of the Act shall apply.

Section 309 of the Act provides, in part, that:

- (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and paragraph (2) of section 308, shall

apply as of the date of birth to a person born out of wedlock if-

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years-

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

Although the record contains DNA evidence of parentage, the record fails to contain the father's agreement in writing to provide financial support for the person until the person reaches the age of 18 years of age. The applicant is now 26 years old.

The record contains evidence to show that his father was only 15 years and 5 months old at the time of the applicant's birth. Therefore, it was impossible for the applicant's father to be physically present in the United States for 5 years after age 14 and prior to the applicant's birth. Due to the impossibility of the applicant's father meeting the physical presence requirements necessary for the applicant to have derived United States citizenship at the time of his birth, the remaining issues in this matter are moot and need not be addressed.

Pursuant to 8 C.F.R. § 341.2(c), the burden of proof shall be upon the claimant, or his parent or guardian if one is acting in his behalf, to establish the claimed citizenship by a preponderance of the evidence. The applicant in this matter has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.