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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services



MAR 01 2004

FILE: [Redacted]

Office: HOUSTON, TEXAS

Date:

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship under Section 309 of the Immigration and Nationality Act, 8 U.S.C. § 1409.

ON BEHALF OF APPLICANT:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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 application was denied by the District Director, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on February 1, 1963, in Miguel Aleman, Tamaulipas, Mexico. The applicant's natural father, [REDACTED] was born a United States (U.S.) citizen on September 30, 1944. The applicant's mother, [REDACTED] is a native of Mexico and has no claim to U.S. citizenship. The applicant was born out of wedlock and her birth certificate contains no information regarding her natural father. The record reflects that the applicant's parents never married and that the applicant's birth certificate was never amended to reflect her father's name. On August 21, 2002, the Starr County, Texas Court of Law issued a final order establishing parentage between the applicant and her natural father, and pronounced that the order was effective Nunc Pro Tunc and retroactive to February 1, 1973. The applicant presently seeks a certificate of citizenship pursuant to section 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1409, based on the claim that she acquired U.S. citizenship through her father.

The district director determined that the applicant had not been legitimated by her father prior to her twenty-first birthday. The district director concluded that the applicant had therefore failed to meet the requirements for U.S. citizenship pursuant to section 309 of the Act. The application was denied accordingly.

On appeal, counsel asserts that the August 21, 2002, Nunc Pro Tunc, Retroactive, Parentage Order issued by the Starr County, Texas, Court at Law, establishes that the applicant's father (Mr. [REDACTED]) legitimated the applicant on February 1, 1973, when she was 10 years old. Counsel asserts that the applicant has therefore established that she is a U.S. citizen under section 309 of the Act.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir., 2000) (citations omitted).

Prior to November 14, 1986, Section 309(a) of the former Act, stated in pertinent part that:

- (a) The provisions of paragraphs (3), (4), and (7) of section 301(a), and of the paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.¹

Section 101(c) of the Act states, in pertinent part, that:

- (1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and . . . the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.

¹ The AAO notes that in order to derive citizenship pursuant to section 301(a)(7) of the former Act, it must be established that when the child was born, the U.S. citizen parent was physically present in the U.S. or its outlying possession for 10 years, at least 5 of which were after the age of 14. See § 301(a)(7) of the former Act.

Based on the evidence in the record, the applicant's residence or domicile prior to her twenty-first birthday was in Mexico. The AAO notes that pursuant to Article 130 of the Constitution of Mexico, legitimation of an out-of-wedlock child occurs only if the natural parents marry through a civil marriage. *See Matter of Rodriguez-Cruz*, 18 I&N Dec. 72 (BIA 1981). In the present case, the applicant's parents never married. The applicant was therefore not legitimated in Mexico.

The AAO notes further that Section 13.21 of the Texas Family Code, in existence prior to the applicant's twenty-first birthday, provided, in pertinent part, that:

- (a) If a statement of paternity has been executed by the father of an illegitimate child, the father . . . may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.
- (b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:
 - 1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;
 - 2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and
 - 3) the mother or the managing conservator, if any, has consented to the decree.

The record in the present case does not contain a court decree indicating that the applicant's father took any action to legitimate the applicant under section 13.21 of the former Texas Family Code, prior to her twenty-first birthday. Moreover, courts have held that retroactive or nunc pro tunc state court orders are not recognized for purposes of obtaining immigration benefits. *See Hendrix v. INS*, 583 F.2d 1102 (1978). *See also, Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000).

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. *See also* § 341 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1452. The applicant has failed to meet her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal will be dismissed.