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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[REDACTED]

NOV 03 2004

FILE:

[REDACTED]

Office: HARLINGEN, TEXAS

Date:

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship under sections 309(c) and 301(a)(7) of the former Immigration and Nationality Act; 8 U.S.C. §§ 1409(c) and 1401(a)(7).

ON BEHALF OF APPLICANT:

[REDACTED]

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, Harlingen, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was born on September 14, 1965, in Mexico. The applicant's mother, [REDACTED] was born on February 24, 1940, in Mexico, and she derived U.S. citizenship at birth through her U.S. citizen parent. The applicant's father, [REDACTED] was born on April 25, 1936, in Mexico, and he was not a U.S. citizen. The applicant's parents were married in Mexico on April 22, 1965. The record reflects that the applicant's father died in Mexico on May 21, 1965, prior to the applicant's birth. The applicant seeks a certificate of citizenship pursuant to section 309(c) of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1409, based on the claim that he acquired U.S. citizenship at birth through his mother.

The district director found that the applicant was not eligible for citizenship under section 309(c) of the former Act because he failed to establish that his mother had been unmarried at the time of his birth, or that he was born out of wedlock. The district director found further that the applicant failed to establish that his mother satisfied the physical presence requirements set forth in section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7). The application was denied accordingly.

On appeal, counsel asserts that the term "out-of-wedlock" is a different and more generous term than "legitimacy" and that the intent of section 309(c) of the former Act is to protect the child. Counsel concludes that it can therefore be presumed that, in drafting the language contained in section 309(c) of the former Act, Congress considered a child born after the death of his father to be fatherless, and born out of wedlock. Counsel does not address the district director's finding that the applicant was ineligible for citizenship under section 301(a)(7) of the former Act.

"When there is a claim of citizenship . . . one born abroad is presumed to be an alien and must go forward with evidence to establish his claim to United States citizenship." *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969) (citations omitted). The applicant was born in 1965. The provisions of section 301 or section 309 of the former Act therefore apply to the present matter.

Section 309 of the Act, 8 U.S.C. § 1409, states in pertinent part that:

- (a) The provisions of paragraphs (3)(4)(5), and (7) of section 301(a) . . . of this title shall apply as of the date of birth to a child 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.
- (b) [T]he provisions of section 301(a)(7) shall apply to a child born out-of-wedlock on or after January 13, 1941, and prior to the effective date of this Act, as of the date of birth, if the paternity of such child is established before the effective date of this Act and while such child is under the age of twenty-one by legitimation.
- (c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been

physically present in the United States or one of its outlying possessions for a continuous period of one year.

The AAO finds counsel's assertion that Congress intended a child of married parents who is born posthumously to be considered a child born out-of-wedlock, to be unsupported by any legal evidence and contrary to the plain meaning of the term "born out-of-wedlock" (which by any definition means, born to unmarried parents. See WEBSTERS NEW COLLEGIATE DICTIONARY, Ninth Edition). The record in the present matter contains a marriage certificate reflecting that the applicant's parents were legally married in Mexico on April 22, 1965, prior to the applicant's birth. The applicant therefore does not qualify as a child born out-of-wedlock, and he is ineligible for consideration under section 309(c) of the former Act.

Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7) states in pertinent part that:

The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

The definition of "physical presence" was addressed by the Board of Immigration Appeals (Board) in *Matter of V*, 9 I&N Dec. 558, 560 (BIA 1962). The Board determined that the term "physical presence" meant "continuous physical presence" or "residence" in the United States.

In support of his claim, the applicant submitted two November 28, 1995, affidavits written by his maternal grandmother (Ms. [REDACTED]), stating that the applicant's mother (Ms. [REDACTED]) was born in Mexico, but that she lived in Port Isabel, Texas with her grandparents for about two years between the ages of nine and eleven. Ms. [REDACTED] states further that Ms. [REDACTED] also stayed with her grandmother in Port Isabel, Texas for extended periods of time after she turned fifteen years old. The record contains no other evidence relating to Ms. [REDACTED] physical presence in the U.S. between February 24, 1940 and September 14, 1965.

The AAO finds that the November 28, 1995 affidavits written by Ms. [REDACTED] are unsupported by any corroborative evidence, and that they lack material details and evidence relating to the locations and dates that Ms. [REDACTED] resided in Texas. The AAO therefore finds that the affidavits lack probative value and fail to establish that Ms. [REDACTED] resided in the U.S. at any time during the requisite time period set forth in section 301(a)(7) of the former Act.

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. The applicant in the present case has failed to meet his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.