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**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

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FILE:  Office: SAN JOSE, CALIFORNIA

Date: **OCT 28 2005**

IN RE: Applicant: 

APPLICATION: Application for Certificate of Citizenship under §§ 309 and 301 of the former Immigration and Nationality Act, 8 U.S.C. §§ 1409 and 1401.

ON BEHALF OF APPLICANT:

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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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Jose, California, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born in Mexico on February 17, 1967. The applicant's father was born in California in 1928, and he is a U.S. citizen. The applicant's mother is not a U.S. citizen. The record reflects that the applicant's parents did not marry. The applicant seeks a certificate of citizenship pursuant to §§ 309 and 301 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. §§ 1409 and 1401, based on the claim that he acquired U.S. citizenship at birth through his U.S. citizen father.

The district director concluded the applicant had failed to establish that he was legitimated by his father prior to his twenty-first birthday. Specifically, the district director concluded that the applicant's father had not received him into his family or treated him as his legitimate son, as required for legitimation under California law. The application was denied accordingly.

On appeal, the applicant indicates that his father publicly recognized him and received him into his home. The applicant asserts that he was legitimated by his father prior to his twenty-first birthday, and that he is entitled to U.S. citizenship.

"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). The applicant in the present matter was born in 1967; therefore, § 301(a)(7) of the former Act applies to the present case.

Section 301(a)(7) of the former Act states 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 and its outlying possessions 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 or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

Section 101(c) of the Act, 8 U.S.C. § 1101(c) states, in pertinent part, that for Title III naturalization and citizenship purposes:

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 . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.

In order to meet the definition of "child" prior to November 14, 1986, § 309 of the former Act required that paternity be established by legitimation while the child was under twenty-one. Subsequent amendments made to the Act in 1986, provided that a new § 309(a) would apply to persons who had not attained eighteen years

of age as of the November 14, 1986, date of the enactment of the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA). The amendments provided that the former § 309(a) applied to any individual who had attained eighteen years of age as of November 14, 1986, or with respect to whom paternity had been established by legitimation prior to the same date. *See § 13 of the INAA, supra. See also § 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609.*

In the present matter, the applicant was over the age of eighteen on November 14, 1986. The AAO will therefore assess the applicant's claim pursuant to § 309(a) requirements under the former Act. Accordingly, the applicant must establish that he was legitimated by his father prior to his twenty-first birthday, under the law of the applicant's residence or domicile (Mexico), or under the law of his father's residence or domicile (California).

Pursuant to article 130 of the Mexican Constitution, a child born out of wedlock in Mexico becomes legitimated only upon the civil marriage of his or her parents. *See Matter of M-D-*, 3 I&N Dec. 485 (BIA 1949). *See also, Matter of Hernandez*, 14 I&N Dec. 608 (BIA 1974) and *Matter of Rodriguez-Cruz*, 18 I&N Dec. 72 (BIA 1981). The applicant has failed to establish that his parents legally married prior to his twenty-first birthday; therefore, he was not legitimated by his father pursuant to the laws in Mexico.

The AAO finds, however, that the applicant has established that he was legitimated by his father in accordance with legitimation laws in California, prior to his twenty-first birthday. Section 230 of the California Civil Code, which was in effect until 1975, provided that:

The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were legitimate child thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.

Regarding the applicant's relationship with his father, the record includes the applicant's Mexican birth certificate, on which his father's name appears. The applicant's certificate of baptism also lists his father's name. The applicant's father's mother, sister, and sister-in-law all provided statements in which they declared that the applicant's father supported the applicant financially. The applicant stated under oath that he resided with his father and mother in California from about two months of age to three or four years old, and thereafter he resided in Mexico with his mother until he was about twenty. The applicant also stated that his father sent him money, called him on the telephone, and visited him in Mexico. There is no evidence that the applicant's parents ever married other partners. Since the evidence establishes that the applicant's father publicly acknowledged him and received him into his home from the time the applicant was an infant, the AAO finds that the applicant was legitimated under California law.

Regarding whether the applicant was in his father's legal custody at the time of his legitimation, the AAO notes that legal custody vests "by virtue of either a natural right of a court decree." *See Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). In the absence of a court decree, both parents have the natural right to legal custody of their child. The AAO finds that while the applicant lived with his father and was legitimated, he was in his father's legal custody.

The evidence also establishes that the applicant's father was physically present in the United States for a total of ten years prior to the applicant's birth in 1967, five of which were after his fourteenth birthday in 1942. The record contains the applicant's father's birth certificate showing his birth in California in 1928. In a statement submitted in response to the district director's request for evidence, the applicant's father's sister declared that she lived with the applicant's father in the United States from 1951 until 1953. She stated further that she was personally aware that the applicant's father continued to live in the United States until his death in 1989. The applicant's aunt's statement provides evidence of his father's physical presence in the United States for sixteen years prior to the applicant's birth and after the former's fourteenth birthday. The applicant submitted a copy of his father's social security earnings statement reflecting the applicant's father's physical presence in the United States from 1955 to 1967, 1969, 1971 to 1973, and 1976 to 1980. This document provides evidence of twelve years of physical presence prior to the applicant's birth and subsequent to his father's fourteenth birthday. The record thus establishes that the applicant's father met the physical presence requirements set forth in § 301(a)(7) of the former Act.

The applicant has established that he was born to a U.S. citizen father who legitimated him, and who met the physical presence requirements outlined in § 301(a)(7) of the former Act. The applicant has therefore established that he is eligible for a certificate of citizenship under § 301(a)(7) of the former Act. The appeal will be sustained.

ORDER: The appeal is sustained.