

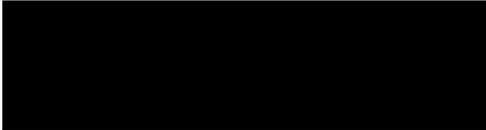


U.S. Citizenship
and Immigration
Services

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FILE:



Office: EL PASO, TEXAS

Date:

SEP 26 2005

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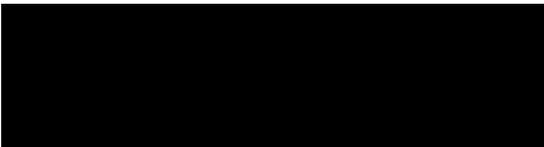
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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, El Paso, Texas. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Juarez, Mexico on December 19, 1963. The applicant's birth certificate states that his father is [REDACTED] a Mexican citizen. The applicant claims however, that his biological father is [REDACTED] and that [REDACTED] was born in New Mexico and is a United States citizen. The applicant's mother [REDACTED] was born in Mexico on July 29, 1933, and she is not a U.S. citizen. [REDACTED] and [REDACTED] were married in Texas on February 2, 1972, when the applicant was eight years old. The record reflects that [REDACTED] legally adopted the applicant in Mexico on February 26, 1975, when the applicant was eleven years old. The applicant presently seeks a certificate of citizenship pursuant to section 301 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1401, based on the claim that he derived U.S. citizenship at birth through his biological father.

The district director found the applicant had failed to establish that [REDACTED] was his biological father or that he had a U.S. citizen parent, as required by section 301 of the former Act. The district director determined further that the citizenship provisions contained in section 321 of the former Act, 8 U.S.C. § 1432 (for children of naturalized U.S. citizen parents), were inapplicable to the applicant's case. The application was denied accordingly.

On appeal, counsel asserts the record contains evidence that [REDACTED] and [REDACTED] had a daughter named [REDACTED]. Counsel asserts that the applicant has submitted DNA evidence establishing that he and [REDACTED] are full-blooded siblings. Counsel concludes that the applicant has thus established that [REDACTED] is his biological father and that his application for citizenship should be approved.¹

The record contains the following evidence relating to [REDACTED]'s paternity over the applicant:

¹ Counsel does not dispute that the applicant does not qualify for citizenship under section 321 of the former Act, which stated in pertinent part that:

- (a) A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
 - (1) The naturalization of both parents; or
 - (2) The naturalization of the surviving parent if one of the parents is deceased; or
 - (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
 - (4) Such naturalization takes place while such child is under the age of eighteen years; and
 - (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

A Mexican birth certificate reflecting that the applicant was named [REDACTED] at birth, and that he was born to [REDACTED] and [REDACTED] (father) on December 19, 1963.

A Texas marriage certificate reflecting that [REDACTED] and [REDACTED] were married on February 2, 1972.

A Mexican adoption decree reflecting that on February 26, 1975, [REDACTED] legally adopted the applicant, [REDACTED], born December 19, 1963, (known, as of the date of the adoption, as [REDACTED]). The adoption decree reflects that [REDACTED] also adopted [REDACTED], and [REDACTED] Chacon.

A Mexican birth certificate reflecting that [REDACTED] was born on January 1968 to [REDACTED] and [REDACTED] (mother).

Results from a DNA "Siblingship Analysis" reflecting a 99.99206955% probability that [REDACTED] and [REDACTED] are full siblings.

The AAO finds that despite the contrary paternity information contained in the applicant's birth certificate, the cumulative evidence submitted by the applicant establishes that [REDACTED] is the applicant's biological father.

Prior to November 14, 1986, section 309 of the former Act required that in cases involving a child born out of wedlock, paternity must be established by legitimation while the child is under twenty-one. Subsequent amendments made to the Act in 1986 provided that a new section 309(a) applied to persons who had not attained eighteen years of age as of the November 14, 1986. *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA). Amendments provided however, that the former section 309 applied to any individual who had attained eighteen years of age as of November 14, 1986, and that former section 309 applied to any individual with respect to whom paternity had been established by legitimation prior to November 14, 1986. *See* section 13 of the INAA, *supra*. *See also* section 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609.

The record reflects that the applicant was born prior to November 14, 1986, and that he was over the age of eighteen on November 14, 1986. The AAO will therefore analyze the present matter pursuant to the legitimation requirements contained in pre-1986, section 309 provisions.

Section 101(c) of the Act 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 [for former section 309 purposes, the age of 21] . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.

The record reflects that the applicant resided in Mexico at the time of his parent's marriage in 1972, and prior to his twenty-first birthday. Article 130 of the Mexican Constitution, reflects that a child born out of wedlock in Mexico becomes legitimated upon the civil marriage of his or her parents. *See Matter of Rodriguez-Cruz*, 18 I&N Dec. 72 (BIA 1981). The applicant has established that his parents were legally married prior to his twenty-first birthday. The AAO therefore finds that the applicant was legitimated by his father pursuant to the laws of the applicant's residence and place of domicile in Mexico

"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." *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant was born in Mexico in 1963. Section 301(a)(7) of the former Act (now known as section 301(g) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g)) therefore controls his claim to derivative citizenship.

Section 301(a)(7) of the former Act 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 applicant must thus establish that [REDACTED] was physically present in the U.S. for ten years between March 8, 1933 and December 19, 1963, and that five of those years occurred after March 8, 1947, when [REDACTED] turned fourteen.

The record contains the following evidence pertaining to [REDACTED] physical presence in the United States during the requisite time period:

A New Mexico birth certificate reflecting that [REDACTED] was born in Luna County, New Mexico on March 8, 1933, to [REDACTED] (father) and [REDACTED] (mother).

An Application for Social Security Account Number, reflecting that [REDACTED] resided in New Mexico and applied for a Social Security Number on October 12, 1949. The application reflects further that [REDACTED] parent's names were Jose [REDACTED] (father) and [REDACTED] (mother).

A Social Security Administration Statement of Earnings reflecting the following recorded work history for [REDACTED] between January 1949 and December 1959:

October to December 1949 - \$20.80
October to December 1951 - \$222.50
April to June 1955 - \$14.00
Unknown dates in 1955 - \$331.83
Unknown dates in 1956 - \$385.48
July to December 1957 - \$ 135.70
January to March 1958 - \$130.00

October to December 1958 - \$42.00

Unknown dates in 1958 - \$230.00

Throughout 1959 - \$1411.12

A January 15, 1998 letter from the City of El Paso Personnel Department stating that [REDACTED] was employed as a seasonal worker from November 18, 1959 to June 7, 1971.

A 1960 El Paso, Texas City Directory reflecting that [REDACTED] resided in the city.

A 1934 El Paso, Texas City Directory reflecting that [REDACTED] resided in the city (in Chihuahua Club).

A 1935 El Paso, Texas City Directory reflecting that [REDACTED] resided in the city (in Chihuahua Café).

A 1936 El Paso, Texas City Directory reflecting that [REDACTED] resided in the city (in Chihuahua Café).

A 1940 El Paso, Texas City Directory reflecting that [REDACTED] resided in the city (in Chihuahua Café), and that various persons named [REDACTED] resided in the city.

A 1941 El Paso, Texas City Directory reflecting that [REDACTED] and [REDACTED] resided in the city (in Chihuahua Café).

A 1942 El Paso, Texas City Directory reflecting that [REDACTED] and [REDACTED] resided in the city (in Chihuahua Café), and that [REDACTED] resided in the city at the same address.

A 1943 El Paso, Texas City Directory reflecting that [REDACTED] and [REDACTED] resided in the city (in Chihuahua Café) and that various persons with the name [REDACTED] resided in the city.

A 1944 El Paso, Texas City Directory reflecting that [REDACTED] resided in the city.

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. Under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true. *See Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

The AAO finds that the 1934 through 1944 El Paso, Texas City Directories lack probative value as to [REDACTED] physical presence in the United States. The AAO notes that [REDACTED] stated in his 1949 Social Security Administration application that his father's name was [REDACTED] and the record contains no evidence to establish that [REDACTED], [REDACTED], [REDACTED] or the Margaritas referred to in the City Directories are [REDACTED]'s parents or to establish that [REDACTED] resided with the persons referred to in the directories.

The AAO finds that the Social Security earnings evidence establishes by a preponderance of the evidence that [REDACTED] was physically present in the United States for, at most, six years between 1933 and 1959 (up to five years in 1933, 1955, 1956, 1958 and 1959, up to six months in 1949 and 1951, and up to six months in

1957). The City of El Paso, Texas employment letter submitted by the applicant reflects that that [REDACTED] was a seasonal worker for the city between November 18, 1959 and December 1963. The employment letter does not otherwise specify the length of time that [REDACTED] worked during each year. However, the AAO notes that [REDACTED] Social Security earnings statement reflects that he worked for the City of El Paso, Texas between October and December of 1959. Assuming each season that [REDACTED] worked for the City of El Paso, Texas lasted three months, the AAO finds that the employment letter establishes [REDACTED] was physically present in the U.S. for two years between 1960 and December 1963.

Based on the above cumulative evidence, the AAO finds the applicant has established by a preponderance of the evidence that [REDACTED] was physically present in the United States for up to eight years between March 8, 1933 and December 19, 1963. The applicant has, however, failed to meet his burden of establishing that [REDACTED] was physically present in the United States for ten years prior to his birth as required by section 301(a)(7) of the former Act. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.