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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

E₂

[Redacted]

FILE:

[Redacted]

Office: SAN DIEGO, CA

Date:

APR 02 2007

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Certificate of Citizenship under Sections 309(a) and 301(g) of the
Immigration and Nationality Act; as amended, U.S.C. §§ 1409(a) and 1401(g)

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Diego, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed on March 29, 2007. Based on a misapplication of the physical presence requirements of section 301(g) of the Immigration and Nationality Act (the Act), the AAO reopens the matter for further consideration. The appeal will be dismissed.

The record reflects that the applicant was born on October 7, 1974 in Mexico.¹ The individual identified as the applicant's natural father, [REDACTED] automatically acquired U.S. citizenship at birth on December 25, 1957 through his U.S. citizen mother [REDACTED]. The applicant's mother, [REDACTED] was identified as a Mexican citizen at the time of his birth and the record does not indicate that her nationality has changed. The applicant's parents never married. The applicant seeks a certificate of citizenship pursuant to sections 309 and 301(g) of the Act, as amended, 8 U.S.C. §§ 1409 and 1401(g), based on the claim that he acquired U.S. citizenship at birth through his natural father.

Based on the evidence of record, the district director determined that the applicant had not established that his father, prior to his birth, had been physically present in the United States for at least ten years, five of which followed his 14th birthday, as required by section 301(a)(7) of the Act. Accordingly, he denied the application.

On appeal, counsel asserts that the district director erred in requiring [REDACTED] to have been physically present in the United States for ten years prior to the applicant's birth, five of which occurred after his 14th birthday. She further contends that the U.S. residence of [REDACTED] mother should be imputed to her son as he was a minor at the time of the applicant's birth. Counsel also finds the gender-specific residency requirements of the Act to violate the equal protection guarantees embedded in the Fifth Amendment of the U.S. Constitution.

As the applicant was born out of wedlock to parents who never married, the derivative citizenship provisions set forth in section 309 of the Act apply to this case. Prior to November 14, 1986, section 309 of the Act required a father's paternity to be established by legitimation before a child reached twenty-one years of age. As of that date, the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA) amended section 309, applying the changed provisions to persons who were not yet 18 years of age on November 14, 1986.² As the applicant in this case was only 12 years old on

¹ The record contains a birth certificate and registration that list the applicant's date of birth as [REDACTED] 1975. Although counsel at the time of filing indicated that she was submitting an amended birth certificate to establish the applicant's birth as having occurred on October 7, 1974, that documentation also shows the applicant's date of birth as [REDACTED]. The AAO notes, however, that the applicant's baptismal certificate lists an [REDACTED] date of birth and that other documentation in the record indicates that the applicant was admitted to San Diego University Hospital in December 1974 as a two-month old premature baby. Accordingly, the AAO will accept counsel's claim that the applicant was born on October 7, 1974.

² The Immigration Technical Corrections Act of 1988, Pub.L. 100-525, 102 Stat. 2609, states, in pertinent part:

November 14, 1986, his application will be considered under section 309(a) of the Act, as established by the 1986 amendments.

Section 309(a) of the Act states:

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 . . . 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.

If the applicant establishes his eligibility under section 309(a) of the Act, he must also prove that prior to his birth, his father has met the physical presence requirements of section 301(g) of the Act. Honorable service in the U.S. military, employment with the U.S. Government or with certain international organizations by U.S. citizen parents may qualify as physical presence in the United States.

The AAO now turns to the basis for the district director's denial of the applicant – the failure of the applicant to establish his father's presence in the United States for the requisite period of time prior to his birth. The district director denied the application because [REDACTED] prior to the applicant's birth, had not been physically present in the United States for a total of ten years, five of which followed his 14th

(r) Effective Dates. – INAA is further mended by adding at the end the following new section:

“Effective Dates

“Sec. 23 . . .

“(d) The amendment made by section 12 shall apply to persons born on or after November 14, 1986.

“(e)

(1) Except as provided in paragraph (2)(B), the new section 309(a) (as defined in paragraph 4(A)) shall apply to persons who have not attained 18 years of age as of the date of the enactment of this Act.

birthday, the physical presence requirements of section 301(g) of the Act prior to amendment by the INAA. On appeal, counsel contends that [REDACTED] need have been physically present in the United States for only five years prior to the applicant's birth, two of which followed his 14th birthday, the amended requirements of section 301(g). The AAO notes, however, that while the 1986 amendments to section 309(a) may be applied to individuals who were not yet 18 years of age on the date of that legislation's enactment, the amended language of section 301(g) may be applied only to persons born on or after November 14, 1986.³ Accordingly, the applicant in the present case must establish eligibility under section 301(g) of the Act by proving that his father resided in the United States for ten years prior to his birth, five of which followed Mr. Espinoza's 14th birthday.

Although the applicant has submitted evidence to establish the length of his father's physical presence in the United States, the AAO notes that the applicant was born several months before his father celebrated his 17th birthday. As the applicant's birth occurred only three years after [REDACTED] 4th birthday, it is not possible for the applicant to establish that his father met the residency requirements of section 301(g) of the Act prior to his birth – a total of ten years of physical presence, five of which followed his father's 14th birthday.

Counsel on appeal also contends that section 301(g) of the Act should be construed to impute the residence of a U.S. citizen grandparent, [REDACTED], to a U.S. citizen father who had a child out of wedlock while still a minor, [REDACTED]. She cites the findings of *Cuevas-Gasper v. Gonzalez*, 430 F.3d 1013 (9th Cir. 2005) and *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994) as offering proof of the way in which the courts have dealt with residence under other titles of the Act. Counsel's reasoning is not, however, persuasive. The referenced cases relate to removal proceedings, specifically the imputation of parents' *lawful permanent residence/lawful unrelinquished domicile* in cases involving cancellation of removal and discretionary waiver of deportation. Accordingly, neither the facts of these cases, nor their findings are relevant to the current matter before the AAO – whether the record establishes that the applicant's father has met the *physical presence* requirements of section 301(g) of the Act.

Counsel also contends that the physical presence requirement imposed on the U.S. citizen fathers of children born out of wedlock violates the equal protection guarantees embedded in the Fifth Amendment by discriminating along both age and gender lines. The AAO, like the Board of Immigration Appeals, cannot rule on the constitutionality of laws enacted by the U.S. Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Accordingly, the AAO will not consider counsel's assertions regarding the constitutionality of the residency requirements of section 301(g) of the Act.

Based on the evidence of record, the applicant has not established that his father, [REDACTED] was physically present in the United States for ten years prior to his birth, five of which followed his father's 14th birthday. Accordingly, the appeal will be dismissed.

³ As indicated in Footnote 2, section 23(d) of the Immigration Technical Corrections Act of 1988 states that the amendment made by section 12 of the INAA of 1986, i.e., the amendment to section 301(g) of the Act, applies only to persons born on or after November 14, 1986. In its initial dismissal of the application, the AAO failed to distinguish between the effective date language of section 23(e)(1) of the Immigration Technical Corrections Act of 1988 and that of section 23(d).

Beyond the decision of the director, the AAO also finds the evidence in the record to be insufficient to establish that [REDACTED] supported the applicant financially until he reached 18 years of age, as required by section 309(a)(3) of the Act. [REDACTED] declaration indicates that the applicant "grew up with [her] and [her] children" and that the applicant is like a son to her. [REDACTED] declaration states that the applicant came to live with him at his mother's house following his December 1974 hospitalization. He does not address whether he was financially responsible for the applicant during his childhood. Neither is there any evidence in the record that [REDACTED] supported his son financially until he reached 18 years of age. In the absence of such evidence, the applicant has also failed to establish his eligibility for a certificate of citizenship under section 309(a) of the Act. For this reason as well, the appeal will be dismissed.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in this proceeding.

ORDER: The appeal is dismissed.