

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Er

[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **AUG 29 2007**

IN RE: Applicant [Redacted]

APPLICATION: Application for Certificate of Citizenship under Section 321 of the former Immigration and Nationality Act; 8 U.S.C. § 1432.

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on October 20, 1985 in Guyana. The applicant's birth certificate reflects that his parents were [REDACTED] and [REDACTED]. The applicant's parents were never married to each other. The applicant's father was married to [REDACTED] on August 24, 1980. The applicant's father became a naturalized U.S. citizen on January 31, 1981. He passed away on December 12, 1996. The applicant was admitted to the United States as a lawful permanent resident on March 14, 1988, when he was 2 years old. The applicant seeks a certificate of citizenship claiming that he derived U.S. citizenship through his father.

The director determined that the applicant did not qualify for citizenship under sections 301 and 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401 and 1409, because he did not establish that his father had the required physical presence in the United States. The director further found the applicant ineligible for citizenship under section 321 of the former Act, 8 U.S.C. § 1432, because his parents were never "legally separated." Finally, the director found that the applicant was ineligible for citizenship under section 320 of the Act, 8 U.S.C. § 1431, because he was not in his father's custody on February 27, 2001 when the amendments to that section took effect.

On appeal, the applicant contends that "there is sufficient documentation in the file as evidence of [his] father's physical presence in the U.S. as required by law." See Applicant's Appeal Brief. He further claims that that section 321 of the former Act, 8 U.S.C. § 1432, does not require him to show that his parents were legally separated as they were never married. *Id.* Finally, the applicant maintains that his father had legal custody over him and his sister. *Id.* The appeal is accompanied by a copy of the applicant's father's high school record for the years 1977 to 1979. The applicant also submits two affidavits attesting to his father's U.S. residence. The affidavits are executed by [REDACTED] the applicant's step-mother, and [REDACTED], his aunt.

Section 301(g) of the Act, 8 U.S.C. § 1401, states in pertinent part, that the following shall be nationals and citizens of the United States at birth:

(g) 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 five years, at least two of which were after attaining the age of fourteen years

Because the applicant was born out of wedlock, the provisions set forth in section 309 of the Act apply to his case. Prior to November 14, 1986, section 309 of the former Act required that a father's paternity be established by legitimation while the child was under 21. Amendments made to the Act in 1986 included a new section 309(a) applicable to persons who had not attained 18 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). In the present case, the applicant was under 18 years old on November 14, 1986. His case will therefore be considered pursuant to the provisions of section 309(a) of the amended Act.

Section 309 of the amended Act states in pertinent part that:

(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.

The AAO finds that the applicant has met his burden of proof with respect to the requirements of section 309(a) of the Act, 8 U.S.C. § 1409(a). Legitimation in the State of Maryland, where the applicant has resided since age 2, can be accomplished through open and notorious acknowledgement of the child by his parent. *See Matter of Chambers*, 17 I.&N. Dec. 117 (BIA 1979).¹ The AAO notes also that the applicant's father's name is on the applicant's birth certificate, that the applicant's father became a U.S. citizen prior to the applicant's birth, and the applicant's father financially supported the applicant until his death in 1996 (when the applicant was 11 years old).

The AAO further finds that the applicant has established that his father was physically present in the United States for five years, two of which while over the age of 14. In this regard, the AAO notes that the applicant's father was admitted as a lawful permanent resident in 1975, when he was 15 years old, and naturalized in 1981. A review of the applicant's father's naturalization petition reflects that the applicant's father established that he resided in the United States for five years prior to his naturalization. The AAO also notes that the record contains two affidavits, tax records, and the applicant's father's high school records for the years 1977 to 1979. Upon careful consideration, the AAO finds that the applicant has established, by a preponderance of the evidence, that his father was physically present in the United States for five years, at

¹ The AAO notes, on the other hand, that the applicant was not legitimated under Guyanese law. *See Matter of Rowe*, 23 I.&N. Dec. 962, 967 (BIA 2006) (overruling *Matter of Goorahoo*, 20 I.&N Dec. 782 (BIA 1994), and holding that "marriage of the parents of a child born out of wedlock is the sole means of legitimation under Guyanese law").

least two of which while over the age of 14. The AAO thus concludes that the applicant acquired U.S. citizenship at birth.²

8 C.F.R. § 341.2(c) provides 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 met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.

² Having found that the applicant acquired U.S. citizenship at birth, the AAO need not address the issue of eligibility under section 321 of the former Act, 8 U.S.C. § 1432. The AAO notes, however, that that applicant cannot meet the requirements of section 321 of the former Act because the applicant's mother is not a U.S. citizen and because since the applicant's parents were never married, they were never legally separated. *See Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003)(holding that the child of a U.S. citizen father could not derive U.S. citizen, despite the fact that the father's naturalization and the child's immigrant admission took place before the child's 18th birthday and that the child was residing with the father, because the child's parents were never married and therefore never legally separated); *see also Lewis v. Gonzales*, 481 F.3d 125 (2nd Cir. 2007) (stating that "because the second clause of § 321(a)(3) explicitly provides for the circumstance in which "the child is born out of wedlock," we cannot interpret the first clause to silently recognize the same circumstance, and moreover, to do so by excusing the express requirement of a legal separation").