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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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FILE:



Office: SEATTLE (YAKIMA), WA

Date:

FEB 28 2008

IN RE:

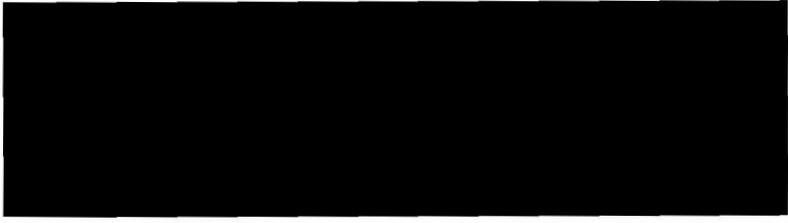
Applicant:



APPLICATION:

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

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Seattle (Yakima), Washington, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on June 14, 1970 in Tamaulipas, Mexico. The applicant's father is a native-born U.S. citizen born on November 14, 1931. The applicant's mother, is a citizen of Mexico. The applicant's parents were married in California in 1971. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his father pursuant to section 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1409.

The field office director concluded that the applicant had failed to establish that his father had the requisite period of physical presence in the United States to be eligible to derive citizenship under section 309 and 301 of the Act, 8 U.S.C. §§ 1409 and 1401. The application was accordingly denied.

On appeal, the applicant, through counsel, states that USCIS is bound by the findings of the U.S. District Court and Immigration Court and that his application must be approved. *See* Form I-290B, Notice of Appeal. The applicant also maintains that his father had the required physical presence in the United States.

“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 this case was born in 1970. 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 16 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 notes that the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046, re-designated section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7), as section 301(g). The requirements of section 301(a)(7) remained the same after the re-designation and until 1986. Section 301(a)(7) of the former Act was in effect at the time of the applicant's birth and is therefore applicable to this case.¹

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.

At the outset, the AAO notes that the applicant seems to be requesting that U.S. citizenship be granted on the basis of a collateral estoppel theory. The AAO is without authority to apply the doctrine of estoppel in this or any other case. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991) (stating that the AAO, like the Board of Immigration Appeals, is "without authority to apply the doctrine of equitable estoppel against the Service [CIS] so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation"). The jurisdiction of the AAO is limited to that authority specifically granted by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement.²

¹ The applicant claims that section 301(g) of the Act, as amended, is applicable to his case and requires him to establish that his father was physically present for only five years prior to 1970. The AAO disagrees. The AAO notes that, for the reasons stated below, the applicant cannot establish by a preponderance of the evidence that his father was physically present in the United States for either 10 or five years prior to 1970.

² The AAO notes, in any event, that the U.S. District Court documents in the record reflect that the court did not make a finding of citizenship with respect to the applicant. The Immigration Court, likewise, did not find that the applicant was a U.S. citizen. The question before the Immigration Court was whether the government had proven by clear and convincing evidence that the applicant was an alien. Therefore, the Immigration Court's notation that the applicant

The requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and CIS lacks statutory authority to issue a Certificate of Citizenship when an applicant fails to meet the relevant statutory provisions set forth in the Act. A person may only obtain citizenship in strict compliance with the statutory requirements imposed by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988). Even courts may not use their equitable powers to grant citizenship, and any doubts concerning citizenship are to be resolved in favor of the United States. *Id.* at 883-84. Moreover, "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect." *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967).

In this case, the applicant must establish, by a preponderance of the evidence, that he is the natural, legitimate child of a U.S. citizen who was physically present in the United States for at least 10 years prior to July 14, 1970, five of which were after November 14, 1945 (when his father turned 14 years old).

The record does not contain any evidence that the applicant's father agreed in writing, as is required by section 309(a)(3) of the Act, to provide financial support for the applicant until his 18th birthday. The AAO also notes that the only evidence relating to the applicant's father's physical presence in the United States is 1) his birth certificate, 2) a social security printout indicating income for the years 1965 to 1976, and 3) an affidavit executed by [REDACTED] indicating that the applicant's father worked in her parents' business from "beginning in the early 1950's" and "until approximately 1959."

Based upon a careful review of the record, the AAO finds that the applicant has failed to establish that his father was physically present in the United States for the required 10 years prior to 1970, five of which were after 1945. The AAO notes that the affidavit of [REDACTED] does not provide sufficient detail regarding the dates when the applicant's father was in her parents' employ. The AAO notes further that the applicant's father's affidavit does not address the issue of physical presence at all. The AAO finds that the social security statement does not provide sufficient evidence of physical presence, as the income earned during the years listed was minimal, no details regarding employment are available, and it appears the applicant's father spent some time in Mexico between 1965 and 1976. The AAO notes that the social security statement indicates that the applicant's father had no income beginning in the years 1977, precisely the year he claims to have taken his son to live in California. *See* Affidavit of [REDACTED]

According to the Board of Immigration Appeals' finding in *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 331 (BIA 1969):

[W]here a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily. However, when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies, then the special inquiry officer need not accept the evidence proffered by the claimant. (Citations omitted.)

appeared to be prima facie eligible for citizenship is not a determination on the question of whether the applicant is a U.S. citizen.

The AAO finds the evidence submitted by the applicant does not establish that his father was physically present in the United States for the requisite period. 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. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The AAO notes that "citizenship is a high privilege, and when doubts exist concerning a grant of it ... they should be resolved in favor of the United States and against the claimant." *United States v. Manzi*, 276 U.S. 463, 467 (1928). The AAO finds that the applicant has not met his burden of proof and the appeal will be dismissed.

ORDER: The appeal is dismissed.