



U.S. Citizenship
and Immigration
Services

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FILE:



Office: HARLINGEN, TEXAS

Date: MAR 09 2006

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship under § 322 of the Immigration and Nationality Act; 8 U.S.C. § 1433.

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, Harlingen, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant seeks a certificate of citizenship pursuant to § 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433. The applicant was born in Mexico on August 4, 1988, and he apparently resides in Monterrey, Nuevo Leon, Mexico. The record reflects that the applicant's father was born in Mexico in 1950, and that he acquired U.S. citizenship at birth through his mother, who was born in the United States in 1925 and was a U.S. citizen at the time of his birth. The applicant's father resides in Texas and has been married since 1972 to a woman other than the mother of his son, the subject of this application. As noted, the applicant's natural parents have never been married.

The district director concluded the applicant had failed to establish that he resides outside of the United States in his father's legal and physical custody, as required by § 322 of the Act. The application was denied accordingly.

On appeal, counsel points out that the applicant's mother authorized in writing his father's legal custody and rights over the applicant; therefore, the applicant meets the requirements for a certificate of citizenship described at § 322 of the Act.

Section 322 of the Act applies to children born and residing outside of the United States and provides, in pertinent part, that:

(a) A parent who is a citizen of the United States . . . may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General [now Secretary, Homeland Security "Secretary"] shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General [Secretary], that the following conditions have been fulfilled:

- (1) At least one parent . . . is a citizen of the United States, whether by birth or naturalization.
- (2) The United States citizen parent--
 - (A) has . . . been 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; or
 - (B) has . . . a citizen parent who has been 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.
- (3) The child is under the age of eighteen years.
- (4) The child is residing outside of the United States in the legal and physical custody of the applicant
- (5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

The applicant's father is a U.S. citizen whose mother was also a U.S. citizen and who lived in the United States for the period specified at § 322(a)(2)(B) of the Act. The applicant is under the age of eighteen, and he appears to reside outside the United States, as required under § 322(a)(3) and (4). The applicant is not currently present in the United States, as specified in § 322(a)(5), above; however, he entered the United States for the naturalization interview pursuant to a B-2 visitor's visa.

Regarding § 322(a)(4), the record does not establish that the applicant's father lives outside the United States, or that he has legal and physical custody of his child. The AAO acknowledges the applicant's mother's assignation of legal rights to the father; however, the record does not establish that the father has legitimated his child, which is a requirement for a finding that he has legal custody of the child. The AAO notes that legal custody vests "by virtue of either a natural right or a court decree". See *Matter of Harris*, 15 I&N Dec. 39 (BIA 1970). Biological fathers have a natural right of custody over legitimated children that is equal to that of a biological mother. *Matter of Rivers*, 17 I&N Dec. 419 (BIA 1980). The regulations at 8 C.F.R. § 322.1 clarify that in the absence of a court decree to the contrary, it is presumed that the applicant's natural father has legal custody of the child at the time he legitimates the child.

The Act includes a legitimation requirement in its definition of a child for Title III naturalization and citizenship purposes. Section 101(c) of the Act states, in pertinent part, that:

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.

The applicant was born in Mexico of a relationship outside of marriage. The AAO notes that that 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 failed to establish that his father was at any time married to his mother. The AAO thus finds that the applicant was not legitimated under the laws in Mexico.

The AAO additionally finds that the applicant has failed to present any evidence to indicate that he was legitimated in accordance with legitimation laws in Texas. The Texas Family Code provides that a Texas court may issue a decree of legitimation upon a father's compliance with paternity decree provisions set forth in § 13.23 of the Texas Family Code, as well as legal legitimation provisions set forth in § 13.2.1 of the Texas Family code. The applicant has failed to establish that his father obtained a Texas court-ordered decree of paternity. In the alternative, the applicant has also failed to establish that he was legally adopted.

In sum, the evidence on the record does not establish the § 322(a)(4) requirement that the child reside outside of the U.S. in the applicant's physical and legal custody; hence, the applicant does not qualify for a certificate of citizenship. 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. The applicant has not met that burden, and the appeal will be dismissed.

ORDER: The appeal is dismissed.