E2

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: LOS ANGELES, CA Date: MAR 01 2004

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was born on January 6, 1982, in Chilpancingo, Guerrero, Mexico. The record indicates that the applicant's father, (Mr. was born a United States (U.S.) citizen on January 29, 1940. Mr. died on November 12, 1996. The record indicates that the applicant's parents did not marry and that the applicant's mother is not a U.S. citizen. The applicant seeks a certificate of citizenship pursuant to section 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1409, based on the claim that he acquired U.S. citizenship through his father.

The district director found that pursuant to section 341 of the Act, 8 U.S.C. § 1452, the applicant was ineligible for a certificate of citizenship under section 309 of the Act, because he did not reside in the United States. The district director additionally found that the applicant was ineligible for a certificate of citizenship under section 322 of the Act, 8 U.S.C. § 1433, because he was over the age of eighteen (18). The application was denied accordingly.

On appeal, counsel asserts that section 309 of the Act does not contain a U.S. residence requirement, and that the U.S. presence language contained in section 341 of the Act signifies only that the applicant must be in the United States at the time he is provided with his certificate of citizenship. Counsel asserts further that the applicant meets the requirements for U.S. citizenship set forth in section 309 of the Act. Counsel does not address the grounds of denial under section 322 of the Act, and asserts instead that the applicant never intended to apply for U.S. citizenship pursuant to section 322 of the Act.[1]

---

[1] Section 322 of the Act applies to children born and residing outside of the United States. The section 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 (or, at the time of his or her death, had) 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.

The AAO notes that prior to November 14, 1986, section 309 of the former Act required that paternity be established by legitimation while the child was under twenty-one. Amendments made to the Act in 1986, provided that a new section 309(a) would apply 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). The amendments provided further that the former section 309(a) applied to any individual who had attained 18 years of age as of November 14, 1986, and that former section 309(a) 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. In the present case, although the applicant was born prior to November 14, 1986, he was under the age of 18 when the new section 309 was enacted, and the record contains no evidence to indicate that he was legitimated by Mr. prior to that date. The applicant must therefore establish that he qualifies for citizenship under the present rather than the old section 309(a).

Section 309 of the Act, 8 U.S.C. § 1409, 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.

Section 301(g) of the Act 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

---

> (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 [Secretary] with a certificate of citizenship.

The AAO notes that the applicant was over the age of 18 at the time that his application was adjudicated. He thus failed to meet the requirement set forth in section 322(b) of the Act. The AAO notes further that the record contains no evidence to indicate that the applicant resided outside of the United States in the legal or physical custody of Richard Jesus Garcia, as required under section 322(a)(5) of the Act.

> 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.

The AAO notes that Section 12 of the Act of November 14, 1986, shortened the required period of U.S. residence for the citizen parent from the previous ten and five years. However, the shorter time period applies only to persons born on or after November 14, 1986. *See section 8(r) of the Immigration Technical Corrections Act of 1988, supra. See also section 23 of the Immigration and Nationality Act Amendments of 1986, supra.* Because the applicant was born prior to November 14, 1986, he must establish that his father was physically present in the U.S, for 10 years between June 29, 1940 and the applicant's birth date on January 6, 1982, and that at least 5 years were after July 1954, when Mr. Garcia reached the age of 14.

Section 341 of the Act states in pertinent part that:

> (a) A person who claims to have derived United States . . . by virtue of the provisions of . . . paragraph (c), (d), (e), or (g) of section 301 of this title . . .may apply to the Attorney General [now, Secretary, Homeland Security, "Secretary"] for a certificate of citizenship. Upon proof to the satisfaction of the Attorney General [Secretary] that the applicant is a citizen, and that the applicant's alleged citizenship was derived as claimed, or acquired, as the case may be, and upon taking and subscribing before a member of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, such individual shall be furnished by the Attorney General [Secretary] with a certificate of citizenship, but only if such individual is at the time within the United States.

The AAO finds counsel's assertion that there is no requirement that the applicant must be in the United States at the time his application is submitted, and that the statute only precludes the issuance of a certificate of citizenship to a person who is not physically in the United States at the time of issuance, to be persuasive. *See* Counsel's, July 9, 2002, Reconsideration of Denial, letter citing section 99.04[3](a) of *Immigration Law and Procedure,* Vol. 7, Gordon, Mailman, & Yale-Loehr.

The AAO notes that neither Section 309 nor Section 341 of the Act contain a provision requiring that an applicant must reside in the United States in order to acquire U.S. citizenship. Moreover, the plain language of section 341 of the Act indicates simply that an applicant *shall be furnished* with a certificate of citizenship only if the applicant is within the United States at the time she or he is provided with the certificate. Accordingly, the AAO finds that the district director erroneously concluded that the applicant must reside in the U.S. in order to qualify for U.S. citizenship pursuant to section 309 of the Act.

Counsel asserts on appeal that the applicant meets the requirements for U.S. citizenship under section 309 of the Act. Counsel asserts that the applicant's father (Mr. is a U.S. citizen who lived his entire life in the United States, and counsel submits Mr. U.S. birth certificate, as well as school and military service documentation to establish that Mr. the physical presence requirements set forth in section 301(g) of the Act. Counsel asserts further that Mr. legitimated the applicant pursuant to section 309 of the Act, because the applicant was recognized as Mr. on in probate court proceedings that occurred subsequent to Mr. death.

Based on the evidence in the record, the applicant's residence or domicile is in Mexico. The AAO notes that pursuant to Article 130 of the Constitution of Mexico, legitimation of an out-of-wedlock child occurs only if the natural parents marry through a civil marriage. In the present case, the applicant's parents never married. The applicant has therefore failed to establish that he was legitimated in Mexico, pursuant to section 309(a)(4)(A) of the Act. Furthermore, the record contains no evidence to indicate that Mr. acknowledged paternity of the applicant in writing under oath, as set forth in section 309(a)(4)(B) of the Act.

Counsel asserts that pursuant to section 309(a)(4)(C) of the Act, paternity of the applicant was established in 1998, while the applicant was under the age of 18, by the San Bernardino County Superior Court, in probate hearings pertaining to the applicant's entitlements under Mr. will. *See* Counsel's December 8, 1998 letter, to the Los Angeles, California, District Director. Counsel indicates further that references in Mr. will, to the applicant as his son, and the San Bernardino County Superior Court's acknowledgement in court probate orders that the applicant is the son of Mr. constitute a finding of paternity by a competent court.

The AAO is finds counsel assertions to be unconvincing. In *Nguyen v. INS,* 208 F.3d 528, 534 (2000), the U.S. Supreme Court found that a citizen father cannot establish that a child has been legitimated for section 309 of the Act purposes, unless ***the father takes affirmative steps*** prior to the child's 18th birthday, to either acknowledge paternity in writing or establish paternity in a court of competent jurisdiction.

> The statute allows the father to prove [his] relationship through fairly uncomplicated methods such as signing a statement of paternity under oath, **having paternity adjudicated** by a competent court or legitimating the child under the law of the [person's] state.

See Nguyen at 535 (emphasis added). The record in the present case contains no evidence of a paternity order relating to the applicant. The record also contains no evidence to establish that at any time, Mr. Garcia affirmatively petitioned a competent court with jurisdiction, for a court order of paternity relating to the applicant. Accordingly, the AAO finds that the applicant has failed to meet the requirements set forth in section 309(a)(4)(C) of the Act.

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. In the present case, the applicant has failed to meet his burden. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed..