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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEW YORK, NEW YORK Date: APR 01 2005

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under § 301(a)(7) of the Immigration and Nationality Act (June 27, 1952), 8 U.S.C. § 1401(a)(7)(1952)

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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, El Paso, Texas. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant was born on March 17, 1956 in Mexico. The applicant's mother was born in the United States, according to her delayed birth certificate. The applicant's father is a Mexican citizen. The applicant was lawfully admitted to the United States as a lawful permanent resident in 1975, but he was later deported after a criminal conviction in 1989. He subsequently reentered the United States without inspection in 2003. The applicant's U.S. citizenship must be determined pursuant to § 301(a)(7) of the Immigration and Nationality Act (June 27, 1952) (the former Act), 8 U.S.C. § 1401(a)(7)(1952), which was the law in effect at the time of his birth.

The district director concluded that the applicant, as a legitimate child, is subject to the provisions of § 301(a)(7) of the former act, rather than § 309(c), as claimed by counsel, since the latter pertains to children born out of wedlock. The district director found that the applicant had failed to establish that his U.S. citizen mother met the ten-year residency requirement provided for in the former Act at § 301(a)(7); therefore, the applicant is not entitled to a certificate of citizenship. The application was denied accordingly.

On appeal, counsel asserts that the applicant was born out of wedlock, since his parents divorced seven months prior to his birth. In support of the claimed divorce, counsel submits an untranslated copy of a divorce decree issued in Mexico in 1955. The record also contains the applicant's parents' marriage certificate, with a marginal notation indicating that they were divorced. Counsel contends that, because the applicant's parents were divorced at the time of his birth, the applicant's situation falls under the more lenient provisions of § 309(c) of the former Act, which only requires that he demonstrate that his mother was continuously physically present in the United States for one year prior to his birth. Counsel maintains that the evidence on the record demonstrates the applicant's mother's one-year physical presence. The AAO finds counsel's assertions unconvincing and concurs with the district director's determination.

Section 301(a)(7) of the former Act granted citizenship at birth to:

> [A] person born outside the geographical limits of the United States or 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 for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . .

Section 309(c) of the Act provides a shorter residency requirement for U.S. citizen mothers of children born abroad out of wedlock:

> [A] person born, on or after the effective date of this chapter [December 23, 1952], outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

On appeal, counsel asserts that the phrase "out of wedlock" appearing in § 309(c) of the former Act applies to the applicant's birth status, even though he was conceived during his parents' marriage, his father acknowledged paternity, and the applicant is listed as "legitimate" on his birth certificate. The AAO disagrees. In the former Act, the phrase "out of wedlock" referred to illegitimate children, not to those whose paternity was legally acknowledged and who were recognized as legitimate. The phrase "out of wedlock" has been used interchangeably with the word "illegitimate" in cases as recent as *US v. Cervantes-Nava,* 281 F.3d 501 (5th Cir.), cert. denied, 536 US 914 (2002), in which the court of appeals rejected an equal protection challenge based on the defendant's contention that the former Act provided more favorable terms for naturalization of illegitimate children than legitimate ones. The court referred to children born out of wedlock as "illegitimate," indicating that the difference between the children lay not in the specific marital status of their parents, but rather in the children's status as legitimate or not.

Moreover, the association between the words "out of wedlock" and the concept of illegitimacy, as opposed to legitimation, is found in administrative guidance such as the Department of State Foreign Affairs Manual (FAM). Chapter 7 of the FAM at § 1133.4-2(b)(4)(a)(ii) describes legitimation as "the giving, to a child born out of wedlock, the legal status of a child born in wedlock, who traditionally has been called a 'legitimate' child." The FAM states further that "legitimacy is a legal status in which the rights and obligations of a child born out of wedlock are identical to those of a child born in wedlock."

In the instant case, the applicant is clearly legitimate. In fact, it is noted that on his Mexican birth certificate, the applicant's father declared before the authorities that he was married, a detail not translated into English. It matters not whether counsel provides evidence of the applicant's parents' divorce, as there is no evidence that it affected the applicant's legal rights as a legitimate child. Therefore, for the purposes of the citizenship provisions of the former Act, the applicant is not considered to be illegitimate or born "out of wedlock" as that phrase is contemplated by § 309(c). The applicant is thus subject to the provisions of § 301(a)(7) of the former Act.

The AAO finds that even if the applicant were subject to § 309(c) of the former Act, the evidence on the record does not establish that the applicant's mother fulfilled its more lenient one year continuous physical presence requirement. The record contains evidence that the applicant's mother and her siblings were born in Texas, but there is no evidence at all that the applicant's mother spent any time after her birth in the United States. The AAO points out that the applicant's mother's siblings' birth certificates do not constitute proof that the applicant's mother was present in the United States. The record contains an affidavit executed by the applicant's mother listing several lengthy periods of residence in Texas; however, there is no independent documentation in support of her statements. The AAO concludes that the applicant has failed to establish that his mother fulfilled either the ten year physical presence requirement of § 301(a)(7) of the former Act, which applies to his situation, or the more lenient one year continuous physical presence requirement of § 309(c) of the former Act, which counsel unsuccessfully proposes as applicable. The applicant is therefore not entitled to 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 his burden in this case and the appeal will be dismissed.

ORDER: The appeal is dismissed