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20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship
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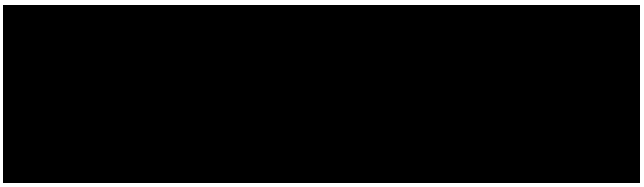

FILE: [redacted] Office: LOS ANGELES, CA Date: APR [illegible] 2005

IN RE: [redacted]

PETITION: Application for Certificate of Citizenship under sections 309 and 301 of the Immigration and Nationality Act, 8 U.S.C. §§ 1409 and 1401.

ON BEHALF OF PETITIONER:

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 record reflects that the applicant was born in Mexicali, B.C. Mexico, on January 11, 1979. The applicant's mother, was born in Mexico on August 17, 1959, and she is not a United States (U.S.) citizen. The applicant's father, was born in San Diego, California on February 23, 1961, and he is a United States citizen. The applicant's birth certificate lists his parents as unmarried. The record indicates that the applicant entered the United States at San Isidro, California on January 1, 1990. The applicant seeks a certificate of citizenship pursuant to section 301(a)(7) of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1401(a)(7), based on the claim that he acquired U.S. citizenship at birth through his father.

The director concluded that the applicant failed to establish that his father resided in the U.S. for the amount of time required by Section 301(a)(7) of the Act. The application was denied accordingly. *Decision of the District Director*, Los Angeles, California, dated October 4, 2004.

On appeal, counsel contends that the director:

1) Analyzed the statutes for children born in wedlock, when in fact, the applicant was born out of wedlock, and different statutes apply;
2) Failed to analyze the rules pertaining to parents who served in the U.S. Armed Forces;
3) Failed to analyze the rules that apply to foreign-born children of a U.S. citizen father who may have had U.S. citizen grandparents.

In support of the appeal, counsel submitted a brief; the applicant's birth certificate; the father's birth certificate; the father's Certificate of Release or Discharge From Active Duty in the U.S. Armed Forces; and the applicant's I-94.

"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 the present matter was born in 1979. Section 301(a)(7) of the former Act therefore applies to the present case.

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.

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. Subsequent amendments made to the Act in 1986, provided that a new section 309(a) would apply to persons who had not attained eighteen 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 that the former section 309(a) applied to any individual who had attained eighteen 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 matter, the applicant was born prior to November 14, 1986, and he was under the age of eighteen on November 14, 1986. The AAO will therefore assess the applicant's claim pursuant to section 309(a) requirements under the 1986 Amendments to the Act. Accordingly, the applicant must establish that he was legitimated by his father prior to his eighteenth birthday under the law of the applicant's residence prior to his arrival in the U.S. (Mexico), or under the law of California where the applicant has resided since 1990.

Section 309 of the Act addresses children born out of wedlock:

> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, 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.

[redacted] is listed as father on the applicant's birth certificate, therefore the applicant has established by clear and convincing evidence that a blood relationship exists between himself and [redacted] as required by Section 309(a)(1) of the Act.

[redacted] birth certificate indicated that he was born in the U.S., making him a U.S. citizen at the time of the applicant's birth, therefore Section 309(a)(2) of the Act has been met.

The record contains no evidence that [redacted] agreed in writing to provide financial support for the applicant until he reached age 18, therefore Section 309(a)(3) of the Act has not been met.

The applicant has not satisfied the requirements of Section 309(a)(4)(A) of the Act. First, 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 parents were at any time married; therefore, the applicant was not legitimated prior to his eighteenth birthday pursuant to the laws in Mexico.

Second, under the California Civil Code § 7004, when a child is born out of wedlock, the father must receive the child into his home and openly hold out the child as his natural child. Counsel contends that the applicant was legitimated because is listed as father on the applicant's birth certificate. The birth certificate notation does not show that received the applicant into his home or openly held the applicant out as his natural child, and since the record contains no other relevant evidence, the applicant has not established that he was legitimated by in accordance with California law.

The record contains no evidence indicating that acknowledged paternity of the applicant in writing under oath before the applicant turned 18, or that the paternity of the applicant was established by adjudication of a competent court before the applicant turned 18. Accordingly, the applicant has not met the requirements of Section 309(a)(4)(B) or Section 309(a)(4)(C) of the Act.

Because counsel has not established that the applicant was legitimated under Section 309 of the Act, it is not necessary to address whether the applicant's father has satisfied the physical presence requirements of Section 301(a)(7) of the former Act. Accordingly, counsel's contentions concerning service in the U.S. Armed Forces, and the time parents (who may be U.S. citizens) were physically present in the United States, are not relevant to this decision.

In addition to asserting that the director's decision was incorrect, counsel maintains that the 1952 Act is a violation of the U.S. Constitution because its physical presence requirements hamper the right of a foreign born child to derive citizenship from his or her U.S. citizen father. The AAO does not have jurisdiction over constitutional issues, so counsel's assertion will not be addressed.

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