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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] OFFICE: LOS ANGELES, CA DATE: MAR 08 2007

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]

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born in Canada on October 21, 2003. The applicant's birth certificate reflects that her father is [redacted], born January 12, 1972, in California. Mr. [redacted] is a U.S. citizen. The applicant's birth certificate reflects that her mother is [redacted] (Mrs. [redacted], born April 11, 1962, in Ontario Canada. Mrs. [redacted] is not a U.S. citizen. Both Mr. [redacted] are married to other persons, and Mr. [redacted] did not at any time marry one another. The record reflects that Mrs. [redacted] is Mr. [redacted] wife's sister, and that she is not genetically or biologically related to the applicant. Rather, Mrs. [redacted] is the gestational surrogate mother of the applicant, pursuant to a medical procedure in which she carried to term the egg/ova from an anonymous donor, which was artificially inseminated by Mr. [redacted] via an in vitro fertilization procedure. The applicant presently seeks a Certificate of Citizenship pursuant to section 309(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1409(a), based on the claim that she acquired U.S. citizenship at birth as the out of wedlock child of a U.S. citizen father.

The district director determined that the applicant failed to establish that Mr. [redacted] was her father under Canadian or Uniform Parentage Act and California state law, or that she was born out of wedlock to a U.S. citizen father as required by section 309 of the Act. The district director determined further that the applicant failed to establish that she had been adopted by Mr. [redacted], or that she resided in the United States pursuant to a lawful admission for permanent residence, or qualified as his child for section 320 of the Act, 8 U.S.C. §1431, purposes.[1] The application was denied accordingly.

On appeal, counsel does not contest the district director's interpretation of Mr. [redacted] parental status under Canadian law. Counsel also does not dispute the district director's finding that the applicant does not qualify for U.S. citizenship pursuant to section 320 of the Act. Counsel asserts, however, that the district director inappropriately applied Uniform Parentage Act (UPA) provisions to the present matter, and that California statutory and case law should be applied favorably in this case. Counsel asserts that paternity evidence and the fact that Mr. [redacted] has received the applicant into his home and openly held her out to be his natural child, establish that Mr. [redacted] is the applicant's legal and natural father under California law. Counsel concludes that the requirements contained in section 309(a) of the Act have been met in the present case, and that the applicant therefore qualifies for U.S. citizenship.

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[1] Section 320(a) of the Act states that:

> A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
> (2) The child is under the age of eighteen years.
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

The issues in the present matter are thus whether Mr. [redacted] is the father of the applicant under California law (his state of residence), and whether Mr. [redacted] has satisfied the requirements to transmit U.S. citizenship to the applicant.

"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.)

Section 309(a) of the Act, in effect at the time of the applicant's birth, 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 record contains the following evidence relating to the parentage of the applicant:

A Canadian Statement of Live Birth reflecting that the applicant was born in Canada on October 21, 2003, to [redacted] and [redacted]

A marriage license reflecting that Mr. [redacted] were married in Pitkin County, Colorado on July 12, 2003.

A California Declaration of Paternity signed by Mrs. [redacted] stating that Mr. [redacted] is the biological father of the applicant and that Mrs. [redacted] is the applicant's natural mother.

A statement signed by Mrs. [redacted] in Ontario, Canada, stating that she acted as a surrogate for her sister and her sister's husband, and that she gave birth to the applicant. Mrs. [redacted] states that Mr. [redacted] is the applicant's birth father, and that her sister, [redacted] plans to adopt the children in the United States.

An Egg Donation Agreement signed in California by Mr. [redacted] his wife, and an unmarried anonymous egg donor, reflecting their agreement that Mr. [redacted] and his wife are the intended parents of any child created through in vitro fertilization using the donated egg/ova.

A medical affidavit signed by Dr. [redacted] in California, reflecting that the applicant's embryo was created via in vitro fertilization, using an anonymously donated egg/ova. The medical affidavit reflects that Mr. [redacted] is the genetic and biological father of the applicant. The medical affidavit reflects further that Mrs. [redacted] carried the applicant to term as a surrogate mother, and that she gave birth to the applicant, but has no biological or genetic connection to the applicant.

A Surrogacy Agreement and Affidavits signed in California by Mr. [redacted] and Mrs. [redacted] reiterating the statements made in the medical affidavit, and stating that Mr. [redacted] assumes financial and parental obligations over the applicant, and that Mrs. [redacted] makes no parental claims to the applicant.

Because Mr. [redacted] resides in California, the AAO looks to California law to establish whether Mr. [redacted] is the legal, natural father of the applicant. The AAO notes that although the UPA has not been formally adopted in the state of California, UPA provisions have been incorporated into California statutory and case law. For example, in *Johnson v. Calvert,* 5 Cal. 4th 84, 88 (Cal. 1993), the California Supreme Court discussed the UPA and its application to California law by stating that, "[p]assage of the Act [UPA] clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet it facially applies to *any* parentage determination . . . ." In *Elisa B. v. Superior Court of El Dorado County,* 37 Cal. 4th 108, 116 (Cal. 2005), the California Supreme Court held that the question of parentage in an anonymous donor artificial insemination, surrogacy case is "[g]overned by the Uniform Parentage Act (UPA) (Fam. Code, § 7600 et seq.)" The California Supreme Court decision, *K.M. v. E.G.,* 37 Cal. 4th 130, 147 (Cal. 2005) clarified further that the UPA, as codified in the California Family Code, is the statutory guidance used by the California Supreme Court to resolve surrogacy related parentage cases.

The California Family Code (CFC) provision pertaining to Mr. [redacted] s status as the applicant's legal natural father is contained in CFC section 7613(b). This section states that "[t]he donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." *See Robert B. v. Susan B,* 109 Cal. App. 6th 1109, 1113 (2003). CFC section 7613(a) provides further that when a married woman is artificially inseminated by a man not her husband, the married woman's husband "[i]s treated in law as if he were the natural father of a child thereby conceived." *See Buzzanca v. Buzzanca,* 61 Cal. App. 4th 1410, 1417 (1998).

The record reflects that Mr. [redacted] participated in a medical in vitro fertilization procedure to artificially inseminate an egg/ova from an anonymous donor that was subsequently carried to term by a married woman who was not his wife. Based on a plain reading of CFC 7613, it therefore appears that Mr. [redacted] is not the legal natural father of the applicant.

In *K.M. v. E.G.,* however, the California Supreme Court indicated that the provisions contained in CFC section 7613(b) were "not intended to solve all questions posed by the use of artificial insemination. (*See*

K.M. v. E.G., supra at 139-40, discussing CFC § 7613(b)'s predecessor statute, Civil Code section 7705.) The California Fourth District Court of Appeals stated in *Buzzanca v. Buzzanca,* 61 Cal. App. 4th 1410, 1424 (Cal. Ct. App. 4th, 1998) that, "[a] rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability" ([redacted] Citing to its [redacted] decision, the California Supreme Court indicated further in *K.M. v. E.G.,* that CFC § 7613(b) did not apply in a surrogacy case where a husband and wife:

> [D]id not intend to 'donate' their sperm and ova to the surrogate mother, but rather 'intended to procreate a child genetically related to them by the only available means' . . . . In *Johnson* it was clear that the married couple did not intend to 'donate' their semen and ova to the surrogate mother, but rather permitted their semen and ova to be used to impregnate the surrogate mother in order to produce a child to be raised by them.

Using an intent-based analysis, the California Supreme Court thus found that CFC § 7613(b) provision did not apply to a man's donation of sperm for artificial insemination of a woman not his wife, purposes.

In the present matter, the evidence contained in the record reflects clearly that Mr. [redacted] donated his sperm for in vitro fertilization purposes, with the intent to procreate a child that would be raised by him and his wife. The evidence also reflects clearly that all parties involved understood and agreed that the in vitro fertilization process was undertaken in order to produce a child to be raised by Mr. [redacted] and his wife, and that Mr. [redacted] was the intended father. Pursuant to the reasoning set forth in the California court decisions discussed above, the AAO therefore finds that CFC § 7613(b) provisions do not apply to Mr. [redacted] in the present matter. Accordingly, Mr. [redacted] is the applicant's legal, natural father under California law.

For the reasons set forth below, the AAO finds that the applicant has established that she acquired U.S. citizenship through Mr. [redacted] pursuant to section 309(a) of the Act.

The applicant's birth certificate and the surrogacy related evidence contained in the record establish by clear and convincing evidence that there is a blood relationship between Mr. [redacted] and the applicant. Furthermore, the record contains a U.S. Passport issued to Mr. [redacted] on February 8, 1995, reflecting his birth in the United States on January 12, 1972, and establishing his U.S. citizenship at the time of the applicant's October 21, 2003, birth. The applicant therefore satisfies the first and second criteria for citizenship under section 309(a) of the Act - that a blood relationship between the person and the father is established by clear and convincing evidence; and that the father had the nationality of the United States at the time of the person's birth. The record contains a surrogacy agreement and affidavits signed by Mr. [redacted] and Mrs. [redacted] stating that Mr. [redacted] assumes all financial and parental obligations over the applicant. The applicant has thus also satisfied the requirement set forth in section 309(a)(3) – that the father has agreed in writing to provide financial support for the person until the person reaches the age of 18 years. Section 309(a)(4)(A)'s acknowledgement of paternity under oath requirements have also been met, as the record contains a California Declaration of Paternity signed and notarized by Mr. [redacted] and Mrs. [redacted] on August 24, 2005. Alternatively, the applicant also established that legitimation requirements set forth in section 309(a)(4)(B) have been met. CFC section 7611(d) provides that a man is presumed to be the natural father of a child born out of wedlock if he receives the child into his home and openly holds out the child as his natural child. The record establishes that the applicant has resided with Mr. [redacted] and his wife since shortly after her birth, and that he openly holds her out as his natural child.

Section 309(a) reflects that relevant provisions of section 301 of the Act, 8 U.S.C. § 1401 apply if a person born out of wedlock satisfies the requirements set forth in section 309(a) of the Act. In the present matter, the relevant statutory provisions to be applied are contained in section 301(g) of the Act, 8 U.S.C. § 1401(g).

Section 301(g) of the Act provides 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 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 record contains the following evidence relating to Mr. [redacted] physical presence in the United States between his birth on January 12, 1972, and the applicant's birth on October 21, 2003:

> A U.S. Passport issued in Los Angeles, California on February 8, 1995, reflecting Mr. [redacted] birth in the United States on January 12, 1972;
>
> A Diploma of Graduation reflecting that Mr. [redacted] graduated from Crossroads School for Arts and Sciences, in Santa Monica, California, on June 9, 1990;
>
> A Certificate from the U.S. District Court, Central District of California, certifying that Mr. [redacted] was admitted to practice as an attorney on December 7, 1998;
>
> A U.S. Social Security Statement reflecting that Mr. [redacted] earned the following amounts:
> 1998 – $998
> 1987 – 1993 - $0
> 1994 - $2310
> 1995 - $221
> 1996 - $0
> 1997 - $14,942
> 1998 - $1428
> 1999 - $73,569
> 2000 - $131,056
> 2001 - $119,649

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. Under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989.)

The AAO finds that the cumulative evidence presented in the applicant's case establishes by a preponderance of the evidence that Mr. [redacted] meets the U.S. physical presence requirements set forth in section 301(g) of the Act. Accordingly, the AAO finds that the applicant has met her burden of establishing that she qualifies for U.S. citizenship, and the appeal will be sustained.

ORDER: The appeal is sustained.