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U.S. Citizenship and Immigration Services

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FILE: OFFICE: HARLINGEN, TEXAS Date: MAY 18 2007

IN RE: APPLICANT: [redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to Section 309(c) of the Immigration and Nationality Act; 8 U.S.C. § 1409(c).

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, Harlingen, Texas. 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 Mexico on September 4, 1968. The applicant's mother, [redacted] was born in the United States on July 5, 1937, and she is a U.S. citizen. The record does not show, and the applicant does not assert, that his father was or is a U.S. citizen. The applicant's parents formally married on December 1, 1972, when the applicant was four-years-old. The applicant seeks a certificate of citizenship based on the claim that he derived U.S. citizenship at birth through his mother.

The district director found that the applicant had failed to establish that his mother resided in the United States for ten years prior to the applicant's birth, at least five years of which occurred after the applicant's mother turned fourteen, as required by section 301(a)(7) of the former Act. The application was denied accordingly.

On appeal, counsel contends that the applicant's mother was not married at the time of the applicant's birth, thus the applicant was illegitimate and the requirements of section 309(c) of the Act control the present application. Thus, counsel contends that the applicant need only show that his mother was continuously present in the United States for a period of one year prior to the applicant's birth, as required by section 309(c) of the Act. Counsel asserts that the applicant meets this requirement, and the application should be approved. *Brief in Support of Appeal*, submitted May 5, 2006.

The record contains, in pertinent part: a brief from counsel, statements from the applicant's mother and father; a copy of the applicant's birth certificate; a copy of the applicant's mother's certificate of U.S. citizenship; a copy of the applicant's parents' marriage certificate, and; copies of the applicant's sisters' naturalization and birth certificates. The entire record was reviewed in rendering this decision.

"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 record reflects that the applicant was born on September 4, 1968. Both sections 301(a)(7) and 309(c) of the former Act were in effect as of the applicant's birth date.

Section 309 of the former Act, entitled, "Children Born Out of Wedlock" states in pertinent part that:

> (c) [A] person born, after 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.

Section 301(a)(7) of the former Act states, in pertinent part 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 . . . 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.

Thus, whether the applicant was born out of wedlock determines the residency requirements the applicant's mother must have met in order for the applicant to have derived U.S. citizenship from her at birth. Specifically, if the applicant was born out of wedlock, he must show that his mother "had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." Section 309 of the former Act. Yet, if the applicant's parents were married at the time of his birth, he must show that, prior to his birth, his mother "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 301(a)(7) of the former Act.

The record reflects that the applicant's parents were not formally married at the time of his birth. Yet, the applicant's parents met in Tamaulipas, Mexico and began living together in [redacted] beginning in 1953. *Statement from Applicant's Father*, dated April 21, 2004; *Statement from Applicant's Mother*, dated April 21, 2004. The applicant's parents stated that they resided in Harlingen, Texas from 1954 until August 1957, at such time that they returned to Mexico. *Id.* The applicant's mother provided that she and the applicant's father had nine children. ***Statement from Applicant's Mother*** **at 1.** The record contains documentation to show that the applicant's parents had a daughter in Mexico prior to the applicant, on January 31, 1966. *Birth Certificates of Applicant's Sister.*

From 1947 to 1961, Article 70 of the Civil Code of Tamaulipas was in effect. Article 70 recognized common law marriages in the state by providing that, "[f]or the purposes of this law, marriage shall be considered to be the union, the cohabitation, and the continuous sexual relations of one man and one woman." However, in 1961, the Supreme Court of Mexico held Article 70 to be unconstitutional, as it was in conflict with two principles of Article 130 of the Mexican Constitution, namely that marriages must involve civil authorities, and that marriages must be registered. *Virginia Reyes viuda de Hinojosa v. Jose Hinojosa*, Suprema Corte de Justicia (July 1, 1954). After 1961, common law marriages that had existed in Tamaulipas prior to that date were still in effect if they could be legally proved by being registered in the Office of the Civil Registry.

The fact that the applicant's parents resided together as a couple beginning in 1953, ultimately leading to the birth of nine children, suggests that they would have been recognized as married by the government of Tamaulipas pursuant to Article 70 up until 1961 when Article 70 was no longer in effect. However, the record reflects that the applicant's parents were married in Tamaulipas on December 1, 1972. The fact that the applicant's parents were married, and registered that marriage, in Tamaulipas in 1972 serves as evidence that they did not register their common law marriage prior to that date. Thus, after 1961 when Article 70 was no longer in effect, including the applicant's birth date on September 4, 1968, the applicant's parents' common law marriage would not have been recognized by the State of Tamaulipas or the federal government of Mexico. Accordingly, the applicant would have been deemed an illegitimate child.[1]

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[1] It is noted that, in *Matter of Hernandez,* the Attorney General issued a decision finding a common law marriage in the State of Tamaulipas to be valid for the purpose of determining whether an applicant for a certificate of citizenship was born in or out of wedlock. *Matter of Hernandez*, 14 I&N Dec. 608 (A.G. 1974). However, the applicant in *Matter of Hernandez* was born in Tamaulipas in 1949, when Article 70 was still in effect. Further, the record of proceeding in *Matter of Hernandez* indicated that the applicant's parents' marriage had been registered with government authorities. Thus, as of his date of birth, the State of Tamaulipas would have considered the applicant in *Matter of Hernandez* legitimate. The present matter can be distinguished, as the applicant was born in 1968, after the Mexican Supreme Court had struck down Article 70 as unconstitutional. As noted above, the record does not reflect that the applicant's parents

Based on the foregoing, the AAO deems that the applicant was an illegitimate child at the time of his birth. Thus, section 309 of the former Act controls the present application, and the applicant must show that his mother "had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." Section 309 of the former Act.

Upon review, the applicant has submitted sufficient evidence to establish by a preponderance of the evidence that his mother satisfied the residency requirement of section 309 of the former Act. The applicant submitted a statement from his father, and two statements from his mother, in which they describe their residence in the United States prior to the applicant's birth. *Statement from Applicant's Father*; *Statement from Applicant's Mother*. Specifically, the applicant's parents stated that they moved to Harlingen, Texas in 1954, where they resided until approximately one week before one of their daughters was born on August 21, 1957. *Id.* The applicant's parents indicated that the applicant's father had no legal status during this period, and they returned to Mexico due to the fact that he was apprehended by U.S. immigration authorities. *Id.* The applicant's father described U.S. policy at the time of his apprehension, and noted that he and the applicant's mother returned to Mexico in order to remain together. *Statement from Applicant's Father.* The applicant's father recounted the address and location where he and the applicant's mother resided in Harlingen, Texas, and the type of work he performed during that time. *Id.*

In a subsequent statement, the applicant's mother indicated that her parents brought her to the United States at the age of two. *Second Statement from Applicant' Mother*, dated March 3, 2006. She provided that she and her family resided in a Hotel in McAllen, Texas where her parents worked. *Id.* She stated that she remained there without interruption until she was approximately age eight. *Id.*

In her second statement, the applicant's mother indicated that she and the applicant's father moved to the United States in 1952 after meeting in [redacted] and that they departed in August 1957. *Id.* This date of arrival in the United States is inconsistent with the applicant's mother's and father's prior statements, as they initially stated that they moved to Harlingen together in 1954. *Statement from Applicant's Father*; *Statement from Applicant's Mother.* It is noted that the statements from the applicant's parents are the only evidence that the applicant provides to show his mother's presence in the United States prior to his birth.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. Affidavits alone may serve as sufficient evidence to show a fact by a preponderance of the evidence when they are detailed and consistent. The inconsistency in the date that the applicant's parents arrived in the United States together cannot be overlooked. However, if the later arrival date of 1954 is considered, the applicant's mother still accrued approximately two and one half years of presence in the United States during that period. The remaining statements from the applicant's parents present adequate detail to show that it is more likely than not that they were in the United States together for at least one year prior to the applicant's birth. The applicant's mother further described a period of residence of approximately six years in the United States when she was a young child.

Based on the foregoing, the AAO finds that the applicant has submitted sufficient evidence that his mother "had previously been physically present in the United States or one of its outlying possessions for a

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registered their marriage after 1961 and before the applicant's birth.

continuous period of one year" prior to his birth. Section 309 of the former Act. Therefore, the applicant has established that his mother met the residency requirement of section 309 of the Act.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his claimed citizenship by a preponderance of the evidence. The applicant has met his burden in the present matter. The appeal will therefore be sustained.

ORDER: The appeal is sustained.