U.S. Department of Homeland Security
20 Mass. Ave, N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2008

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Sections 309(a) and 301(g) of the Immigration and Nationality Act; as amended, U.S.C. §§ 1409(a) and 1401(g)

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

The record reflects that the applicant was born on December 2, 1971 in Mexico. The applicant's natural father, [redacted], was born on January 26, 1907 in Chicago, Illinois. The applicant's mother, [redacted], was, at the time of the applicant's birth, a Mexican citizen and the record indicates that she remains a citizen of that country. The applicant's parents did not marry. The applicant seeks a certificate of citizenship pursuant to sections 309(a) and 301(g) of the Immigration and Nationality Act (the Act), as amended, 8 U.S.C. §§ 1409(a) and 1401(g), based on the claim that he acquired U.S. citizenship at birth through his natural father.

Based on the evidence of record, the director determined that the applicant had not established that, prior to the applicant's birth, his father had met the physical presence requirements of section 301(g) of the Act. Accordingly, the director denied the application. *Director's Decision*, dated November 2, 2006.

As the applicant was born out of wedlock to parents who never married, the derivative citizenship provisions set forth in section 309 of the Act apply to this case. Prior to November 14, 1986, section 309 of the Act required a father's paternity to be established by legitimation before a child reached 21 years of age. As of that date, the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA) amended section 309, applying the changed provisions to persons who were not yet 18 years of age on November 14, 1986. As the applicant in this case was 14 years old on November 14, 1986, his application will be considered under section 309(a) of the Act, as established by the 1986 amendments.

Section 309(a) of the Act states:

> (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.

Should the applicant establish his eligibility under section 309(a) of the Act, he must also prove that prior to his birth, [redacted] 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 followed his father's 14th birthday, as required

by section 301(g) of the Act. Honorable service in the U.S. military, employment with the U.S. Government or with certain international organizations by U.S. citizen parents may qualify as physical presence in the United States.

The AAO notes that in his decision the director indicated that the applicant was required to establish that [redacted] had been physically present in the United States for periods totaling ten years prior to the date of the applicant's 1971 birth, i.e., the physical presence requirements imposed prior to the 1986 amendments. However, it is only in cases where INAA-eligible individuals were legitimated under the laws of their father's domicile prior to the effective date of the INAA that their claims to citizenship must be considered under the pre-1986 requirements of section 309(a).[1] In the present matter, the record does not demonstrate that the applicant was legitimated under the laws of Texas, his father's domicile, prior to the effective date of the INAA.

Under Texas law, children who were born out of wedlock are legitimated if their parents reside in a common-law union in Texas and their father acknowledges his paternity or if their parents marry. *See Matter of A- E-*, 4 I&N Dec. 405(BIA 1951); *Texas Probate Code* §42(b). Prior to 1989, former sections 13.21 through 13.24 of the Texas Family Code offered individuals who, like [redacted] were not married to their child's mother, the opportunity to legitimate the child by executing a statement of paternity and having a Texas court designate them as the child's father. As [redacted] and the applicant's mother lived together only in Mexico and never married, the AAO has reviewed the record for evidence that the applicant was legitimated through court decree. No evidence has been found that a decree of legitimation was ever issued by a Texas court with regard to the applicant. Accordingly, the record does not establish that the applicant was legitimated under Texas law and the director erred in imposing the ten-year physical presence requirement on the applicant.

On appeal, counsel states that the letters, records and affidavits submitted by the applicant establish that Mr. [redacted] resided in the United States at least ten years prior to the applicant's birth and satisfy the requirements of section 504 of the Act.. She notes that the Supreme Court in *Savorgnan v. United States*, 70 S.C. 94 (1950) found the determination of residence to be based on objective fact, that an individual's actual general abode is the sole test for determining residence. Counsel also cites *Alcarez-Garcia v. Ashcroft* 293 F.3d 1155 (9th Cir. 2002), which, she notes, states that "the Nationality Act's definition did not necessarily contemplate the establishment of a domicile or place of permanent residence." To establish [redacted]'s residence in the United States, counsel submits: his Social Security earnings record for the years 1963-1973; an affidavit from the applicant's mother, dated August 4, 2006, regarding her relationship with [redacted]; [redacted]s U.S. birth and death certificates; money orders sent to the applicant's mother by [redacted]; and an October 2, 2006 letter from the Campo Mexico Hotel in Durango, State of Durango, Mexico stating that from 1960 to 1970, [redacted] stayed at the hotel at six month intervals. The AAO does not find counsel's reasoning to be persuasive or the submitted evidence to satisfy the requirements of section 301(g) of the Act.

"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*. Accordingly, counsel's citation of the requirements of "section 504" and the findings in *Savorgnan*

[1] Amendment to the Immigration and Nationality Act Amendments of 1986 by the Immigration Technical Corrections Act of 1988, Pub. L. 100-532, 102 Stat. 2609.

v. United States and *Alcarez-Garcia v. Ashcroft* do not relate to the present matter. These cases involve applicants born in 1950 and 1952, respectively, to U.S. citizen parents, whose claims to U.S. citizenship were considered under the residence requirements of section 504 of the Nationality Act of 1940, requirements that do not apply to the applicant's 1971 birth out of wedlock. As previously discussed, to qualify for a certificate of citizenship, the applicant must comply with the requirements of section 309(a) of the Act and section 301(g) of the Act, as amended.

Section 301(g) requires the applicant to establish that his father, prior to his 1971 birth, had a total of at least five years of physical presence in the United States. The affidavit sworn by the applicant's mother states that she lived with [redacted] when he was in Durango during the period 1964-1973 and that he stayed at the hotel where she worked for periods ranging from three to six months at a time. Although the applicant's mother states that [redacted] lived in Houston, Texas during this period, the AAO notes that she has first-hand knowledge only of [redacted] presence in Mexico and is not a witness to his presence in the United States. The social security earnings for [redacted] for the period 1963 to 1973 prove that he had U.S. employment during that period, but do not establish the period of time that he was physically present in the United States. The statement from the applicant's mother and the letter from the Campo Mexico Hotel indicate that for some significant portion of each of the years from 1960 to 1971, the year of the applicant's birth, [redacted] was living in Mexico. The copies of the money orders sent to the applicant's mother by [redacted] also fail to establish that he was in the United States during the requisite period prior to the applicant's birth. Two of the four money orders are dated 1972 and, therefore, do not relate to Mr. [redacted] presence in the United States prior to the applicant's birth. The AAO also notes that one of the two 1972 orders is drawn on a Mexican bank. The third order is undated and the date on the fourth is illegible. [redacted]'s birth certificate establishes that he was born in the United States and that his parents were residing in Chicago, Illinois, at that time. It does not demonstrate that [redacted] and his family continued to reside in Illinois thereafter. [redacted] 1973 death certificate documents that his death occurred in the United States, but not whether he had resided in the United States prior to 1973. Accordingly, the AAO finds that the applicant has not established that his father was physically present in the United States for periods totaling at least five years prior to his birth, two of which followed his father's 14th birthday, as required by section 301(g) of the Act.

Although, the AAO acknowledges the potential difficulty of documenting the physical presence of an individual who was born in 1907, it notes that the applicant has failed to submit publicly-available documentation such as census reports, school and church records, property records or birth certificates for any siblings born after 1907 that could establish his father's or his grandparents' presence in the United States. The record does not indicate that the applicant has attempted to obtain such documentation or that it is unavailable.

The AAO now turns to a consideration of the applicant's eligibility under section 309(a) of the Act and finds that the record does not establish that the applicant has satisfied section 309(a)(4) of the Act, which requires that, prior to his 18th birthday, the applicant have been legitimated under Mexican law, have been acknowledged by his father in writing under oath or have had his paternity established by a competent court.

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). As the applicant's parents never married, the applicant was not legitimated by his father prior to his 18th birthday. Neither, as previously discussed, has the applicant submitted any evidence to demonstrate that his paternity was established in a judicial proceeding prior to his 18th birthday or that [redacted] acknowledged him as his son in writing and under oath.

At the time of filing, counsel submitted the applicant's birth certificate, which identifies [redacted] as his father, as proof of the blood relationship between the applicant and [redacted], contending that it was also proof that [redacted] had acknowledged his paternity with regard to the applicant. While the AAO agrees that the birth certificate establishes [redacted] as the applicant's biological father, it does not satisfy the specific documentary requirements of section 309(a)(4) of the Act, which require [redacted] to have acknowledged his paternity in writing under oath. The applicant's birth certificate lists [redacted] as his father, but, as it did not require [redacted] signature, cannot be viewed as a written and signed acknowledgement of paternity. Neither does the record offer any other evidence that would satisfy this requirement. Therefore, the record does not demonstrate that the applicant has met the requirements of section 309(a)(4) of the Act.

For the reasons previously noted, the applicant has not established eligibility for a certificate of citizenship under sections 309(a) or 301(g) of the Act. Accordingly, the appeal will be dismissed.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in this proceeding.

ORDER: The appeal is dismissed.