



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: HARLINGEN, TX Date: **DEC 03 2009**

IN RE: Applicant: [REDACTED]

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

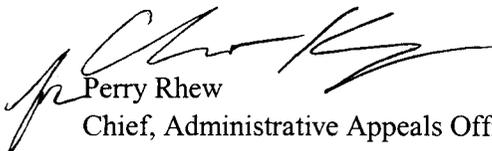
ON BEHALF OF APPLICANT:

RICARDO GONZALEZ, ESQ.
217 E. MONROE
HARLINGEN, TX 78550

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Harlingen, Texas, 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 August 14, 1981 in Mexico. His birth certificate indicates that his parents are [REDACTED]. The applicant's parents were not married to each other. The applicant's father was born in Mexico but acquired U.S. citizenship at birth. He was married to [REDACTED]. The applicant seeks a certificate of citizenship pursuant to sections 301 and 309 of the Immigration and Naturalization Act (the Act), 8 U.S.C. §§ 1401 and 1409, claiming that he acquired U.S. citizenship at birth through his father.

The field office director denied the applicant's citizenship claim finding that he had failed to establish that he was legitimated by his father. On appeal, the applicant, through counsel, indicates that a brief will be submitted within 30 days in support of his citizenship claim. See Form I-290B, Notice of Appeal to the AAO. No brief or additional evidence has been received by this office. The matter will therefore be reviewed based upon the record currently before the AAO.

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. See *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 1981. Section 301(g) of the former Act, 8 U.S.C. § 1401(g) (1981), therefore applies to the present case.¹

Section 301(g) 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 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.

Section 101(c) of the Act, 8 U.S.C. § 1101(c) states, in pertinent part, that for Title III naturalization and citizenship purposes:

¹ Section 301(a)(7) of the former Act was re-designated as section 301(g) upon enactment of the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046. The substantive requirements of this provision remained the same until the enactment of the Act of November 14, 1986, Pub. L. 99-653, 100 Stat. 3655.

The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.

Because the applicant was born out of wedlock, the provisions set forth in section 309 of the Act apply to his case. Prior to November 14, 1986, section 309 of the former Immigration and Nationality Act (former Act) required that a father's paternity be established by legitimation while the child was under 21. Amendments made to the Act in 1986 included a new section 309(a) applicable to persons who had not attained 18 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 further provided, however, 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.

The applicant has submitted a birth certificate issued by the State of Tamaulipas, Mexico that establishes he was born in Mexico in 1981 to [REDACTED]. According to a 2004 Library of Congress (LOC) opinion, parentage in the [REDACTED] Mexico can be established, *inter alia*, by acknowledgement of a child on the birth record. *See* LOC Opinion 2004-416. The AAO must conclude that the applicant was legitimated in 1981, when his birth was registered listing both his parents. As such, the AAO finds that former section 309(a) of the Act applies to his case, and that because he was legitimated prior to his 21st birthday, the applicant fulfilled the requirements of section 309(a) of the former Act.

The question remains whether the applicant can establish that his father was physically present in the United States for 10 years prior to 1981, five of which while over the age of 14 (after 1972). In this regard, the AAO notes that the applicant has submitted his father's certificate of citizenship and social security earnings statement. The applicant also has submitted his step-sister's birth certificate, evidencing her birth in the United States in 1980, and his paternal aunt's birth certificate, evidencing her birth in the United States in 1961. There are also DNA test results evidencing the applicant's and his father's biological relationship.

The documents submitted do not establish, by a preponderance of the evidence, that the applicant's father was physically present in the United States for 10 years prior to 1981, five of which after 1972 (while over the age of 14). The AAO notes that the applicant's father was born in Mexico in 1958. His certificate of citizenship was issued in 1982. Although it appears that the father's sister was born in Texas in 1961, that fact establishes that the applicant's grandmother was in the United States but does not provide sufficient basis to establish the applicant's father's presence in the United

States at the time. Similarly, the applicant's step-sister's birth in the United States in 1980 also does not establish, by a preponderance of the evidence, his father's physical presence. The AAO notes that the social security records provided by the applicant establish that the applicant's father has worked in the United States since 1973, but for less than 10 years prior to the applicant's birth in 1981. There is no other evidence in the record relating to the applicant's father's physical presence in the United States.

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant in the present case has failed to meet his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.