

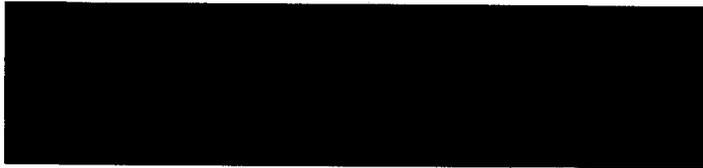
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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



EM

FILE: [REDACTED] Office: PHOENIX, AZ Date: MAY 16 2005

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under section 322 of the former Immigration and Nationality Act, 8 U.S.C. § 1433.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, Phoenix, Arizona, 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 June 18, 1987, in Mexico. The applicant's father, [REDACTED] was born in Mexico on June 30, 1959, and he derived U.S. citizenship at birth through his father. The applicant's mother [REDACTED] was born on July 5, 1965, and she is not a U.S. citizen. The record reflects that the applicant's parents married in Arizona on January 15, 1997, when the applicant was nine years old. The applicant seeks a certificate of citizenship pursuant to section 322 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1433.

The district director concluded that the applicant was ineligible for a certificate of citizenship under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433, because she had failed to establish that she resided outside of the United States in the legal and physical custody of her U.S. citizen parent, or that she was temporarily present in the U.S. pursuant to a lawful admission and was maintaining such lawful status. The application was denied accordingly.

On appeal, the applicant, through her father, asserts that she filed her citizenship application before amendments to section 322 of the Act went into effect, and that her eligibility for citizenship should be determined pursuant to section 322 of the former Immigration and Nationality Act (the former Act). The applicant additionally asserts that the U.S. Citizenship and Immigration Services district office in Phoenix, Arizona (CIS) unreasonably delayed the processing of her application and violated her right to due process. The applicant indicates that she should not be penalized for CIS processing delays, and that she is entitled to citizenship under section 322 of the former Act.

The AAO finds that the requirements for citizenship, as set forth in the Act, are statutorily mandated by Congress, and that CIS lacks statutory authority to issue a certificate of citizenship when an applicant fails to meet the statutory requirements set forth in the Act. *See, Iddir v. INS*, 301 F.3d 492 (7<sup>th</sup> Cir. 2002). The AAO therefore finds that the applicant's eligibility for citizenship under section 322 provisions is not affected or changed by CIS processing delays, and that in order to obtain a certificate of citizenship, the applicant must establish that she fully meets the requirements for citizenship as set forth in the Immigration and Nationality Act.

The Child Citizenship Act of 2000 (CCA) amended section 322 of the former Act to allow a child born outside of the U.S. to automatically become a citizen of the United States upon fulfillment of certain conditions. The amended provisions of section 322 are not retroactive and apply only to persons who were not yet eighteen-years-old as of February 27, 2001. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). Because the applicant was under the age of eighteen on February 27, 2001, she is eligible for consideration under section 322 of the Act, as amended. Nevertheless, the AAO additionally finds that because the applicant's father filed her citizenship application prior to February 27, 2001, the applicant is also eligible for consideration of her citizenship status under section 322 of the former Act. *See generally, Matter of Rodriguez-Tejedor, supra.*

8 C.F.R. § 322.1 states that, "child means a person who meets the requirements of section 101(c)(1) of the Act." Section 101(c)(1) of the Act, 8 U.S.C. § 1101(c)(1), states in pertinent part that:

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.

The AAO finds that the applicant has established that she meets the definition of "child" as set forth in section 101(c)(1) of the Act. The AAO notes that pursuant to article 130 of the Mexican Constitution, a child born out of wedlock in Mexico, becomes legitimated 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). In the present matter, the record contains a marriage certificate reflecting that the applicant's mother and father married on January 15, 1997, prior to the applicant's sixteenth birthday. Thus, if the applicant resided in Mexico at the time of her parent's marriage, she was legitimated pursuant to article 130 of the Mexican Constitution.

The AAO notes that Arizona law also provides for the legitimation of a child upon intermarriage of the parents. *See Arizona Revised Statutes* § 14-2109(2)(a). Moreover, the state of Arizona has abolished legal differences between legitimate and out-of-wedlock children, and once paternity is established, a child is considered to be the legitimate child of the biological father. *See Arizona Revised Statutes* § 8-601. Thus, the applicant was also legitimated if she resided with her father in Arizona.

Section 322 of the amended Act provides, in pertinent part that:

(a) A parent who is a citizen of the United States . . . may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General [now Secretary, Homeland Security, "Secretary"] shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General [Secretary], that the following conditions have been fulfilled:

- (1) At least one parent is . . . a citizen of the United States, whether by birth or naturalization.
- (2) The United States citizen parent--
  - (A) has . . . been 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; or
  - (B) has . . . a citizen parent who has been 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.
- (3) The child is under the age of eighteen years.
- (4) The child is residing outside of the United States in the legal and physical custody of the applicant
- (5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and . . . upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

As noted by the district director, the applicant failed to establish that she resided outside of the United States in the legal and physical custody of her U.S. citizen parent, or that she was temporarily present in the U.S. pursuant to a lawful admission and was maintaining such lawful status. She therefore does not qualify for citizenship pursuant to section 322 of the Act, as amended.

Section 322 of the former Act stated, in pertinent part:

(a) Application of citizen parents; requirements

A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- 1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- 2) The child is **physically present in the United States pursuant to a lawful admission.**
- 3) The child is under the age of 18 years and in the legal custody of the citizen parent.
- 5) If the citizen parent has not been 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-
  - (A) the child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or
  - (B) a citizen parent of the citizen parent has been 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.

b) Attainment of citizenship status; receipt of certificate

Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service [CIS] within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

(Emphasis added). The applicant concedes that she was not admitted into the United States pursuant to a lawful admission for permanent residence, and that her father does not meet the physical presence requirements set forth in section 322 of the former Act.<sup>1</sup> The applicant asserts, however, that although she is not presently in a lawful immigrant status, her initial border crossing card admission into the United States was lawful. The applicant asserts that she therefore satisfies the section 322(a)(2) former Act requirement that she is physically present in the U.S. pursuant to a lawful admission. The applicant asserts further that she is eligible for citizenship under section 322(a)(5)(B), based on her U.S. citizen grandfather's physical presence in the United States.

The AAO finds that the applicant has failed to establish that she meets the section 322(a)(2) former Act requirement that she "[i]s physically present in the United States pursuant to a lawful admission." The AAO finds that the plain language of section 322(a)(2) of the former Act reflects that in order to satisfy the provision, an applicant must be physically present in the U.S. pursuant to an unexpired lawful admission. The AAO finds further that the language contained in the section 322(a)(5) amended Act provision did not change the physical

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<sup>1</sup> The AAO notes that pursuant to section 301(g) of the Act, 8 U.S.C. § 1401(g) derivative citizenship provisions, 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 five years, at least two of which were after attaining the age of fourteen years.

In order to qualify for consideration under section 301(g) of the Act, the applicant must first establish that she meets the section 309 of the Act, 8 U.S.C. § 1409 requirements for persons born out of wedlock.

Section 309(a) of the Act states:

(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.

Although the applicant appears to meet the requirements set forth in section 309(a) of the Act, the evidence in the record reflects that the applicant's father lacks the required U.S. physical presence as set forth in section 301(g) of the Act.

presence and lawful admission requirements previously set forth in section 322(a)(2) of the former Act. Instead, the new language simply clarified the requirement that an applicant must maintain lawful admission status in order to be eligible for citizenship under section 322 of the Act. The applicant has failed to establish that she is presently maintaining a lawful admission status. The AAO therefore finds that the applicant is not eligible for citizenship under section 322 of the former Act.

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. The applicant has failed to meet her burden. The appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed.