

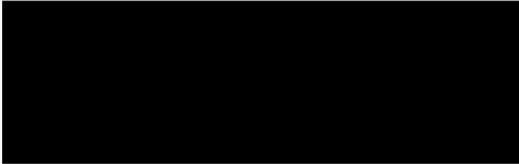


U.S. Citizenship
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FILE:



OFFICE: ST. PAUL (BLOOMINGTON), MN

DATE: APR 11 2006

IN RE:



APPLICATION: Application for Certificate of Citizenship under Section 309 and 301(a)(7) of the former Immigration and Nationality Act, 8 U.S.C. §§ 1409 and 1401(a)(7).

ON BEHALF OF APPLICANT:



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, St. Paul, Minnesota. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant was born on August 19, 1967, in Vietnam. The applicant's father, [REDACTED] was born in the United States on August 10, 1943, and he is a U.S. citizen. The applicant's mother was born in Vietnam, and she became a naturalized U.S. citizen on June 18, 1997, when the applicant was twenty-nine years old. The applicant's parents did not marry. The record reflects that the applicant was admitted into the United States as a refugee in June 1983. The applicant presently seeks a Certificate of Citizenship pursuant to section 309 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1409, based on the claim that he acquired U.S. citizenship at birth through his father.

The district director determined the applicant had failed to establish that he was legitimated by his father under Vietnamese, Georgia state or Minnesota state law, prior to his eighteenth birthday, as required by section 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1409. The application was denied accordingly.

Counsel asserts on appeal that the applicant's father (Mr. [REDACTED]) attempted to adopt the applicant on numerous occasions while he was in Vietnam, and that he supported the applicant financially and held him out publicly as his son from 1967 to 1972, when Mr. [REDACTED] left Vietnam, and after 1983 when the applicant came to the United States and took up residence in Minnesota. Counsel indicates that the applicant was therefore legitimated by his father under Minnesota law. Counsel asserts further that while the applicant was a minor, Vietnamese law did not distinguish between children born in, and out of wedlock, and that the applicant was therefore also legitimated by his father under Vietnamese law. Counsel concludes that the applicant was legitimated, and that he meets the requirements for acquisition of citizenship through his father.

Because the applicant was born out of wedlock, citizenship provisions set forth in section 309 of the Act apply to the present matter. Prior to November 14, 1986, section 309 of the former Act required that paternity be established by legitimation while the child was under twenty-one. Subsequent amendments made to the Act in 1986, provided that a new section 309 applied to persons who had not attained eighteen years of age as of the November 14, 1986 enactment date of the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA). The amendments provided further that section 309 of the former Act provisions applied to any individual who had attained eighteen years of age as of November 14, 1986. Section 309 of the former Act provisions also 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.*

In the present matter, the applicant was born prior to November 14, 1986, and he was over the age of eighteen on November 14, 1986. Moreover, counsel asserts that Mr. [REDACTED] legitimated the applicant between 1967 and 1972. The AAO will therefore assess the applicant's claim pursuant to section 309 of the former Act (pre-November 14, 1986) requirements.

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

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.¹

The record in the present matter contains DNA evidence clearly establishing that Mr. [REDACTED] is the applicant's biological father. The record additionally contains birth certificate evidence establishing that Mr. [REDACTED] was born in the state of Georgia on August 10, 1943, and that he is a U.S. citizen. As discussed below, the AAO additionally finds that the evidence contained in the record establishes by a preponderance of the evidence that Mr. [REDACTED] legitimated the applicant prior to his twenty-first birthday.

The AAO notes that Georgia state law allows for the legitimation of a child upon the intermarriage of his or her parents (*see* Code of Georgia § 74-101) or upon the father's legal petition to establish his paternity (Code of Georgia § 74-103.) It is further noted that Library of Congress legal research information obtained by U.S. Citizenship and Immigration Services on May 26, 2005, demonstrates that Vietnamese law allows for the legitimation of a child if the father officially acknowledges or recognizes the child, and the father's acknowledgement is recorded on the child's birth certificate. In the present matter, the applicant's birth certificate contains no indication that the applicant was acknowledged by his father in Vietnam. Moreover, the record contains no evidence establishing that Mr. [REDACTED] legally established his paternity over the applicant in the state of Georgia. Accordingly, the applicant was not legitimated by his father under Vietnamese or Georgia state legitimation laws.

The AAO finds, however, that the applicant has established by a preponderance of the evidence that he was legitimated by his father prior to his twenty-first birthday, pursuant to Minnesota state legitimation laws. Minnesota Statutes provide that a child becomes legitimated by the intermarriage of his or her parents (*see* Minnesota Statutes § 517.19), or alternatively, if the father receives the child into his home and openly holds out the child as his own while the child is a minor (*see* Minnesota Statutes § 257.56(d).)

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).

In the present matter, the record contains affidavit evidence as well as Immigration Court testimony by Mr. [REDACTED] and the applicant's mother, stating that Mr. [REDACTED] was in Vietnam between 1965 and 1972, that he had three children with the applicant's mother (the applicant was the middle child), that he rented an apartment in Vietnam in order to live there with his family, and that he provided financial assistance to the applicant and his family between 1967 and 1972. The testimony reflects that Mr. [REDACTED] attempted to acknowledge and adopt the applicant and his siblings in Vietnam, but that his efforts were thwarted by Vietnamese officials based on corruption, and U.S. and racial prejudice. The testimony reflects further that

¹ The AAO notes the Board of Immigration Appeals finding in *Matter of Rivers*, 17 I&N Dec. 419, 422-23 (BIA 1980), that a natural father is presumed to have legal custody of his child at the time of legitimation in the absence of affirmative evidence indicating otherwise. The AAO notes further that The applicant falls within a narrow statutory age bracket which allows him to satisfy section 309 legitimation requirements upon showing that he was legitimated prior to the age of twenty-one rather than the age of sixteen. *See Miller v. Christopher*, 96 F.3d 1467, 1468 (U.S. App. D.C. 1996.)

Mr. [REDACTED] left Vietnam in 1972, prior to the fall of Saigon, and that he continued to send letters and money to his family in Vietnam until 1975, when the letters were returned to him. Mr. [REDACTED] subsequently lost contact with the applicant and his family, and the applicant's mother destroyed information linking her to Mr. [REDACTED] because she feared being labeled as an American sympathizer. The applicant's mother stated that she kept Mr. [REDACTED] military tag in her bra in order to be able to locate him at a future time. The testimony reflects that Mr. [REDACTED] was informed of the applicant and his family's arrival in the United States in June 1983, and that he traveled to Minnesota to see them within three days of learning of their arrival. The testimony additionally reflects that by 1983, Mr. [REDACTED] was married with a new family. Mr. [REDACTED] testified that his U.S. family knew about the applicant and his siblings, but that he had limited contact with the applicant and his family once they moved to the United States.

The AAO notes that the Immigration Court testimony was found to be credible by the Immigration Judge, and that the credibility of the assertions made by Mr. [REDACTED] and the applicant's mother was not challenged by Immigration and Customs Enforcement (ICE) attorneys. The AAO notes further that the record contains several articles containing information that corroborates the testimony about the conditions for mixed-race couples and children in Vietnam, and about official anti-American sentiment in Vietnam after the fall of Saigon. Based on the information contained in the affidavits and Immigration Court testimony, as well as the above factors, the AAO finds that the applicant has established that it is probably true that Mr. [REDACTED] received the applicant into his home in Vietnam and openly held out the applicant as his child while the applicant was a minor. It is noted that the Minnesota Statutes do not require the legitimating acts to occur in Minnesota. The AAO therefore finds that the applicant was legitimated for section 101(c) and section 309 of the former Act purposes. He therefore qualifies as a "child" for immigration purposes, and his acquisition of citizenship claim will be assessed pursuant to section 301 of the former Act provisions.

"[T]he 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 applicant was born on August 19, 1967. Section 301(a)(7) of the former Act is therefore applicable to his acquisition of citizenship claim.²

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 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 requirement of this paragraph.

In the present matter, the applicant must establish that his father was physically present in the U.S or its outlying possessions, and/or that he served honorably in the U.S. Armed Forces, for ten years between August 10, 1943 and August 19, 1967, at least five years of which occurred after August 10, 1957.

² It is noted that on November 14, 1986, section 301(a)(7) of the former Act was superceded by section 301(g) of the Act.

The record contains a birth certificate reflecting that Mr. [REDACTED] was born in the state of Georgia in August 1943 to U.S. citizen parents. The record also contains U.S. Military Retiree Service information reflecting that Mr. [REDACTED] served abroad in the U.S. Army from May 1965 to May 1971, and that he retired from the U.S. Army on September 30, 1988. In addition, the record contains Mr. [REDACTED] Social Security Earnings Statement reflecting that he began working in the U.S. in 1960, at the age of approximately eighteen, and that he earned a U.S. salary every year from 1960 to 1972 and beyond. The record also contains Immigration Court testimony from Mr. [REDACTED] relating to his experiences as an African-American in the United States prior to, and during the 1960s.

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.

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 physical presence requirements set forth in section 301(a)(7) of the former Act. Accordingly, the AAO finds that the applicant has met his burden of establishing that he qualifies for U.S. citizenship pursuant to section 309 and 301(a)(7) of the former Act. The appeal will therefore be sustained.

ORDER: The appeal is sustained.