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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: NEW YORK, NY Date: FEB 11 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:

[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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on October 13, 1981 in Ramat Gan, Israel. The applicant's father, [REDACTED] is a U.S. citizen. The applicant's parents were not married to each other. The applicant seeks a certificate of citizenship pursuant to sections 301 and 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1401 and 1409, based on the claim that he acquired U.S. citizenship at birth through his father.

The district director denied the application finding that the applicant had failed to provide evidence of his father's required physical presence in the United States.¹ On appeal, the applicant maintains that his father had the required physical presence and submits, among other things, an affidavit executed by his father's brother, a social security earnings statement, and copies of transcripts of his and his father's depositions. The record also contains, in relevant part, the applicant's father's voter registration and record, the results of a DNA test establishing the applicant's relationship to his father, a copy of the applicant's father's U.S. passport, the applicant's birth certificates, an affidavit executed by the applicant's father, and the applicant's father Form DD-214 verifying his honorable service in the U.S. Armed Forces from 1943 to 1946.

"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 applicant in the present matter was born in 1981. Section 301(a)(7) of the former Act, the predecessor to current section 301(g), therefore applies to the present case.

Section 301(a)(7) of the former Act states 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.

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

¹ The AAO notes that the application was initially denied in 2006. Although the applicant's appeal of the 2006 denial was untimely, the director reopened the matter. The director's October 2, 2008 decision is the one currently before the AAO.

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. In the present case, the applicant was four years old on November 14, 1986. The AAO notes, however, that the applicant was legitimated prior to November 14, 1986. His case will therefore be considered pursuant to the provisions of the former section 309(a) of the Act.

Section 309(a) of the Act, as in effect prior to the 1986 amendments, requires only that the applicant establish that he was legitimated prior to his 21st birthday. Under *Matter of Bullen*, 16 I&N Dec. 378 (BIA 1977), legitimation under New York law requires the marriage of the child's parents. *See also, Matter of Patrick*, 19 I&N Dec. 726 (BIA 1988). The district director cites a Library of Congress Advisory Opinion (LOC 2008-01058) indicating that the State of Israel does not recognize a distinction between children born in and out of wedlock. The AAO therefore finds that the applicant was legitimated under the laws of the State of Israel prior to his 21st birthday. Therefore, the applicant has fulfilled the requirements of section 309(a) of the Act.

The question remains whether the applicant can establish eligibility for citizenship under section 301(a)(7) of the Act. To do so, the applicant must demonstrate that his father was physically present in the United States for 10 years prior to October 13, 1981, five of which were after his 14th birthday (on August 30, 1936).

The record contains the following evidence relating to the applicant's father's physical presence prior to 1981: 1) the applicant's father's U.S. passport issued in 1949; 2) the applicant's father's voter's record, establishing that he voted in U.S. elections starting in 1976; the applicant's father's Form DD-214, establishing his honorable service in the U.S. Armed Forces from 1943 to 1946; the applicant's uncle's affidavit indicating that the applicant's father was physically present in the United States from 1946 to 1981; the applicant's father's social security earnings statement for the years 1951 to 2007; the applicant's father's affidavit and deposition transcript. The AAO finds that the record sufficiently establishes that the applicant's father had the required physical presence in the United States prior to the applicant's birth.

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 met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.