identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

E2

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 20 2009

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Sections 309(a) and 301(a)(7) of the Immigration and Nationality Act; as amended, U.S.C. §§ 1409(a) and 1401(a)(7)

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.

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).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Director, Vermont 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 October 6, 1971 in the Federal Republic of Germany. The individual identified as the applicant's natural father, [redacted] was born on October 28, 1948 in the District of Columbia. The applicant's mother, [redacted], was, at the time of the applicant's birth, a German citizen and the record indicates that she remains a German citizen. The applicant's parents did not marry. The applicant seeks a certificate of citizenship pursuant to section 309(a) of the Immigration and Nationality Act (the Act), based on the claim that he acquired U.S. citizenship at birth through his natural father.

Based on the evidence of record, the acting director determined that the record did not establish that the applicant had been legitimated by his father prior to his 21st birthday. Accordingly, she denied the application. *Acting Director's Decision*, dated October 25, 2006.

On appeal, counsel asserts that the applicant's father did legitimate him prior to his 21st birthday under section 1-208 of the Estates and Trust Article of the Maryland Code. Counsel also submits a DNA test, dated August 8, 2005, which concludes that there is a high probability that [redacted] is the father of the applicant and a December 20, 2006 order issued by the Circuit Court for Carroll County, Maryland finding the applicant to have been legitimated by [redacted] and declaring him to be [redacted] legitimate son *nunc pro tunc* to February 28, 1972. Counsel asks that the applicant's claim to citizenship be considered under section 309 of the Act as it existed prior to its amendment on November 14, 1986.

Section 309 of the Act, prior to November 14, 1986, 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. Individuals who were between 15 and 18 years of age on November 14, 1986 could, however, elect to have the legitimation rule previously in effect apply to them. As the applicant was 15 years old on the effective date of the INAA, the AAO will consider his claim to U.S. citizenship under the prior rule,[1] which stated:

> (a) The provisions of paragraphs (3), (4), (5), and (7) of section 301(a), and of the paragraph (2) of section 308 of this title shall apply as of the date of birth to a child born out-of-wedlock . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

---

[1] The AAO notes that if the record establishes that the applicant was legitimated by [redacted] prior to the enactment of the INAA, as asserted by counsel, his claim to citizenship *must* be considered under the pre-1986 requirements of section 309(a) of the Act. *See* 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.

As the applicant is the biological child of a mother and father who never married, he claims derivative citizenship under the above provisions as a child born out of wedlock. However, the AAO notes that at the time of the applicant's birth, [redacted] was married to [redacted] and that the applicant's birth certificate lists [redacted] as his father. Accordingly, prior to determining whether the record demonstrates that the applicant was legitimated prior to his 21st birthday, the AAO will consider whether the applicant's birth qualifies as an out of wedlock birth for the purposes of section 309 of the Act.

The AAO notes that the terms illegitimate and out of wedlock are sometimes used interchangeably. For purposes of section 309(a) of the Act, however, the AAO must first determine whether the applicant was born of parents that were not married to each other (i.e. out-of-wedlock) and if so, then determine, as noted above, whether the applicant was legitimated by his father prior to his 21st birthday.

Black's Law Dictionary defines the phrase "born out of wedlock" as born to "parents [who] are not, and have not been, married to each other regardless of marital status of either parent with respect to another." The AAO thus finds that the applicant was indeed "born out of wedlock."[2]

The question remains whether the applicant was legitimated by his natural father prior to his 21st birthday. The AAO finds that he was not.

In support of his claim that he is the legitimate child of [redacted], the applicant has submitted a copy of a March 14, 2006 decision from the Bremerhaven District Court, Division for Civil Cases in Bremerhaven, Germany, which finds that the applicant is not the "legitimate child" of Mr. [redacted]. The court based its conclusion on testimony from both [redacted] and [redacted] that established they had not had marital relations since July 1970 and had separated as of October 1970. The court document also observes that DNA testing does not exclude [redacted] as the natural father of the applicant. The AAO notes that the record contains an amended German birth certificate for the applicant, issued as of May 12, 2006, which lists [redacted] as his father. Whether or not the applicant is the legitimate child of [redacted], however, is not relevant to his citizenship claim. Moreover, the fact that the applicant may not be the legitimate child of Mr. [redacted] does not mean that he is the legitimate child of [redacted]. In order to find that the applicant was legitimated by [redacted], the AAO must analyze what, if anything, [redacted] did to legitimate the applicant.

The record includes a December 20, 2006 order issued by the Circuit Court for Carroll County, Maryland finding the applicant to have been legitimated by [redacted] and declaring him to be [redacted] legitimate son *nunc pro tunc* to February 28, 1972. The order issued by the Carroll

---

[2] The AAO notes the Ninth Circuit's decisions in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F3d 1090 (9th Cir. 2005). These decisions are not binding in this case, as this matter arises within the Fourth Circuit. The AAO further notes that the Ninth Circuit's analysis is unpersuasive. Among other things, the Ninth Circuit appears to equate the terms "legitimate" with "born in-wedlock." Legitimation, according to Black's Law Dictionary, refers to the process "of making legitimate or lawful that which was not originally so." Marriage of the natural parents is one way to legitimate a child.

County Circuit Court in 2006, when the applicant was 35 years of age, does not establish his legitimation for the purposes of section 309(a) of the Act.

The issue of retroactive legitimation was previously raised in *Miller v. Christopher*, 96 F.3d 1467, 321 (U.S. App.D.C. 1996), *aff'd sub nom. Miller v. Albright*, 523 U.S. 420 (S.Ct. 1998) in which the Court of Appeals rejected a Texas state court's *nunc pro tunc* legitimation order finding that to give it retroactive effect would undercut congressional intent. In reaching its decision, the Court stated:

> [The applicant] contends that . . . the Texas state court's paternity decree applies retroactively to her birth, and that she therefore satisfies the requirements of section 1409(a). We are unpersuaded. [The applicant] obtained the paternity decree after she turned 21; the statue, however, requires legitimation or establishment of paternity '*while* the person is under the age of' 18 or, as in her case, 21, depending on whether the previous or amended version of the statute applies. To allow [the applicant] to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation . . . .

The AAO therefore finds that the applicant did not derive U.S. citizenship from his natural father, because he was not legitimated prior to his 21st birthday.

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. As the applicant has not met his burden in this proceeding, the appeal will be dismissed.

ORDER: The appeal is dismissed.