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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE:

Office: HARLINGEN, TX

Date: **OCT 14 2009**

IN RE:

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

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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 sustained.

The record reflects that the applicant was born on October 5, 1976 in Mexico. The applicant's natural father, [REDACTED], was born in Ojo de Agua, Texas on March 13, 1940. The applicant's mother, [REDACTED] was a citizen of Mexico at the time of his birth and the record does not indicate that her nationality has changed. The applicant's parents never married. The applicant seeks a certificate of citizenship pursuant to former section 309(a), U.S.C. § 1409(a), based on the claim that he acquired U.S. citizenship at birth through his natural father.

Based on the evidence of record, the field office director determined that the applicant had not established eligibility for U.S. citizenship under the requirements of the current or former section 309(a) of the Act or that his father, prior to his birth, had been physically present in the United States for at least ten years, as required by section 301(a)(7) of the Act. *Field Office Director's Decision*, dated April 9, 2009. Accordingly, she denied the application.

On appeal, the applicant, through counsel, asserts that the field office director misapplied the requirements of the current section 309(a) of the Act to the applicant as he was legitimated by his father shortly after his 1976 birth. Counsel further contends that the record contains sufficient evidence to establish that the applicant's father was present in the United States for the required ten years prior to the applicant's birth.

As the applicant was born out of wedlock to parents who never married, the derivative citizenship provisions set forth in section 309 of the Act apply to this case. Prior to November 14, 1986, section 309 of the Act 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 on November 14, 1986.¹ However, in

¹ The Immigration Technical Corrections Act of 1988, Pub.L. 100-525, 102 Stat. 2609, states, in pertinent part:

Section 8. Immigration and Nationality Act Amendments of 1986 (Pub.L. 99-653).

(r) Effective Dates. – INAA is further amended by adding at the end the following new section:

“Effective Dates

“Sec. 23 . . .

“ (e) (1) Except as provided in paragraph (2)(B), the new section 309(a) (as defined in paragraph 4(A)) shall apply to persons who have not attained 18 years of age as of the date of the enactment of this Act.

“(2) The old section 309(a) shall apply –

“(A) to any individual who has attained 18 years of age as of the date of the enactment of this Act, and

cases where INAA-eligible individuals were found to have been legitimated prior to the November 14, 1986 date of enactment, these individuals would remain subject to the pre-1986 requirements of section 309(a) of the Act.²

The applicant in the present case was only ten years old on November 14, 1986. Therefore, his claim to citizenship must be considered under the amended requirements of section 309(a) of the Act unless the record establishes, as counsel contends, that he was legitimated by his natural father shortly after his 1976 birth. Accordingly, the AAO first turns to a consideration of whether the record establishes that the applicant was legitimated prior to November 14, 1986.

The record contains a birth registration for the applicant issued by the Rio Bravo municipality, State of Tamaulipas, Mexico. This document establishes that the applicant was born to [REDACTED] and [REDACTED] on October 5, 1976. Both parents' names appear on the birth registry, dated March 15, 1977. According to a 2004 Library of Congress (LOC) opinion, parentage in the State of Tamaulipas, Mexico can be established, *inter alia*, by acknowledgement of a child on the birth record. See LOC opinion 2004-416. The LOC opinion also indicates that the Civil Code of the State of Tamaulipas, which came into force on February 1, 1987, applies retroactively to children born prior to its enactment unless its retroactive effect would be detrimental to the child. The AAO therefore concludes that the applicant was legitimated on March 15, 1977, the date his birth was registered by his parents.

In reaching its conclusion, the AAO has noted the field office director's reliance on *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Circuit 2006) and on a 2003 unpublished Board of Immigration Appeals (BIA) decision, *In re: Bustamante-Barrera*, No. [REDACTED] (BIA October 3, 2003). However, the AAO does not find either decision to be relevant to the issue of whether the applicant's Mexican birth may be considered legitimate. It also finds the field office director to have erred in relying on an unpublished BIA decision to support her denial of the application. In *Bustamante Barrera v. Gonzales*, the Fifth Circuit refused to recognize a *nunc pro tunc* amended divorce decree, which was issued by a California court *solely* to satisfy the legal custody requirement for [REDACTED] naturalization, although it did not rule out the possibility that some set of circumstances might result in its recognition of such a decree. There are no corresponding issues raised by the present case. Here, the question is whether the applicant, born to a U.S. citizen father, has been legitimated under the laws of the State of Tamaulipas, which apply to all Mexican children born out of wedlock within its boundaries. Accordingly, *Bustamante-Barrera v. Gonzalez* may not be applied to the present case and a determination that the applicant has been legitimated under Mexican law does not contravene its holdings.

In that the applicant was legitimated prior to November 14, 1986, he is subject to former section 309(a) of the Act, 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

“(B) an individual with respect to whom paternity was established by legitimation before such date.

² *Ibid.*

out-of-wedlock . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

As the applicant's legitimation on March 15, 1977 satisfies the requirements of former section 309(a) of the Act, the only remaining issue before the AAO is whether the record also establishes that the applicant has met the requirements of former section 301(a)(7) of the 1952 Act, which stated 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 . . . 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 . . . 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 parents may be included in computing the physical presence requirements of this paragraph.

The applicant has submitted the following evidence that relates to his deceased father's physical presence in the United States:

- A baptismal certificate for [REDACTED] issued by Our Lady of Guadalupe Church, Mission, Texas, stating that [REDACTED] was born on March 13, 1940 in Ojo De Agua, Texas and baptized on November 3, 1940.
- A death certificate for [REDACTED] stating that he was born on March 13, 1940 in Fenita, Texas.
- An August 15, 1958 application for a social security account number submitted by [REDACTED], which states that he was born in Ojo de Agua, Texas and, at the time of application, was living in Williston, Ohio.
- A 1964 application for a social security and tax account number filed by [REDACTED], again indicating his place of birth as Ojo de Agua, Texas and that his mailing address was Mabton, Washington.
- School records for [REDACTED] which establish that he attended school in Edinburg, Texas from September 2, 1953 to April 12, 1954 and January 17, 1955 to April 13, 1955.
- [REDACTED] social security earnings statement for the period January 1958 through December 1977.
- An affidavit sworn by [REDACTED] dated December 21, 2007, in which she states that she knew and worked with [REDACTED] in the United States in 1974.

- An affidavit sworn by [REDACTED] dated June 8, 2009, regarding his knowledge of migrant labor practices from the 1950s through the 1970s.
- State of Texas birth records from 1944 and 1948 for two of [REDACTED] siblings.

In her decision, the field office director indicated that she had found the applicant's father to have been present in the United States for only eight years prior to the applicant's birth. The field office director, using the minimum wage standards in effect at the time of [REDACTED] employment, determined that his social security earnings translated into five and one-half years of employment. She found that the other documentation in the record established [REDACTED] as having been physically present for an additional two and one-half years.

In reviewing the record before it, the AAO finds the field office director to have erred in using the federal minimum wage to calculate the length of [REDACTED] physical presence in the United States. It notes that federal minimum wage requirements did not apply to any agricultural employment until 1967 and that it was not until 1977 that the minimum wage for farm workers actually reached parity with that for nonfarm workers. Accordingly, the AAO finds that when [REDACTED] social security earnings are combined with his birth and baptismal certificates, his school attendance records for 1954 and 1955, the 1944 and 1948 Texas birth records for two younger siblings, and the affidavit provided by [REDACTED] the record demonstrates, by a preponderance of the evidence, that he was physically present in the United States for a minimum of ten years prior to the applicant's birth, five of which followed his 14th birthday. Accordingly, the record establishes that the applicant is eligible for a certificate of citizenship under former section 309(a) of the Act. The appeal will be sustained.

ORDER: The appeal is sustained.