

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

E₂



OCT 20 2009

FILE: [REDACTED] Office: EL PASO, TX Date:

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Section 301(a)(7) of the former Immigration and Nationality Act; 8 U.S.C. § 1401(a)(7)(1983).

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, El Paso, 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 November 16, 1983 in Mexico. The applicant's parents are [REDACTED] and [REDACTED]. The applicant was born out of wedlock. His father is a native-born U.S. citizen, born in El Paso, Texas on October 20, 1959. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his father.

The field office director found that the applicant had failed to establish that his father had the required 10 years of physical presence in the United States prior to his birth, and therefore concluded that he did not derive U.S. citizenship under section 301(a)(7) of the former Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(a)(7)(1983).¹

On appeal, the applicant, through counsel, maintains that he acquired U.S. citizenship at birth through his father under section 301 of the Act, 8 U.S.C. § 1401. Specifically, the applicant claims that he has established his father's physical presence as required by the statute. *See Applicant's Appeal Brief.*

The AAO notes that 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. *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant was born in 1983. Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7), is therefore applicable to this case. Because the applicant was born out of wedlock, he must also fulfill the requirements of section 309 of the Act, 8 U.S.C. § 1409.

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.

¹ Although the requirements of sections 301(a)(7) and 301(g) were the same until 1986, section 301(a)(7) of the former Act was not re-designated as section 301(g) until the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046.

Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7)(1983), thus requires that the applicant establish that his father was physically present in the United States for at least 10 years prior to 1983, five of which after 1973 (when his father turned 14 years old).

Prior to November 14, 1986, section 309 of the former Act required that a father's paternity be established by legitimation while 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).² In the present case, the applicant was two years old on November 14, 1986. 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. The applicant was legitimated at birth in accordance with the Civil Code of Chihuahua, by virtue of his father's acknowledgement.³ The applicant's case must therefore be considered pursuant to the provisions of section 309(a) of the former Act.

² Section 309 of the amended Act states in pertinent part that:

- (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 . . . 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.

³ According to a March 2004 advisory opinion from the Library of Congress (LOC 2004-416), parentage is governed in the state of Chihuahua by the Civil Code ("Code") of the state, promulgated on July 31, 1942 as amended on June 6, 1989. The Code is retroactive, unless its application violates vested rights. Under the Code, all children have equal rights regardless of whether they were born within a union not bound by marriage or within a marriage. Still, children are born within a union not bound by marriage need to have their parentage established in order to have their rights implemented. Parentage is established with respect to the mother by the mere fact of birth. Parentage is established with respect to the father by voluntary acknowledgment of the child or by a final judgment declaring the paternity of the child. Acknowledgment may be achieved by any of the following ways: 1) on the birth record, before the Civil registry Officer; 2) by a special acknowledgment proceeding before the Civil Registry Officer; 3) by a public notarial instrument; 4) under a will; or 5) by direct and open admission in open court. The record contains two versions of the applicant's birth certificate. The birth registration dated in 1984 lists the applicant's father; the registration dated in 1993 does not. The

Section 309 of the former Act required only that the applicant be legitimated prior to his 21st birthday. As noted above, the applicant was acknowledged at birth and therefore legitimated in accordance with the Civil Code in Chihuahua.

The question remains whether the applicant can establish that his father had the required physical presence in the United States. The record contains, in relevant part, the applicant's birth certificate, the applicant's father's marriage certificate dated in 1980 in El Paso, the applicant's father's birth and baptismal certificates, a letter confirming the applicant's father's enrollment in the job corps from January 1976 to May 1977, and social security records indicating earned income during the years 1975-1977 and 1981-1983. The record also contains statements executed by family friends, a copy of the El Paso directory listing the applicant's father, as well as an affidavit executed by the applicant's father. The applicant's father claims in his affidavit that he lived in the United States from birth until the age of 5, and then from 1973 to 1981. The record also contains a copy of the applicant's brother's birth and baptismal certificates, indicating he was born in 1981 in El Paso.

The AAO finds that the applicant has established that his father was physically present in the United States at birth in October 1959 and until his baptism in November 1960, from 1973-1977 and from 1979 to 1983. The record thus establishes, by a preponderance of the evidence, that the applicant's father was physically present in the United States for ten years prior to the applicant's birth in 1983 (five of which after 1973).

The AAO notes "[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). The regulations at 8 C.F.R. § 341.2(c) provide 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 AAO finds that the applicant has met his burden of proof and the appeal will be sustained.

ORDER: The appeal is sustained.

registration dated in 1984 indicates that both mother and father were present at the time of registration. The AAO thus finds that the applicant was acknowledged in accordance with the Code.