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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**

E₂

FILE:

[REDACTED]

Office: PHOENIX, ARIZONA

Date:

JUL 30 2010

IN RE:

[REDACTED]

APPLICATION:

Application for Certificate of Citizenship under former sections 301 and 309 of the
Immigration and Nationality Act; 8 U.S.C. §§ 1401, 1409 (1970)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant was born in Mexico on October 1, 1970, to unwed parents [REDACTED]. The applicant's father is a U.S. citizen based on his birth in the United States. The applicant's mother was born in Mexico and is not a U.S. citizen. The applicant seeks a certificate of citizenship pursuant to former sections 301(a)(7) and 309(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1401(a)(7), 1409(a) (1956), based on the claim that she acquired U.S. citizenship at birth through her father.

The director found that the applicant failed to establish that her father was physically present in the United States for the requisite period prior to the applicant's birth, as required by former section 301(a)(7) of the Act. *See Decision of the Director*, dated Aug. 8, 2009. The application was denied accordingly. *Id.* On appeal, the applicant claims through counsel that the evidence is sufficient to show that her father meets the physical presence requirements. *See Form I-290B, Notice of Appeal*, filed Sep. 10, 2009; *Brief in Support of Appeal*.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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. INS*, 247 F.3d 1026, 1028 n.3 (9th Cir. 2001). The applicant in this case was born in 1970. Accordingly, former section 301(a)(7) of the Act controls her claim to citizenship.¹

Former section 301(a)(7) of the Act 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. . .

The applicant must therefore establish that her father was physically present in the United States for no less than ten years before her birth on October 1, 1970, and that at least five of these years were after her father's fourteenth birthday on July 30, 1944. *See id.*

Additionally, because the applicant was born out of wedlock, she must satisfy the legitimation provisions set forth in section 309(a) of the Act. Although section 309(a) was amended in 1986, the former version of section 309(a) applies to persons who had attained 18 years of age on November

¹ Former section 301(a)(7) of the Act was re-designated as section 301(g) by the Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046 (1978). The requirements of former section 301(a)(7) remained the same after the re-designation and until 1986.

14, 1986, and to any individual with respect to whom paternity was established by legitimation before November 14, 1986, the date of enactment of the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (1986). See Section 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609 (1988).² The pre-amendment version of section 309(a) of the Act required that paternity be established by legitimation before a child turned 21. See former section 309(a) of the Act.

Here, the applicant's father was named on her birth certificate, see *Birth Certificate of* [REDACTED] registered in Sonora, Mexico, on Nov. 6, 1970, and the applicant's parents were married in 1983, when the applicant was twelve years old, see *Arizona Marriage Certificate*, dated Sep. 13, 1983. Accordingly, the applicant's paternity was established by legitimation before November 14, 1986, and the applicant meets the requirements set forth in former section 309(a) of the Act.

Additionally, the preponderance of the evidence corroborates the applicant's claim that her father was born in Mesa, Arizona, and that he met the physical presence requirements set forth in former section 301(a)(7) of the Act. Specifically, the record contains the following evidence regarding [REDACTED] physical presence in the United States before the applicant's birth: a birth certificate, filed on August 4, 1930, showing that [REDACTED] [sic] was born in Mesa, Arizona on July 30, 1930; a Certificate of Baptism, showing that [REDACTED] was baptized in Phoenix, Arizona on December 7, 1930; and a social security statement showing earnings for [REDACTED] in 1955 based on employment in Los Angeles, California.

According to [REDACTED] affidavit, dated November 3, 2005, and a sworn statement made before an officer of U.S. Citizenship and Immigration Services on May 27, 2009, [REDACTED] moved to Mexico with his family when he was between the ages of five and seven. [REDACTED] returned to the United States when he was either fifteen or eighteen years old, and he lived with his uncle, [REDACTED] in Los Angeles, California. In 1955, he moved to Tucson, Arizona, where he lived until 1993. [REDACTED] further stated that when he resided in Tucson, he traveled to Sonora, Mexico "to see [his] family and support them morally and economically." *Affidavit of* [REDACTED] account of his physical presence in the United States is supported by the statements of his siblings. See *Notarized Statement of* [REDACTED], dated Nov. 4, 2005 (stating that [REDACTED] lived in the affiant's home in Tucson, Arizona, for approximately 28 years); *Notarized Statement of* [REDACTED] (stating that [REDACTED] has lived in the United States since 1948); *Declaration of* [REDACTED] dated June 23, 1992 (attesting to [REDACTED] residence in the United States after 1951 through 1970).

On appeal, counsel submits a copy of the Board of Immigration Appeals' decision in the case of the applicant's sister in which it upheld the Immigration Judge's order to terminate removal proceedings because the applicant's sister had established that she acquired citizenship at birth through their

² Additionally, because the applicant was between the ages of fifteen and eighteen on November 14, 1986, she may elect to have the legitimation provisions in the former version of section 309(a) apply to her. See *id.*

father. We are not bound by a determination of the Executive Office for Immigration Review (EOIR) that an applicant is a U.S. citizen. An immigration judge may credit an individual's citizenship claim in the course of terminating removal proceedings for lack of jurisdiction because the government has not established the individual's alienage by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a), (c) (prescribing that the government bears the burden of proof to establish alienage and removability or deportability by clear and convincing evidence). The immigration judge's decision regarding citizenship, however, is not binding on USCIS. USCIS retains sole jurisdiction to issue a certificate of citizenship and the agency's decision is reviewable only by the federal courts, not EOIR. Sections 341(a) and 360 of the Act, 8 U.S.C. §§ 1452(a), 1503; 8 C.F.R. 341.1. *See also Minasyan v. Gonzalez*, 401 F.3d at 1074 n.7 (noting that the immigration court had no jurisdiction to review the agency's denial of [REDACTED] citizenship claim). In addition, while the government bears the burden of proof to establish an individual's alienage in removal proceedings before EOIR; in certificate of citizenship proceedings before USCIS, the applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. 341.2(c).

Although the immigration judge's finding regarding the applicant's sister's citizenship is not binding on these proceedings, the transcript of the pertinent hearings and evidence before the immigration judge, if also part of the record before USCIS, may provide probative evidence relevant to the N-600 application. The record in this case contains the transcripts of additional testimony of the applicant's father during her sister's removal proceedings before the immigration court, which corroborates the applicant's father's physical presence in the United States. *See Hearing Transcript for Matter of* [REDACTED] dated Apr. 24, 2008. Specifically, Mr. Espinoza testified that he was born in the United States and resided here until he moved to Mexico with his family when he was five years old. *Id.* at 35. [REDACTED] stated that he returned to the United States in 1948 to work and reside in California. *Id.* at 36. In 1955, Mr. Espinoza moved to Tucson, where he worked in construction *Id.* at 37-38. Additionally, the record contains a copy of a U.S. passport for an older brother of the applicant. *See Copy of Passport for* [REDACTED]

The applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). The applicant has established by a preponderance of the evidence that her father was physically present in the United States for no less than ten years before her birth in 1970, and that she is eligible for citizenship under former section 301(a)(7) of the Act. Accordingly, the appeal will be sustained, the decision of the director will be withdrawn, and the matter will be returned to the director for the issuance of a certificate of citizenship.

ORDER: The appeal is sustained. The matter is returned to the Phoenix Field Office for issuance of a certificate of citizenship.