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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



E2

Date: **AUG 02 2012**

Office: NEW YORK, NY

FILE:

IN RE:

Applicant:



APPLICATION:

Application for Certificate of Citizenship pursuant to sections 301 and 309 of the
Immigration and Nationality Act, 8 U.S.C. §§ 1401 and 1409

ON BEHALF OF APPLICANT:



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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 dismissed.

The record reflects that the applicant was born on May 20, 1980 in Honduras. The applicant's parents, as indicated in her birth certificate, are [REDACTED]. The applicant was born out of wedlock, but recognized by her father in 1982. The applicant's father, who was born in Honduras on November 7, 1925, became a United States citizen upon his naturalization on November 4, 1959. He passed away in 1998. The applicant seeks a certificate of citizenship claiming that she acquired U.S. citizenship through her father.

The district director denied the applicant's citizenship claim upon finding that she had failed to establish that her father was physically present in the United States as required under former section 301 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401 (1980).

On appeal, the applicant, through counsel, states that she is eligible to derive U.S. citizenship. See Brief in Support of Appeal. The applicant maintains that she is eligible for citizenship under section 322 of the Act, 8 U.S.C. § 1433. *Id.*

The AAO reviews these proceedings *de novo*. 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. See *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1028 n.3 (9th Cir. 2001) (internal citation omitted). The applicant in the present matter was born in 1980. Former section 301(g) of the Act therefore applies to the present case.¹

Former section 301(g) of the Act stated, in pertinent part, 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.

¹Former section 301(a)(7) of the Act was re-designated as section 301(g) upon enactment of the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046. The substantive requirements of this provision remained the same until the enactment of the Act of November 14, 1986, Pub. L. 99-653, 100 Stat. 3655.

The applicant must therefore establish that her father was physically present in the United States for 10 years prior to 1980, five of which were after the age of 14 (after 1939).

The record reflects that the applicant was born out of wedlock. Section 301(g) of the Act, *supra*, is applicable to children born out of wedlock only upon fulfillment of the conditions specified in section 309(a) of the Act, 8 U.S.C. § 1409(a).

Section 309(a) of the Act states, in relevant part:

(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.

At issue in this case is whether the applicant can establish that her father was physically present in the United States for the statutorily required 10-year period prior to her birth. The applicant's father naturalized in 1959. The applicant claims that her father served as a merchant marine from 1952 to 1980. The record contains several certificates of discharge issued to the applicant's father between 1952 and 1980. The record also contains a social security earnings statement indicating sporadic employment income from 1951 to 1984 and a letter evidencing the applicant's father's union membership between 1957 and 1985.

The applicant's father's discharge certificates indicate that he served in "foreign" or "coastwise" merchant marine vessels from 1960 through 1974. As noted by the district director, the U.S. Department of State's Foreign Affairs Manual, at 7 FAM 1133.3-3(b)(7), states, in pertinent part:

Time spent on voyages defined by the Coast Guard as "foreign" or "coastwise" (those from one U.S. port to another in a non-adjacent State in which the vessel travels outside U.S. territorial waters) are not considered physical presence in the United States.

In light of the time spent by the applicant's father as a seaman in "foreign" or "coastwise" vessels, the applicant cannot establish that her father was physically present in the United States for 10 years prior to 1980. The applicant therefore did not acquire U.S. citizenship at birth under former section 301 of the Act.

The applicant also did not acquire U.S. citizenship under former section 322 of the Act.²

Former section 322 of the Act provided, in pertinent part, that:

(a) A parent who is a citizen of the United States may apply to the Attorney General [now the Secretary, Homeland Security, "Secretary"] for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General [Secretary] shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General [Secretary] that the following conditions have been fulfilled:

- (1) At least one parent is a citizen of the United States, whether by birth or naturalization.
- (2) The child is physically present in the United States pursuant to a lawful admission.
- (3) The child is under the age of 18 years and in the legal custody of the citizen parent.

....

(b) Upon approval of the application . . . [and] upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

The AAO notes that, whether or not an applicant satisfied the requirements set forth in former section 322(a) of the Act, she is required to establish that her application for citizenship was approved, and that she took the oath of allegiance, prior to her eighteenth birthday. The applicant in the present case did not meet the requirements set forth in former section 322(b) of the Act because she did not apply for a certificate of citizenship before she turned 18, because no such application

² Section 322 of the Act was amended by the Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), and took effect on February 27, 2001. CCA § 104. The CCA benefits all persons who had not yet reached their eighteenth birthdays as of February 27, 2001. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001). The applicant was over the age of 18 on the CCA's effective date, and former section 322 of the Act is therefore applicable in her case.

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was adjudicated or approved, and because she did not take an oath of allegiance prior to her eighteenth birthday.

The burden in these proceedings is on the applicant to establish eligibility for U.S. citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant in this case has failed to meet her burden of proof. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.