U. S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: [redacted] Office: Houston Date: FEB 12 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Naturalization under Section 322 of the Immigration and Nationality Act, 8 U.S.C. § 1433

IN BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Houston, Texas, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant was born on April 17, 1984, in Mexico. The applicant's father, [redacted], was born in Mexico in June 1959 and became a naturalized U.S. citizen on August 2, 1996. The applicant's mother, [redacted], was born in Mexico in October 1956 and never had a claim to United States citizenship. The applicant's parents married each other on August 28, 1978. The record fails to show that the applicant was ever lawfully admitted for permanent residence or as a nonimmigrant visitor. The applicant is seeking to become a naturalized citizen under section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433.

The district director reviewed the record and concluded that the applicant had failed to establish she had been lawfully admitted for permanent residence as required and denied the application accordingly.

On appeal, counsel, refers to the regulations at 8 C.F.R. § 322 which state that the child must be physically present pursuant to a lawful admission, not lawful admission for permanent residence. He asserts that the applicant is present in the United States pursuant to the Family Unity Program which is proof of lawful admission. He further states that the applicant's citizen parent has satisfied the physical presence requirement because he has resided in the United States since 1990 when he became a lawful permanent resident.

Sections 320 and 322 of the Act were amended by the Child Citizenship Act of 2000 (CCA), and took effect on February 27, 2001. The CCA benefits all persons who have not yet reached their 18th birthday as of February 27, 2001.

The present application was filed on August 13, 1997, and is subject to the law in effect at that time.

Section 322 of the Act in effect between April 1, 1995, and February 27, 2001, provided, in part, that:

> (a) A parent who is a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General 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.

(4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (E) or (F) of section 101(b)(1).

(5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less that 5 years, at least 2 of which were after attaining the age of 14 years-

(A) The child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or

(B) A citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years.

(b) Upon approval of the application (which may be filed abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

In 1994, section 322 of the Act was amended to provide for expedited naturalization of certain children born outside the United States. See Immigration and Technical Corrections Act of 1994 (INTCA), section 102, Pub.L. 103-416, 108 Stat. 4307. Unlike children who acquire citizenship through a citizen parent as of a date of their birth, children who are expeditiously naturalized under section 322 of the Act based on their parent's/grandparent's residence, become citizens upon approval of the application and subscribing to the oath of allegiance (if applicable).

Section 322(a)(2) of the Act in effect between April 1, 1995, and February 27, 2001, required the child to be physically present in the United States pursuant to a lawful admission, provided that the

citizen parent had satisfied the physical presence requirements. A lawful admission includes a lawful admission for permanent residence or a lawful admission as a nonimmigrant visitor, and contemplates a lawful entry after inspection and authorization by an immigration officer.

If the citizen parent could not satisfy the physical presence requirement of the Act, which for persons born before November 14, 1986, was 10 years, at least 5 of which were after attaining the age of 14 years, then the physical presence of a citizen grandparent could be used. The applicant's citizen father appears to have been physically present in the United States for the required 10 years following his entry in 1977. However, there is no evidence in the record that the applicant was lawfully admitted either as a permanent resident or as a nonimmigrant visitor. Therefore, she is not eligible under section 322 of the Act in effect between April 1, 1995, and February 27, 2001.

"Old" section 322 of the Act, pursuant to the amendments of Pub. L. 95-114, 92 Stat. 918, Sec. 7 (1978), which was in effect prior to April 1, 1995, and at the time of the applicant's birth, provided, in part, that:

> A child born outside of the United States, one or both of whose parents is at the time of applying for the naturalization of the child, a citizen of the United States, either by birth or naturalization, may be naturalized if under the age of 18 years and not otherwise disqualified from becoming a citizen...and if residing permanently in the United States, with the citizen parent, pursuant to lawful admission for permanent residence, on the petition of such citizen parent, upon compliance with all the provisions of this title, except that no particular period of residence or physical presence in the United States shall be required....

"Old" section 322 of the Act required that the child be lawfully admitted for permanent residence. The applicant is, therefore, not eligible under that provision.

8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has failed to meet that burden. Therefore, the appeal will be dismissed.

This decision is without prejudice to the applicant's seeking U.S. citizenship through normal naturalization procedures by filing an Application for Naturalization on Form N-400 with a Service office having jurisdiction over her residence.

ORDER: The appeal is dismissed.