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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

MAY 08 2003

FILE [redacted] Office: Buffalo Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under Section 301(g) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g)

ON BEHALF OF APPLICANT:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Buffalo, New York, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on January 2, 1958, in Canada. The applicant's father, [redacted] was born in the United States in November 1935. The applicant's mother, [redacted] was born in March 1935 in Canada and never had a claim to U.S. citizenship. The record fails to contain evidence that the applicant's parents married each other. The applicant claims that he acquired United States citizenship at birth under section 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(g).

The district director determined the record failed to establish that the applicant's United States citizen parent had been physically present in the United States or one of its outlying possessions for 10 years, at least 5 of which were after age 14, as required under section 301(g) of the Act at the time of the applicant's birth.

On appeal, the applicant asserts that the section of law used in determining his right to citizenship, that of a child of a U.S. citizen father, differs substantially from the statutory provisions that confer citizenship on children born to citizen mothers. He, therefore, requests consideration of his due process and equal protection rights. The applicant cites various cases that he states are relevant to his situation. In particular he notes *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, which he asserts supports his contention that section 309 is unconstitutional on equal protection grounds.

Section 301(g) of the Act in effect prior to November 14, 1986, provides, in pertinent part, that 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 10 years, at least 5 of which were after attaining the age 14 years, shall be nationals and citizens of the United States at birth.

The record establishes that the applicant's U.S. citizen parent was physically present in the United States from 1935 until 1940 and then resided in Canada from 1940 until 1965.

The applicant has not shown that he acquired United States citizenship at birth because he has failed to establish that his father was physically present in the United States for the required period prior to the applicant's birth.

Section 309(a) of the Act was amended by Pub. L. 99-653 and was effective as of the date of enactment, November 14, 1986. The old section 309(a) shall apply to any individual who has attained 18

years of age as of the date of the enactment of this Act. The applicant was 28 years old on November 14, 1986.

The text of "old section 309(a) of the Act" is as follows:

> The provisions of paragraphs (c), (d), (e), and (g) of section 301, and paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act [viz., December 24, 1952], if the paternity of such child is established while such child is under the age of 21 years by legitimation.

It is unclear from the record whether the applicant's parents were married or whether he was born out of wedlock. As such, it is not clear whether he is eligible under "old section 309 of the Act". If the applicant is claiming such eligibility he must establish that he was "legitimated" while under the age of 21 years. This evidence is not contained in the record.

While, as stated above, it is unclear whether the applicant has a claim under section 309(a), his assertion that he was denied equal protection is found to be without merit. The final decision in *Miller v. Albright*, which addressed section 309(a), stated that additional proof-of-paternity requirements imposed on the father as opposed to the mother did not represent unconstitutional denial of equal protection based on the sex of the parent. Section 301(g), the section of law addressed in this proceeding, makes no distinction between fathers and mothers in the requirements for derivative citizenship.

Pursuant to 8 C.F.R. § 341.2(c), the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.