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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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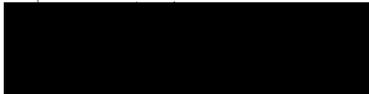
FILE:



Office: Seattle

Date: AUG 19 2002

IN RE: Applicant:



APPLICATION:

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

IN BEHALF OF APPLICANT:



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, Seattle, Washington, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on December 31, 1955, in Poland. The applicant's father, [REDACTED] was born in Poland in 1920 and never had a claim to U.S. citizenship. The applicant's mother [REDACTED] was born in 1920 in the United States. The applicant's parents married each other on June 16, 1943. 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 record reflects that the applicant's mother (hereafter referred to as [REDACTED] resided in the United States from her birth on December 19, 1920, until May 15, 1921, when the family left for Poland. [REDACTED] attempted to return to the United States after voluntarily residing in Poland and the former USSR until 1959. [REDACTED] and the applicant's father remained in the United States until 1968 when the family moved to Canada. The applicant became a Canadian citizen in 1979.

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, counsel disagrees with that decision and states that the district director failed to consider and to apply the proper legal standard for constructive physical presence. The issue advanced in the record is that [REDACTED] could not leave Poland/USSR when Germany invaded Poland in 1939. [REDACTED] passport application dated March 26, 1959, reflects that she resided in the USSR from 1939 to 1955 and in Poland from 1955 to 1959. The record indicates that the applicant was admitted to the United States on an immigrant visa on March 30, 1959, with the alien registration number A11 658 224.

When U.S. consular officers issue immigrant visas to children of United States citizens, they carefully review the possibility of a claim to U.S. citizenship by the children because U.S. citizens are ineligible for immigrant visas. The applicant indicated on his immigrant visa application on March 26, 1959, that he was the child of a U.S. citizen. There is no indication on the application that the applicant's claim to U.S. citizenship was considered at that time.

Montana v. Kennedy, 278 F.2d 68, affd. 366 U.S. 308 (1961), held that to determine whether a person acquired U.S. citizenship at birth abroad, resort must be had to the statute in effect at the time of birth. Section 301(g) of the Act was in effect at the time of the applicant's birth.

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 mother left the United States at the age of 5 months and remained outside the United States until 1959 when she was 38 years old. She was approximately 19 years old when Germany invaded Poland in September 1939. The record does show that her two older brothers returned to the United States in 1937 and 1938 respectively and she was issued a copy of her baptismal certificate by mail in 1939. A note from the passport division April 27, 1949, indicates that the applicant's mother is considered to be a Soviet citizen, and will not be able to obtain an exit permit to leave.

Counsel states that the applicant's mother remained involuntarily absent from the United States from 1939 to 1959. She became a Soviet citizen by treaty and was held as a prisoner of the Cold War by the Stalinist regime and unable to leave the Soviet Union.

The case law cited in this matter, Matter of G-, 9 I&N Dec. 64 (BIA 1960); Matter of Farley, 11 I&N Dec. 51 (Asst. Comm. 1965); and Matter of Navarrette, 12 I&N Dec. 138 (BIA 1967), relates to persons who acquired U.S. citizenship at birth abroad through a U.S. citizen parent, but who failed to satisfy the retention requirements in effect at the time of their birth by coming to the United States prior to a certain age. It was held that where the failure to comply with the retention requirement was caused by official error or misconduct, or by circumstances beyond their control, or by ignorance of the person's claim to U.S. citizenship, this requirement has been constructively met for the purposes of citizenship retention.

The present matter does not concern itself with citizenship retention. It concerns itself with a U.S. born parent who has not met the physical presence requirement to transmit U.S. citizenship to her offspring born abroad.

Beginning with the Nationality Act of 1940 (NA 1940), stringent conditions were imposed defining the prior residence of the citizen parent prerequisite to transmission of U.S. citizenship to a child born abroad. In such cases the condition prerequisite to the transmission of U.S. citizenship was that, prior to the child's birth abroad, the citizen parent must have resided in the United States or one of its outlying possessions for a specific amount of time. By introducing this requirement NA 1940 sought to prevent the perpetuation of United States citizenship by citizens born abroad who remained abroad, or by persons who were born in the United

States but who go abroad as infants and do not return to this country. The 1952 Act continued the major patterns of NA 1940 although enlarging the definition of the term "residence."

Absent such supportive evidence, the applicant has not shown that he acquired United States citizenship at birth because he has failed to establish that his mother was physically present in the United States for the required period prior to the applicant's birth.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence.

The applicant has not met this burden of establishing his mother had been physically present in the United States a total of 10 years, 5 of which were after the age 14. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.