



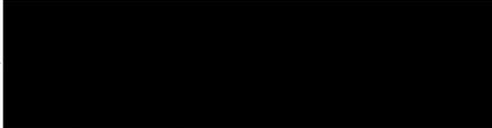
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE



Office: San Antonio

Date:

AUG 26 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, San Antonio, Texas, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed, and the order dismissing the appeal will be affirmed.

The record reflects that the applicant was born on September 13, 1974, in Mexico. The applicant's father, [REDACTED] was born in the United States in November 1953. The applicant's mother, [REDACTED] was born in Mexico in December 1957 and never had a claim to United States citizenship. The applicant's parents married each other on February 1, 1982, and were divorced on February 19, 1987. He was lawfully admitted for permanent residence on April 26, 1983. 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 Immigration and Nationality Act (the Act), 8 U.S.C. 1401(g), in effect at the time of the applicant's birth. The Associate Commissioner affirmed that decision on appeal.

On appeal, counsel discusses the physical presence requirements within the framework of the retention requirements for a child born abroad as discussed in INTERP 301.1(b)(6). The applicant is not required to satisfy any retention requirements as he was born after October 10, 1952. Counsel states that the physical presence requirement does not necessarily contemplate the establishment of a residence in the United States or an intention to reside permanently. Matter of Flores-Maldonado, 10 I&N Dec. 22 (BIA 1962). Counsel argues that the citizen should be regarded as constructively physically present in the United States during allowable absences for the purpose of satisfying the statutory requirement.

INTERP 301.1(b)(5)(v) relates to the continuity of physical presence required by the U.S. citizen parent in order to transmit citizenship to a child at birth and states that whether an absence will be regarded as having broken the required continuity of the parent's physical presence shall be determined in accordance with INTERP 316.1(c)(3).

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.

Section 12 of the Act of November 14, 1986, (Pub.L. 99-653, 100 Stat. 3657), shortened the required period of United States residence for the citizen parent, and substituted "five years, at least two" for "ten years, at least five," effective for persons born on or after November 14, 1986.

The record contains an affidavit by the applicant's father dated August 21, 1999, in which he states that he has resided continuously in the United States since sometime in March 1962. This affidavit is unsupported in the record. In a sworn statement given to a Service officer, with his attorney present, on March 22, 2000, the applicant's father stated (a) that he went to Mexico when he was 7 or 8 years old and then came back to the United States when he was 16 years old; and (b) that he started to live permanently in the U.S. when he was 7 or 8 years old. The record reflects that the applicant's father did not attend school in the U.S. He enrolled in 1962 but never attended.

The applicant's father registered for Selective Service on an unstipulated date. The record contains two earnings receipts for the year 1970, and detailed FICA earnings beginning with the year 1968. However, it appears from the amount of earnings during this period of time that the father did not work full-time during the years prior to the applicant's birth and there is no evidence to show how much time the father spent in the United States during that period of time as opposed to residing in Mexico.

It is again noted that the applicant, his mother and his two brothers were the beneficiaries of Petitions for Alien Relative, all approved on December 12, 1982. The three brothers were classified as IR-2 children of a U.S. citizen. At the time of review on April 15, 1983, the consular officer noted on their immigrant visa applications that each child had previously been living in the United States illegally. The consular officer then issued them immigrant visas. There is no evidence in the record to show that the issue of the applicant and/or his siblings having a claim to U.S. citizenship was raised during their interviews with the consular officer. The record is devoid of any explanation as to why the applicant waited until July 30, 1999, at the age of 24, to seek a certificate of citizenship.

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 father had been physically present in the United States a total of 10 years, 5 of which were after the age 14. Accordingly, the motion will be dismissed, and the order dismissing the appeal will be affirmed.

ORDER: The motion is dismissed. The order of September 6, 2001, dismissing the appeal is affirmed.