



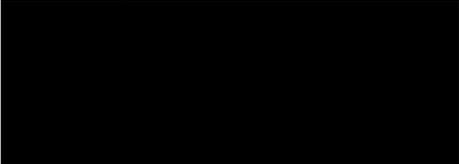
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U.S. Department of Justice

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: Houston

Date: OCT 22 2002

IN RE: Applicant:

APPLICATION:

Application for Certificate of Citizenship under Section 341(a) of
the Immigration and Nationality Act, 8 U.S.C. 1452(a)

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, Houston, Texas, 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 February 18, 1963, in Mexico. The applicant's father, [REDACTED] was born in Mexico in 1929 and was issued a Certificate of Citizenship on June 30, 1970, with an AA number, indicating that he acquired U.S. citizenship at birth on March 14, 1929. The applicant's mother, [REDACTED] was born in 1936 in Mexico and became a naturalized U.S. citizen on October 12, 1995. The applicant's parents married each other on December 26, 1960. The applicant was lawfully admitted for permanent residence on April 12, 1971.

The district director indicated that the applicant had failed to submit documentation which was requested, including a copy of the parent's marriage certificate and proof of the father's residency for 10 years prior to the applicant's birth, at least five of which were after the father's 16th birthday. The district director stated that the copy of the parent's marriage certificate which was submitted was of poor quality and that no proof of the father's residency prior to the applicant's birth was submitted. The district director stated that the father's Service record indicates that he resided in Mexico from birth until February 12, 1970. That record is not present for review by the Associate Commissioner. The district director then determined that the applicant was statutorily ineligible for derivation of citizenship under the benefit sought and denied the application without addressing any specific section of the Act.

On appeal, counsel states that the applicant satisfies all the required elements of the Act. Counsel states that the father became a citizen in 1970 when the applicant was in the father's legal custody, the applicant was under 18 years of age and had been lawfully admitted for permanent residence. Counsel makes reference to Matter of Fuentes-Martinez, 21 I&N Dec. 893 (BIA 1997), in which the Board of Immigration Appeals discusses a matter under former section 321 of the Act, 8 U.S.C. 1432. Counsel asserts that the applicant became a U.S. citizen on June 30, 1970, the day his father naturalized.

A careful review of the father's Certificate of Citizenship reveals that the father did not naturalize as indicated by counsel. The father acquired U.S. citizenship at birth on March 14, 1929.

The Associate Commissioner will review sections 320, 321, 322 and 301(g) of the Act to determine the applicant's eligibility in this matter.

Sections 320 and 322 of the Act were amended and section 321 was repealed 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 birthdays as of February 27, 2001. The

applicant was over the age of 18 years on February 27, 2001. Therefore, he is not eligible for the benefits of the CCA.

The claim under section 320 of the Act

Former section 320 of the Act prior to its amendment provided that:

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such parent is naturalized, become a citizen of the United States, when

(1) such naturalization takes place while such child is under the age of 18 years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of 18 years.

The applicant does not qualify for consideration under former section 320 of the Act. Though his father was a U.S. citizen, his mother naturalized when the applicant was 32 years old.

The claim under section 321 of the Act

Section 321 of the Act was repealed on February 27, 2001, by the CCA, which removed the legal separation requirement from the rules of derivative naturalization. The provisions of the CCA are not retroactive. Matter of Rodriguez-Trejedor, 23 I&N Dec. 153 (BIA 2001). However, as noted in the publication of the interim rule implementing the CCA, all persons who acquired citizenship automatically under former section 321 of the Act, as previously in force prior to February 27, 2001, may apply for a certificate of citizenship at any time.

Former section 321 of the Act provided, in part, that:

(a) a child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-

(4) Such naturalization takes place while said child is under the age of 18 years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The applicant does not qualify for consideration under former section 321 of the Act because both of his parents were not aliens at the time of his birth and both did not naturalize.

The claim to naturalization under section 322 of the Act

Section 322(a) of the Act, in effect at the time of the applicant's birth, at the time of the last event, and as it still reads today, prior to and subsequent to the amendments of Pub. L. 95-114, 92 Stat. 918, Sec. 7 (1978), provides, in part, that:

A child born outside of the United States, one or both of whose parents is at the time of petitioning 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....

The applicant does not qualify for consideration under former section 322 of the Act because the applicant was required to be unmarried and under the age of 18 years both at the time of application and at the time of admission to citizenship.

The claim to birth citizenship under section 301(g) of the Act

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, provided, 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 contains the Service's request for additional documentation with a footnote that failure to return the requested documents and all attachments will result in the application being denied for lack of prosecution.

The record reflects that the applicant's father resided in Mexico until February 1970. The record fails to contain any evidence of the father's physical presence in the United States prior to the applicant's birth.

Absent evidence to the contrary, the applicant has not shown that he acquired United States citizenship at birth because the applicant has failed to establish that his father 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 father had been physically present in the United States for a total of 10 years, 5 of which were after the age 14. Accordingly, the appeal will be dismissed.

Should this matter appear before the Associate Commissioner again, it must be accompanied by the father's Service file, A19 959 222 and the applicant's complete Service file.

ORDER: The appeal is dismissed.