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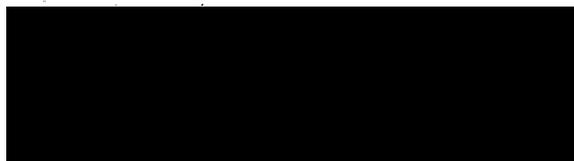
U.S. Department of Homeland Security
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U.S. Citizenship
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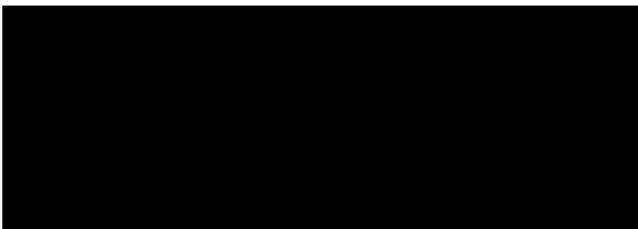


FILE: [Redacted] Office: MINNEAPOLIS, MINNESOTA Date: JUL 06 2005

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to § 301(a)(7) of the former Immigration and Nationality Act; 8 U.S.C. § 1401(a)(7).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Minneapolis, Minnesota, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born on February 27, 1975 in Mexico. The applicant's mother was born in Mexico, and she is not a U.S. citizen. The applicant's father was also born in Mexico in 1948, but he acquired U.S. citizenship at birth through his mother. The record reflects that the applicant's parents were married in Mexico in 1970. The applicant seeks a certificate of citizenship pursuant to § 301(a)(7) of the former Immigration and Nationality Act (the former Act); 8 U.S.C. § 1401(a)(7), based on the claim that he acquired U.S. citizenship at birth through his father.

The district director found that, based on the evidence in the record, the applicant had failed to establish that his father resided in the United States for ten years prior to the applicant's birth, at least five years of which occurred after his father turned fourteen, as required by § 301(a)(7) of the former Act. The application was denied accordingly. On appeal, counsel asserts that requiring the applicant to produce evidence of his father's physical presence in the United States constitutes an undue burden, since the applicant's father did not attend school in the United States and was not paid through a formal payroll. Counsel contends that the consistent and credible affidavits of the applicant's father's physical presence that the applicant submitted are sufficient evidence to establish the applicant's eligibility for a certificate of citizenship.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir., 2000) (citations omitted). The applicant in this case was born in Mexico in 1975. Section 301(a)(7) of the former Act thus controls his claim to derivative citizenship.

Section 301(a)(7) of the former Act states that the following shall be nationals and citizens of the United States at birth:

[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 ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

The applicant must therefore establish that his father was a U.S. citizen at the time of the applicant's birth and that his father met U.S. physical presence requirements prior to the applicant's birth. The record contains evidence establishing that the applicant's father was a U.S. citizen at the time of the applicant's birth. The issue in the instant application is whether the applicant's father was physically present in the United States for a total of ten years between his birth in 1948 and the applicant's birth in 1975, including five years after 1962, when the applicant's father turned fourteen.

Regulatory guidance regarding the submission of different forms of evidence is provided at 8 C.F.R. § 103.2(b), which states, in pertinent part, that:

(1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required

by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) Submitting secondary evidence and affidavits.

(i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Counsel's assertion that, given the applicant's father's lifestyle, it is likely that no records of his presence in the United States exist, is persuasive. The evidence in the record establishes that the applicant's father did not attend school in the United States, did not own or rent a home in this country, and was always paid informally for his labor in the United States. It is plausible that he was present in the United States but left no "paper trail." The affidavits on the record regarding the applicant's father's periods of physical presence in the United States are generally consistent and detailed. Absent discrepancies in the evidence, where a claim of derivative citizenship has reasonable support, it will not be rejected. *See Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995). The instant claim has reasonable support.

In support of the assertion that the applicant's father was present in the United States for at least ten years during the requisite time period, the applicant has submitted affidavits by his father and his father's sister. In her affidavit of July 19, 2004, the applicant's aunt stated that each year from his birth to age six the applicant's father (her brother) lived with their U.S. citizen mother (the applicant's grandmother) in El Paso for several months or almost a whole year. The applicant's aunt wrote that after the applicant's father started to attend school in Mexico, their mother only worked in El Paso during school vacations. The applicant's aunt also stated that the applicant's father began working with their uncle when he was a teenager, and that in 1965 he worked on a ranch in California. The applicant's aunt mentioned the applicant's father's working on another ranch, but she stated that he only worked during vacations, since he was in school in Mexico. This affidavit alone contains insufficient detail to allow the AAO to draw the conclusion that the applicant's father spent ten years in the United States, five of which were after he turned fourteen in 1962.

In his affidavit dated July 29, 2004, the applicant's father wrote that each year from the age of one year old until he entered school in 1954, he stayed with his mother in El Paso for up to eight months. He wrote that when he started school, his mother took him with her during vacations, including Holy Week, summer, and Christmas. The applicant's father stated that when he was twelve years old, his mother took him to his uncle's house in El Paso every vacation and weekend, and his uncle took him to work in the fields. The applicant's father wrote that when he was fourteen years old, he spent up to three months in the summer and up to three weeks during Easter and winter vacations with his uncle doing various jobs, and when he was fifteen years old he spent ten months working in California. He indicated that when he was sixteen he spent vacation times in the United States. The applicant's father stated that when he was seventeen or eighteen, he worked at various agricultural jobs in California, and that in 1974 he worked for ten months with his brother-in-law gardening and building fences.

The record contains an addendum to the applicant's father's first affidavit, dated August 6, 2004. In the addendum, the applicant's father specified that from 1965 to 1975 he worked in the United States for three weeks each during the Holy Week and Christmas periods and for three months during the summers. He stated that the only exception was in 1974, when he remained for ten months in the United States. Taken together, the addendum and the previous affidavit indicate that the total time the applicant's father spent in the United States subsequent to his fourteenth birthday and prior to the applicant's birth was five and a half years.

Finally, the record contains an affidavit by the applicant's father submitted on appeal. In his affidavit on appeal, dated February 25, 2005, the applicant's father writes that from the time he was born until five years of age, he stayed with his mother in El Paso for at least eight months every year. The other affidavits indicate that the applicant's father stayed up to eight months from age one through age five. On appeal, the applicant's father states that at the age of six he began to spend school vacations with his mother, including three months during the summer and three weeks each during Holy Week and Christmas vacation. He states further that from the age of twelve to fourteen, he spent these same vacation periods in the United States in addition to every other weekend. He had previously indicated that he spent every weekend in the United States. He writes that at age fifteen he spent ten months in the United States, then from age sixteen to eighteen he spent vacations in this country, as before. The applicant's father states that when he was nineteen he began to study accounting at the University in Chihuahua, and he continued to come to the United States each year during vacation periods from 1967 to 1976. He notes that in 1974, however, he remained for ten months. The applicant's father did not mention in his other affidavits that he was attending the university during this period.

The affidavits indicate that from his first birthday in August 1949 until his sixth birthday in August 1954, the applicant's father spent from several months to eight months with his mother in the United States. Based on an average of six months per year, the applicant's father spent a total of two and a half years with his mother in Texas prior to age six. The affidavits establish with sufficient detail that from the time the applicant's father turned six in August 1954 until the applicant's birth in February 1975, the applicant's father spent a total of eight and a half years in the United States. The weekends mentioned in the applicant's two affidavits have not been counted, because in one affidavit he stated that he went to Texas every weekend, while in the other affidavit, he stated he went every other weekend. Nevertheless, the record reflects a total of ten years of physical presence, five and a half of them being after the applicant's father's fourteenth birthday. Section 301(a)(7) of the former Act requires that the applicant establish that his father was physically present in the United States for a total of ten years, five of which were after his fourteenth birthday. The applicant has therefore met the statutory requirements for 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 established by a preponderance of the evidence that his father was physically present in the United States for at least ten years prior to the applicant's birth, as required for the applicant to acquire U.S. citizenship at birth under § 301(a)(7) of the former Act.

ORDER: The appeal is sustained.