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U.S. Citizenship
and Immigration
Services

Ez

[Redacted]

FILE:

[Redacted]

Office: EL PASO, TEXAS

Date:

JUL 13 2005

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Certificate of Citizenship under Section 201(g) of the Nationality Act of 1940.

ON BEHALF OF APPLICANT:

[Redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, El Paso, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further action consistent with this decision.

The record reflects that the applicant was born on June 14, 1949, in Mexico. The applicant's father [REDACTED] was born in the United States on February 1, 1913, and he was a U.S. citizen. The applicant's mother is not a U.S. citizen. The applicant's parents married in Mexico in 1944. The applicant seeks a certificate of citizenship pursuant to section 201(g) of the Nationality Act of 1940 (the Nationality Act, now known as section 301(g) of the Immigration and Nationality Act (the Act)), based on the claim that he acquired U.S. citizenship at birth through his father.

The district director found that the applicant had failed to establish his U.S. citizen father [REDACTED] had resided in the United States for ten years prior to the applicant's birth, at least five years of which occurred after [REDACTED] turned sixteen, as required by section 201(g) of the Nationality Act. The application was denied accordingly.

On appeal, the applicant, through counsel, asserts that his siblings derived U.S. citizenship through his father and that he is equally entitled to a certificate of citizenship under section 201(g) of the former Act. Counsel asserts further that the issue of [REDACTED] residence in the U.S. has been previously decided, and that the district director must therefore approve the applicant's Form N-600, Application for Certificate of Citizenship (N-600 application) pursuant to principles of *res judicata*.

The AAO finds that counsel has failed to establish that U.S. citizenship determinations made in the applicant's siblings cases constitute binding *res judicata* determinations regarding the applicant's eligibility for U.S. citizenship.

The AAO notes that *Matter of McMullen*, 17 I&N Dec. 542 (BIA 1980), *Matter of Perez-Valle*, 17 I&N Dec. 581 (BIA 1980), and *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), reflect the following test for *res judicata* determinations – identical parties, a valid final judgment upon the merits, and identical issues. The AAO notes that these cases all deal with administrative adjudication of immigration matters already determined in federal court or on issues specifically delegated to other government agencies. The AAO notes further that [REDACTED] specifically held that decisions made in judicial extradition proceedings were not *res judicata* in deportation proceedings because the parties were different.

In the present matter, although the general requirements for obtaining derivative citizenship under section 201(g) of the Nationality Act are identical for all applicants born between January 14, 1941 and December 23, 1952, the applicant and his siblings are not identical parties with identical issues, as there are several date of birth and retention requirement differences relating to each individual's eligibility for citizenship under section 201(g) of the Nationality Act. Accordingly, the AAO finds that a previous Consular or Service (CIS) determination regarding the citizenship eligibility of another member of the applicant's family does not constitute a final judgment on the issue for purposes of the adjudicating the applicant's claim to citizenship.

Section 201(g) of the Nationality Act stated that:

A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years residence in the United States or one of its outlying possessions, at least five of

which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reached the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

Section 201(h) of the Nationality Act stated:

The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

In the present matter, the applicant must establish that his father resided in the U.S. for ten years between February 1, 1913, and June 14, 1949, and that five of those years occurred after February 1, 1929, when [REDACTED] turned sixteen.

The evidence relating to [REDACTED] residence in the United States during the requisite time period consists of the following:

A Delayed Certificate of Birth, dated September 19, 1965, reflecting that [REDACTED] was born in Fabens, El Paso, Texas on [REDACTED]

A Certificate of Baptism reflecting that [REDACTED] was baptized in Texas on March 16, 1913.

A copy of [REDACTED] American Foreign Service, U.S. Card of Identity and Registration, reflecting that he was registered as a U.S. citizen at the U.S. Consulate in Ciudad Juarez, Mexico on July 17, 1970.

[REDACTED] Application for Registration and his Supplemental Application Statement, filed on May 19, 1970, stating that he resided in Fabens, Texas from the time of his birth to 1935.

An October 15, 1969, sworn affidavit signed by [REDACTED] before the U.S. Vice Consul in [REDACTED] Mexico, stating that he lived in Fabens, Texas from the time of his birth on February 1, 1913 until 1935, and that he attended school in Fabens, Texas from 1920 to 1927, and outlining where he worked in Fabens, Texas from 1928 or 1929 until June or July 1935.

An October 23, 2001, letter from the [REDACTED] stating that [REDACTED] was listed in the school district's Daily Register of 1923-24.

A January 29, 1974, letter from the Fabens Independent School District certifying that [REDACTED] attended school in the district during the 1920-21 school year.

A Report from the Social Security Administration, dated October 30, 2001, stating that it

has no FICA earnings or work history information for [REDACTED]

An affidavit signed on October 12, 2001, by [REDACTED] stating that [REDACTED] worked as a laborer on his father's ranch between 1934 and 1943.

An affidavit signed by [REDACTED] on February 13, 1974, stating that [REDACTED] lived with his parents [REDACTED] and [REDACTED] in Texas from the time he was seven until 1944, and that [REDACTED] attended school in Fabens, Texas from about 1920 to 1926.

An affidavit signed by [REDACTED] on February 13, 1974, stating that [REDACTED] is his nephew and that [REDACTED] lived with him from the time he was seven until he returned to Mexico to marry in 1944.

An affidavit signed by [REDACTED] on February 13, 1974, stating that [REDACTED] worked on his father's farm from about 1930 to 1935.

An affidavit signed on October 13, 1969, by [REDACTED] stating that he knew [REDACTED] family and that [REDACTED] lived in Texas from 1913 to 1935.

An affidavit signed on October 11, 1969, by [REDACTED] stating that he knew [REDACTED] since his birth and that [REDACTED] worked at his gas station in Fabens, Texas in 1934 and 1935.

An affidavit signed by [REDACTED] on October 18, 1969, stating that he attended school with [REDACTED] in Fabens, Texas beginning in 1923, and that [REDACTED] lived in Fabens until 1935, when he moved to Mexico.

An affidavit signed on October 18, 1969, by [REDACTED] stating that she is [REDACTED] second cousin and that he resided in Texas from his birth until 1935.

A copy of [REDACTED]'s Application for Registration, dated May 19, 1970, reflecting the consular officer's opinion that [REDACTED] met U.S. citizen and physical presence requirements. However, [REDACTED] application for registration was denied because, although he began his physical presence in the U.S. prior to the age of twenty-three, he interrupted his stay by periods exceeding the limit permissible, and because he acknowledged he was aware of the possibility of acquiring U.S. citizenship for more than a year prior to filing his application.

A Department of State, Operations Memo dated June 25, 1970, stating that the applicant's brother [REDACTED] (born June [REDACTED] failed to comply with section 201(g) citizenship retention requirements, as set forth in section 301(b) of the former Act, and that his registration application was therefore disapproved on the ground that he had ceased to be a citizen.

A copy of [REDACTED]'s N-600 application filed January 4, 1974, stating that [REDACTED] resided in the U.S. from 1913 to 1943, and thereafter, went back and forth between Mexico and the United States. The N-600 application contains a Service (CIS) determination made November 6, 1974, that [REDACTED] met the U.S. citizenship and physical presence requirements set forth in section 201(g) of the Nationality Act. The Service found further that Jose had established constructive presence in the U.S. before his 26th birthday (pursuant to State Department policy at the time, because he was

unaware of his citizenship claim), and that he therefore met the retention requirements set forth in section 201(g) of the Nationality Act.

A U.S. Citizen Identification Card issued on August 16, 1977, to [REDACTED] by the Service (CIS).

A copy of [REDACTED] Certificate of Citizenship issued by the Service (CIS) on January 10, 1977, reflecting that [REDACTED] was a derivative U.S. citizen at birth.

A March 23, 1981, letter from the U.S. Consulate General in [REDACTED] Mexico, stating that the applicant's brother, [REDACTED] born June 18, 1946, is registered as a U.S. citizen at the Consulate, and that he acquired citizenship under section 201(c) [should read 201(g)] of the Nationality Act through his U.S. citizen father.

A copy of the U.S. Consulate General records for [REDACTED] reflecting that on October 16, 1969, a consular officer found [REDACTED] to be eligible for citizenship under section 201(g) of the Nationality Act. The consular officer noted that [REDACTED] only recently became aware of his claim to citizenship and had not yet complied with retention requirements set forth under section 301(b) of the former Act, but that because he was not yet twenty-eight years old, he was eligible for limited registration in order to facilitate compliance with applicable retention requirements.

An unadjudicated copy of [REDACTED] N-600 application, filed August 29, 1989, stating that [REDACTED] resided in the U.S. from February 1, 1913 to February 1942.

A copy of a second N-600 application filed by [REDACTED] on May 11, 1982, stating that Mr. Rey resided in the U.S. between 1913 and 1972. The application was closed by the Service in July 1992 due to [REDACTED] failure to show up for his citizenship interview.

A Certificate of Citizenship issued November 15, 1999, to the applicant's sister, Concepcion [REDACTED] born December 8, 1950, reflecting her derivative U.S. citizenship.

A copy of Concepcion [REDACTED] N-600 application, filed March 29, 1997, stating that [REDACTED] resided in the U.S. from 1913 to 1972, and reflecting the Service's finding on November 15, 1999, that Concepcion acquired citizenship through her U.S. citizen father at the time of her birth

A copy of Concepcion [REDACTED] American Foreign Service, U.S. Card of Identity and Registration, reflecting that she was registered as a U.S. citizen at the U.S. Consulate in [REDACTED] Mexico. The registration card reflects that it was valid through Concepcion's 23rd birthday on December 7, 1973.

A copy of the applicant's sister's American Foreign Service, U.S. Card of Identity and Registration, reflecting that [REDACTED] born April 10, 1948, was registered as a U.S. citizen at the U.S. Consulate in [REDACTED] Mexico on July 17, 1970. The registration card reflects that it was valid through Evangelina's 23rd birthday on April 9, 1971.

A copy of [REDACTED] Application for Registration, filed May 19,

1970, reflecting the consular officer's opinion that [REDACTED] met U.S. citizenship and residence requirements set forth in section 201(g) of the Nationality Act and that Evangelina was entitled to registration until April 9, 1971, one day prior to her twenty-third birthday.

A copy of [REDACTED]'s N-600 application stating that [REDACTED] resided in the U.S. from 1913 to 1936. The N-600 reflects further the Service's (CIS) determination on October 15, 1979, that [REDACTED] father was a U.S. citizen who resided in the U.S. for ten years prior to her birth, at least five years of which occurred after [REDACTED] turned sixteen.

A copy of the Service's (CIS) August 29, 1977, finding that [REDACTED] met the two-year continuous physical presence between ages fourteen and twenty-eight, requirement set forth in section 201(g) of the Nationality Act, as amended by section 301(b) of the former Immigration and Nationality Act (former Act); 8 U.S.C. § 1401(b).

A Certificate of Citizenship issued on October 18, 1979, reflecting that [REDACTED] is a derivative U.S. citizen.

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. In *Matter of E-M*, 20 I&N Dec. 77 (Comm. 1989), the Commissioner indicated that in order to satisfy the preponderance of evidence standard, it is generally sufficient that the evidence establish that something is probably true.

Matter of Tijerina-Villarreal, 13 I&N Dec. 327, 330 (BIA 1969) states in pertinent part:

[W]here a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily. However, when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies, then the special inquiry officer need not accept the evidence proffered by the claimant." *Tijerina-Villareal* at 331 (citations omitted.)

The AAO finds that a review of the cumulative evidence contained in the record reflects that it reasonably supports the applicant's claim that his father was a U.S. citizen and that his father resided in the United States for at least thirty-five years between 1913 and 1935. Accordingly, the AAO finds that the applicant has established by a preponderance of the evidence that his father met the U.S. citizenship and residence requirements set forth in section 201(g) of the Nationality Act.

Nevertheless, the AAO finds that the present record contains no information or evidence to establish whether the applicant has met the residence retention requirements set forth in section 201(g) of the Nationality Act (requiring that the applicant resided in the United States or its outlying possessions for five years between the age of thirteen and twenty-one). The record also does not contain information or evidence to establish whether the applicant has met the physical presence retention requirements set forth in section 301(b) of the former Act (requiring that the applicant entered the U.S. and began compliance with retention requirements prior to his 26th birthday in 1975, and that the applicant was continuously physically present in the U.S. for two years between the ages of fourteen and twenty-eight). The AAO is therefore unable to determine whether the applicant is entitled to derivative U.S. citizenship under section 201(g) of the Nationality Act.¹

¹ The AAO notes that the Nationality Act of 1940 was repealed on December 24, 1952, by the Immigration and Nationality Act (the former Act). At that time, persons under the age of sixteen, who had been born subject to the

Moreover, the AAO notes that on March 1, 1995, Title 1 of the Immigration and Nationality Technical Corrections Act of 1994 (INTCA)) allowed, with limited exceptions, for oath of allegiance restoration of U.S. citizenship to former citizens who had lost their nationality by failing to comply with retention requirements set forth in the Immigration and Nationality Act of 1952 and the Nationality Act of 1940. Thus, “[p]ersons whose citizenship had ceased as a result of failure to comply with the [section 301(b) of the Former Act] retention requirements were provided a means to resume citizenship through the taking of an oath of allegiance.” *See* 7 FAM 1133.5-1.²

retention requirements of section 201(g) of the Nationality Act, and had not taken up residence in the United States, but who wished to keep their U.S. citizenship were required to comply with section the 301(b) of the former Act retention requirements unless the person had begun compliance with section 201(g)’s retention requirements and could complete his or her five years of U.S. residence prior to reaching the age of twenty-one. *See* Volume 7 of the Foreign Affairs Manual (7 FAM) section 1134.6-3(b) and (c).

Section 301(b) of the former Act stated that a child who acquired citizenship at birth abroad through one citizen parent must be continuously physically present in the United States for a period of five years between the ages of fourteen and twenty eight in order to retain his or her U.S. citizenship. Section 301(c) of the former Act, 8 U.S.C. § 1401(c), “applied the requirements of section 301(b) to persons born between May 24, 1934, and December 24, 1952, who were subject to, but had not complied with, and did not later comply with, the retention requirements of section 201(g) or (h) of the Nationality Act.” *See* 7 FAM 1133.5-2(c).

A two-year retention requirement was later substituted retroactively in 1972. Specifically, “Public Law 92-584 amended section 301(b) of the former Act, effective October 27, 1972, to read [in pertinent part] as follows:

Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) shall lose his nationality and citizenship unless – (1) he shall come to the United States and be continuously physically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.”

See 7 FAM 1133.5-7. Public Law 95-432, effective October 10, 1978, subsequently repealed section 301(b) of the former Act, and eliminated completely, the physical presence requirement for retention of U.S. citizenship. *See* 7 FAM 1133.2-2(d). However, the “[c]hange was prospective in nature. It did not reinstate as citizens those who had ceased to be citizens by the operation of section 301(b) as previously in effect.” *Id.* Thus, “[p]ersons who were subject to section 301(b) and reached age 26 before October 10, 1978, without entering the United States to begin compliance with the retention requirements lost their citizenship on their 26th birthday. *See* 7 FAM 1133.5-13(a) and (c).

² Section 324(d)(1) of the Immigration and Nationality Act as amended (the Act) provides that:

A person who was a citizen of the United States at birth and lost such citizenship for failure to meet the physical presence retention requirements under section 301(b) (as in effect before October 10, 1978), shall, from and after taking the oath of allegiance required by section 337 be a citizen of the United States and have status of citizen of the United States by birth, without filing an application for naturalization, and notwithstanding any of the other provisions of this title

The AAO notes further that if a person is unable to take an oath under section 324(b) of the Act, asserted defenses to section 301(b) retention requirements should be considered (unawareness of U.S. citizenship, impossibility of performance and official misinformation). *See* 7 FAM 1133.5-16 to 1133.5-19.³

It is unclear from the record whether the applicant has satisfied the retention requirements set forth in section 201(g) of the Nationality Act or section 301(b) of the former Act. It is also unclear from the record whether the applicant must satisfy the retention requirements in light of section 324(d)(1) of the Act provisions, or whether, in the alternative, the applicant's compliance with section 301(b) retention requirements can be waived. Accordingly, the AAO finds it necessary to remand the present matter to the district director for consideration of the issues stated above and entry of a new decision which, if adverse to the applicant, shall be certified to the AAO for review, accompanied by a properly prepared record of proceedings.

ORDER: The matter is remanded to the district director for further action consistent with this decision.

except the provisions of section 313. Nothing in this subsection or any other provision of law shall be construed as conferring United States citizenship retroactively upon such person during any period in which such person was not a citizen.

³ The AAO notes counsel's assertion on appeal that the applicant is bedridden, on medication and severely retarded. The AAO notes further that the record contains an October 9, 2001 affidavit signed by [REDACTED] stating that the applicant, [REDACTED] has brain paralysis, and doesn't speak. The affidavit states that the applicant walks and has a very low capacity of learning, and that he has been a patient at the medical office for seven years.