

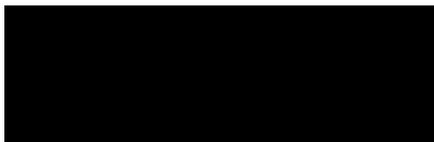
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
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U.S. Citizenship
and Immigration
Services

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JUN 11 02 2005

FILE:



Office: NEW YORK, NEW YORK

Date:

IN RE:

Applicant:



APPLICATION:

Application for Certificate of Citizenship under § 301 of the former Immigration and Nationality Act, 8 U.S.C. § 1401.

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The record reflects that the applicant was born in the Philippines on March 25, 1967. The applicant's mother was also born in the Philippines on July 13, 1946, and she derived U.S. citizenship through her father, who had become a naturalized U.S. citizen. The applicant's father was born in the Philippines, and he became a naturalized U.S. citizen in 2003. The applicant seeks a certificate of citizenship pursuant to § 301 of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1401, based on the claim that he acquired U.S. citizenship at birth through his U.S. citizen mother.

The district director concluded the applicant had failed to establish that his mother was a citizen at the time the applicant was born and that she had accrued the required period of U.S. physical presence prior to the applicant's birth. The district director also found the record lacking evidence of the applicant's grandfather's U.S. citizenship and physical presence. The application was denied accordingly.

On appeal, counsel asserts that, according to the 1966 amendment to the active military duty proviso of § 301(a)(7) of the former Act, the applicant's mother was considered to be physically present in the United States while her father was stationed on active duty in various parts of the world. Counsel submits documentation establishing how the applicant's grandfather became a U.S. citizen (through naturalization), that the applicant's grandfather honorably served in the U.S. army from 1942 to 1971, and that the applicant's mother was considered to be a U.S. citizen at the time of the applicant's birth. Counsel also submits documentation establishing that the applicant's mother enjoyed a warm relationship with her father and that he sent her money for her support during certain periods. The documentation does not establish, however, whether the applicant's mother could be considered to be a member of her father's household, as required by the 1966 amendment. In any case, the applicant's mother could not have accrued the statutorily required ten total years' physical presence, including five years after her fourteenth birthday, because she did not depend on her father for five full years following her fourteenth birthday. According to the evidence on the record the applicant's mother became emancipated when she eloped (notwithstanding the voiding of her first marriage contract) with the applicant's father several months after her eighteenth birthday.

"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 was born in 1967; hence, § 301(a)(7) of the former Act applies to the present case.

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 Act of November 6, 1966, Public Law 89-770, (80 Stat. 1322) amended the proviso contained in the above section of law by adding qualifying U.S. physical presence categories. The § 301(a)(7) proviso was amended as follows:

That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of the person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations Immunities Act, may be included in order to satisfy the physical presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

In order to meet the requirements of § 301(a)(7) of the former Act, the applicant's mother would have had to accrue ten years of physical presence in the United States between July 13, 1946 and March 25, 1967. Five years of the total had to have been between July 13, 1960 and March 25, 1967.

According to the 1966 amendment, the applicant's mother could constructively accrue the required ten years' U.S. physical presence if she were physically present abroad as a dependent, unmarried daughter who was a member of the applicant's grandfather's household while he was serving in the U.S. army. Turning to 7 FAM 1133.3-4(g) for guidance on this issue, it is found that "dependent" refers to a person who relies on her parents for more than half of her support. "Member of the household" is a son or daughter who lives with the person serving in the U.S. armed forces, although in some situations sons or daughters living elsewhere may be considered to be members of the parents' household. This situation would occur most often when the parent is serving on an unaccompanied tour abroad or the child attends school in another foreign country during a parent's tour of duty abroad. Furthermore, according to 7 FAM 1133.3-4(g)(5)(b), "[a] person whose parents maintained separate foreign residences for convenience or necessity but were not estranged can count as physical presence in the United States time during which that person lived at *either* of those residences while the qualifying parent was employed within the scope of section 301(g) INA."

There is evidence on the record indicating that the applicant's grandfather became a naturalized U.S. citizen in 1943, and that as a member of the U.S. army, he was stationed in various parts of the world during the applicant's mother's childhood. According to the applicant's statement, his mother was never present in the United States prior to his birth for several reasons: his mother's family was unaware that she was a U.S. citizen; it was too expensive to move the family to the United States; his grandmother died when his mother was nine years old, and his grandfather could not care for the children by himself due to his military duty; and his mother's U.S. visa application was denied. Thus, even though it is not clear from the evidence on the record during what periods the applicant's mother actually resided in the same home as her U.S. citizen father, it appears that the maintenance of separate households was either convenient or necessary, particularly after the applicant's grandmother died.

The issue in this case, then, hinges on whether the applicant's mother could be considered to have accrued sufficient constructive physical presence through her dependent relationship with the applicant's grandfather. If the applicant were to have accrued sufficient physical presence on account of her status as a dependent, unmarried member of her father's household, she would have had to maintain such status until five years after her fourteenth birthday, that is, until her nineteenth birthday, on July 13, 1965. According to the applicant's January 6, 2004 statement, his mother eloped with his father on November 3, 1964, when she was eighteen

years and four months old. Several days later the couple married, but the applicant states that the marriage contract was void without the applicant's grandfather's consent. Even if the applicant's mother was not legally married at that time, she would no longer have been considered to be dependent on, or a member of the household of her father when she was eighteen years and three months old. The 1966 amendment to the § 301(a)(7) proviso does not provide for constructive physical presence of sons or daughters who are not dependent members of the military parent's household. Therefore, the applicant's mother's constructive physical presence ceased prior to her accrual of five years' presence past her fourteenth birthday.

The applicant has not established that his mother was physically present in the United States for a total of ten years, five of which were after her fourteenth birthday, as required for transmission of U.S. citizenship under § 301(a)(7) of the former Act. The applicant is not eligible for a certificate of citizenship under any other section of law; hence the denial of his application is affirmed. This decision, however, is without prejudice to any other immigration application or petition the applicant or his parents may wish to submit.

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 failed to meet his burden, and the appeal will be dismissed.

ORDER: The appeal is dismissed.