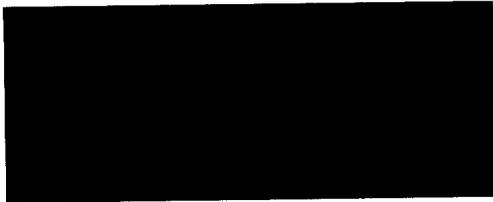


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U.S. Citizenship
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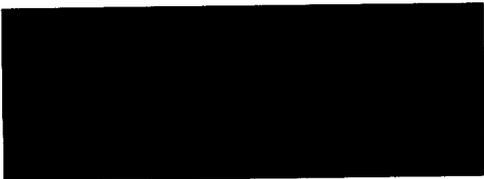
Applicant:



APPLICATION:

Application for Certificate of Citizenship pursuant to section 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 waiver application was denied by the District Director, Phoenix, Arizona. A subsequent appeal was rejected by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted. The November 25, 2003, AAO Order rejecting the appeal will be withdrawn and the appeal will be sustained.

The record reflects that the applicant was born on December 18, 1957, in Mexico. The applicant's father, [REDACTED] was born in the United States on May 18, 1910. He died in 1973. The applicant's mother, [REDACTED] was born in Mexico in July 1931. She is not a U.S. citizen. The applicant's parents were legally married on April 12, 1968. The applicant presently seeks a certificate of citizenship pursuant to section 301(a)(7) of the former Immigration and Nationality Act (former Act), 8 U.S.C. § 1401(a)(7), (now section 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(g)).

In a decision dated, February 18, 2000, the district director determined the applicant had failed to establish that at the time of his birth, his United States citizen father had been physically present in the United States or one of its outlying possessions for ten years, at least five of which were after age fourteen, as required by section 301(a)(7) of the former Act. The application was denied accordingly.

In a timely appeal, counsel asserted that the applicant had established that his father met the physical presence requirements set forth in section 301(a)(7) of the former Act, and that the applicant was entitled to derive U.S. citizenship through his father.

The AAO found in a November 25, 2003 decision, that immigration court deportation proceedings had been terminated against the applicant based on an immigration judge (IJ) finding that the applicant was a U.S. citizen. The AAO decision additionally found that the Board of Immigration Appeals (Board) had affirmed the IJ's U.S. citizenship determination, and that no subsequent appeals or motions had been filed. Based on its conclusions, the AAO determined that pursuant to 8 C.F.R. § 3.1(d)(6), the AAO was bound by the Board determination that the applicant was a U.S. citizen. The AAO subsequently rejected the applicant's appeal.

In a Motion to Reconsider dated December 31, 2003, counsel asserts that the AAO erroneously concluded that the decisions terminating deportation proceedings against the applicant amounted to an IJ or Board finding that the applicant was a U.S. citizen. Counsel asserts that the IJ decision, affirmed by the Board, determined only that the Immigration and Naturalization Service had failed to meet its burden of proving the applicant's alienage and deportability by clear, convincing and unequivocal evidence. Counsel indicates that U.S. Citizenship and Immigration Services (CIS) has jurisdiction over certificate of citizenship proceedings, and counsel asserts that in such proceedings, 8 C.F.R. § 341.3(c) sets forth that the burden of proof shifts to the alien to establish his or her claim to U.S. citizenship by a preponderance of the evidence.

8 C.F.R. § 103.5(a)(3) states:

- (3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The AAO finds counsel has convincingly established that the legal reasoning used by the AAO in its November 25, 2003 rejection of the applicant's appeal was erroneous. The U.S. Supreme Court held in *Woodby v. INS*, 385 U.S. 276, 286 (1966) that, "[n]o deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." In *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995), the Ninth Circuit Court of Appeals stated that in deportation proceedings, the government must prove alienage by clear, unequivocal and convincing evidence. *Minasyan v. Gonzalez*, 2005 WL 647736 (9th Cir. 2005) clarifies further that the immigration court does not have authority to declare that an alien is a citizen of the United States, and that such jurisdiction rests with the U.S. CIS citizenship unit and the federal courts. Accordingly, the motion to reconsider the applicant's appeal will be granted, and the AAO will reconsider the appeal.

"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 Mexico in 1957. The version of section 301 of the Act that was in effect at that time (section 301(a)(7)) therefore controls his claim to derivative citizenship.

Section 301(a)(7) of the former Act states in pertinent part 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 . . . 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 . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

In the present matter, the applicant must establish that his father was physically present in the U.S. for a period of ten years between May 18, 1910 and December 18, 1957, and that five of those years occurred after May 18, 1924, when his father turned fourteen.

The record contains the following evidence relating to the applicant's father's [REDACTED] physical presence in the U.S. during the requisite time period:

An Arizona Delayed Certificate of Birth filed in 1966 reflecting that [REDACTED] was born in Mesa, Arizona on May 18, 1910.

A baptismal certificate reflecting that [REDACTED] was baptized at the Queen of Peace Parish in Mesa, Arizona on May 22, 1910.

A 1930 U.S. Census record indicating that [REDACTED] resided in Yuma Arizona as of April 1, 1930.

An application to resume U.S. citizenship signed and sworn to on April 9, 1947, by [REDACTED] in Mexicali, Mexico, stating in part that he was born in Mesa, Arizona on May 18, 1910, that he resided in the United States until 1931, and that since 1931, he resided in San Luis, Sonora, Mexico. Mr. [REDACTED] states that he lost his U.S. citizenship after voting in a Mexican presidential election on July 4, 1943. He states further that he intends to return to the U.S. to reside permanently as soon as he regains his American citizenship.

An Arizona birth certificate reflecting that the applicant's half-brother, [REDACTED] was born in Arizona to [REDACTED] and his wife, Delfina [REDACTED] on June 6, 1947.

A baptismal certificate reflecting that [REDACTED] (born June 6, 1947) was baptized at the Immaculate Conception Church in Yuma, Arizona on November 30, 1947.

An Application for Social Security Account Number signed by [REDACTED] on April 26, 1948. The application states that [REDACTED] was employed by [REDACTED] in Yuma Arizona. His mailing address states "Yuma, Arizona" and does not contain the street or P.O. box number.

A Social Security, Report of Confidential Social Security Benefit Information stating that Mr. [REDACTED] employers from 1951 to 1971 are not listed in their records.

A photocopy of the Yuma County Library District's historic collection of local telephone and city directories reflecting that [REDACTED] and [REDACTED] names, Arizona address and telephone number were contained in the 1951 Yuma County City and telephone directory.

Somerton Arizona school records reflecting that the applicant's half-brother, [REDACTED] (son of [REDACTED] and [REDACTED]) attended school in Somerton between 1947-49 and 1953-1954.

U.S. Census Bureau records reflecting that [REDACTED] family was found to be living in Arizona as of April 1, 1950, but that [REDACTED] name was not listed, and that no records for [REDACTED] or his family were found under the April 1, 1940 census.

A September 27, 2001 affidavit signed by [REDACTED] discussing the stories he remembered his father and aunts and uncles telling him as a child regarding their work and residence in the U.S. and in Mexico. He states that his father moved with his family to Mexico at the age of four or five, and that his father remained in Mexico until the late 1920s when he was a teenager. [REDACTED] states that his father returned to Mexico and then returned to the U.S. permanently in 1946. He states that from 1946 until his father's death in 1973, [REDACTED] lived and worked for the railroad company or as a migrant worker in the United States. [REDACTED] states that he also remembers traveling as a migrant worker with his father around 1951 through 1954.

[REDACTED] U.S. Railroad Retirement Board record reflecting that he was employed by Southern Pacific Company during the following relevant years:

1948 - 3 months
1949 - 2 months
1950 - 5 months
1951 - 5 months
1955 - 2 months
1956 - 12 months
1957 - 12 months

A July 9, 2001 affidavit signed by the applicant's mother [REDACTED] stating that she met [REDACTED] in San Luis Rio Colorado, Mexico in 1951, and that she saw him on weekends only for seven to nine months because he worked in the U.S. for the railroad and in the fields. The affidavit states that [REDACTED] did not see [REDACTED] in 1952 because he moved to California. She states that [REDACTED] sent her many letters from California. The affidavit states that after [REDACTED] returned to Arizona, she saw him only on weekends until she joined him in the United States in 1969. Mrs.

states that during the entire time she knew him, never took up residence in Mexico.

A Mexican divorce decree reflecting that on September 17, 1958, obtained a divorce from his first wife in San Luis Rio Colorado, Mexico.

An Arizona marriage license reflecting that and married in Arizona on April 12, 1968.

An Immigration and Naturalization Service, Record of Sworn Statement signed by in San Luis, Arizona on January 20, 1972. states in pertinent part that she met Mr. in San Luis, R.C., Mexico in 1950, and that they began living together and having marital relations in 1952. When asked whether she lived with Mrs. stated that he came on weekends and that he rented a room at a hotel, while she lived in the house where she worked. In response to a question regarding whether assisted her while she was expecting or having her baby, stated that he helped pay the bills, but that he did not live with her and that he stayed with her on weekends only because he worked in the United States (p.4-5).

An Immigration and Naturalization Service, Record of Sworn Statement signed by in San Luis, Arizona on December 16, 1971. The statement contains the following pertinent questions and answers (p.3-5):

Q: After your birth in Mesa, Arizona in 1910 when did you go to Mexico?
A: I do not remember.

Q: Do you think it was about 1915?
A: It may have been about 1915.

Q: When was the first time you returned to the United States?
A: About 1947

....
Q: When did you first meet Mrs.
A: In 1950, here in San Luis R.C., Sonora.

....
Q: When did you begin to live with her?
A: I think it might have been about 1951.

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 under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true

The AAO finds that the combined evidence contained in the record establishes that it is probably true that Mr. was physically present in the U.S. for ten years between May 18, 1910 and December 18, 1957, and that five of those years occurred after May 18, 1924 when turned fourteen. The AAO finds that the 1971 and 1972 sworn statements made by and do not contradict the claim that Mr.

██████████ resided in the United States after they met in 1950 or 1951. ██████████ statements in 1972 reflect that ██████████ did not reside in Mexico and that he lived and worked in the U.S. and visited her in Mexico only on weekends. Moreover, the AAO finds that in light of the context of the statements and all of the evidence in the record, ██████████ 1972 statement that she and ██████████ began marital relations in 1952, and ██████████ 1971 statement that he began to live with ██████████ around 1951, do not contradict the claim that ██████████ worked and resided in the U.S. after meeting ██████████ and that he visited her in Mexico on weekends. The AAO finds further that, although the evidence in the record is not clear regarding when ██████████ first moved to Mexico and regarding the periods of time that ██████████ was physically present in the U.S. during his childhood and teenage years, a preponderance of the evidence establishes that ██████████ was physically present in the U.S. in 1910 and 1930, and between 1947 and 1957. Accordingly, the AAO finds that the applicant has established, by a preponderance of the evidence, that Mr. ██████████ meets the physical presence requirements set forth in section 301(a)(7) of the former Act. The appeal will therefore be sustained.

ORDER: The appeal is sustained.