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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: LOS ANGELES, CA Date: AUG 29 2008
[REDACTED] and [REDACTED] (Relate)

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship pursuant to Section 201(g) of the Nationality Act of 1940; 8 U.S.C. § 601(g).

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Mexico on April 28, 1943. The applicant's father, [REDACTED], was born in Bakersfield, California on September 1, 1913. The applicant's mother, [REDACTED] was, at the time of his birth, a citizen of Mexico and the record does not indicate that she has acquired a different nationality. The applicant's parents married on May 20, 1933. The applicant seeks a certificate of citizenship based on the claim that he acquired U.S. citizenship at birth through his father.

"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). As the applicant was born in 1943, he must satisfy the requirements of section 201(g) of the Nationality Act of 1940 (1940 Act), the nationality law in place at the time of his birth.

Section 201(g) of the 1940 Act states in pertinent part 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 before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

Therefore, in the present matter, the applicant must establish that his father resided in the United States for ten years between his birth on September 1, 1913 and the applicant's birth on April 28, 1943, and that five of those years followed September 1, 1929, the date on which [REDACTED] turned 16 years of age. Further, the applicant must, himself, satisfy certain residency requirements, initially set forth in section 201(g) and amended by subsequent immigration legislation.

In his denial, the field officer director incorrectly indicated that the applicant was subject to the provisions of section 301(d) of the Immigration and Nationality Act, as amended, rather than section 201(g) of the 1940 Act. The AAO notes, however, that the field office director applied the residency requirements of section 201(g) of the 1940 Act in considering the applicant's claim to citizenship. He determined that the evidence of [REDACTED]'s U.S. employment between 1965 until 1978 failed to establish the applicant's claim to citizenship since it did not demonstrate that [REDACTED] had ten years of residence in the United States prior to the applicant's 1943 birth. *Field Office Director's Decision*, dated June 6, 2008.

On appeal, counsel states that the field officer director failed to consider the declarations of three of the applicant's relatives who attest that [REDACTED] resided in the United States prior to the applicant's birth. *Form I-290B, Notice of Appeal or Motion*, dated July 2, 2008. In support of the appeal, counsel provides a

fourth declaration regarding the time spent by [REDACTED] and the applicant in the United States from a friend of the applicant and resubmits documentation previously provided.

The AAO now turns to a consideration of whether the record proves that the applicant's father was physically present in the United States for the ten-year period required by section 201(g) of the 1940 Act. Evidence of U.S. residence includes:

- [REDACTED]'s delayed birth certificate reporting his September 1, 1913 birth in Bakersfield, California and a baptismal certificate issued on February 23, 2007 by the St. Francis of Assisi Parish Church in Bakersfield, California, which indicates that [REDACTED] was baptized there on September 14, 1913.
- An earnings statement for [REDACTED], issued by the Social Security Administration branch office in West Covina, California on May 5, 2000, which reports U.S. income in the years 1964 through 1978.
- A July 5, 2007 declaration made by [REDACTED] who states that [REDACTED] was married to her husband's aunt. [REDACTED] asserts that she knows that [REDACTED] lived in the United States for many years and that he spent time in both Mexico and the United States, living in the United States during the harvest season and then returning to Mexico. [REDACTED] indicates that every year for 15 to 18 years, [REDACTED] came to California with his family and that he and his family would come to visit her family in San Gabriel, California.
- A July 5, 2007 declaration made by [REDACTED] who states that [REDACTED] was his uncle and that he spent much of his life in the United States until he and his parents returned to Mexico sometime in the 1930s. [REDACTED] asserts that after moving to Mexico, Mr. [REDACTED] returned each year to California for the harvest in the Salinas Valley, San Joaquin and San Jose, California. [REDACTED] reports that, either on his way to California or to visit family in Mexico, [REDACTED] would visit him and his wife and that he would take Mr. [REDACTED] and his family shopping.
- A July 5, 2007 declaration made by [REDACTED] who states that [REDACTED] was his uncle and that both as a young boy and a young man he came to the United States to work in the fields. He reports that [REDACTED] lived in the United States for many years but returned to Mexico with his parents under a U.S. Government repatriation program that operated between 1929 and 1944. After [REDACTED]'s marriage to the applicant's mother, [REDACTED] asserts, [REDACTED] returned to work in the United States during the harvest season in the San Joaquin Valley. Following his own move to the United States in 1952, [REDACTED] reports that he remembers seeing [REDACTED] when he would come through San Gabriel, California each year.
- A July 22, 2008 declaration made by [REDACTED] who states that he met the applicant in 1955 when they were attending school in Mexico and that, from that time on, he was aware that [REDACTED] spent each year harvesting crops in California. He indicates that he saw Mr.

Counsel reports on appeal that, despite an exhaustive search for evidence of [REDACTED]'s residence in the United States between 1913 and 1943, no documentary proof has been found. She contends that, as each of the declarants knew [REDACTED] and the applicant personally, and submitted their statements under penalty of perjury, they should be sufficient under the preponderance of evidence standard to establish [REDACTED]'s U.S. residence for the requisite period.

The AAO notes that the regulation at 8 C.F.R. § 103.2(b)(2)(i) allows for the submission of affidavits when primary or secondary documentation is unavailable:

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.

While the AAO acknowledges the difficulty of obtaining contemporaneous documentation of [REDACTED] residence in the United States between 1913 and 1943, it does not find the submitted declarations sufficient to demonstrate that the United States was [REDACTED] "place of general abode," the definition of residence in section 104 of the 1940 Act, for periods totaling ten years prior to the applicant's birth. In reaching this conclusion, the AAO does not question the veracity of the individuals who provided declarations on behalf of the applicant. Rather, it does not find the record to establish that they have direct personal knowledge of Mr. [REDACTED]'s residence in the United States during the years preceding the applicant's birth. Although [REDACTED] and [REDACTED] each state that [REDACTED] lived in California for many years prior to the applicant's birth, they do not indicate that this knowledge comes from their own experience. Instead, their personal observations concerning [REDACTED] residence in the United States appear to come from a time period following the applicant's birth.

[REDACTED] born in 1932, states that for a period of 15 to 18 years, [REDACTED] came to California for the harvest season and would visit her and her family in San Gabriel, California. She states that his visits were a ritual and that everyone had a good time during these gatherings. Her statement, however, does not indicate that she had direct knowledge of [REDACTED]'s presence in the United States beyond his visits to her family. Her statement also fails to reference the specific time period during which his visits took place. Moreover, as [REDACTED] states that [REDACTED] was accompanied by his family on these visits, her testimony may refer to visits that followed the applicant's birth.

[REDACTED], born in 1930, testifies that [REDACTED] would visit him and his wife while traveling to the California fields or when he returned to Mexico in the off season. As [REDACTED] would have been no more than 13 years of age at the time of the applicant's birth, his testimony regarding [REDACTED]'s visits with him and his wife necessarily refers to [REDACTED]'s residence in the United States after 1943.

[REDACTED] states that he knows that [REDACTED] lived in the United States for many years with his parents and that after returning to Mexico under a U.S. repatriation program and marrying the applicant's

mother in 1933, he returned to the United States during the harvest seasons. Like [REDACTED] and Mr. [REDACTED] does not indicate that his statement regarding [REDACTED] movements is based on first-hand knowledge of these events. He states only that after moving to the United States in 1952, he remembers seeing [REDACTED] when he would come through San Gabriel, California with his family.

[REDACTED] declaration states that he met the applicant in 1955 and became aware that his father spent each harvest season in California. Accordingly, [REDACTED] statement also does not address [REDACTED] presence in the United States during the requisite time period.

Therefore, although [REDACTED] s birth and baptismal certificates establish that he was born in the United States and initially lived in the United States with his parents, no other evidence in the record reliably places [REDACTED] in the United States prior to the applicant's 1943 birth. The declarations submitted by the applicant are insufficient proof that, for a period of at least ten years prior to his birth, the United States was his father's "principal dwelling place," the definition of residence provided in *Alvarez-Garcia v. Ashcroft*, 293 F.3d 1155 (9th Cir. 2002), as noted by counsel. Accordingly, the record does not demonstrate that the applicant is eligible for a certificate of citizenship under section 201(g) of the Act.

Although the record does not establish that the applicant acquired U.S. citizenship at the time of his birth, the AAO will, nevertheless, consider whether the applicant, had he acquired citizenship at birth, would meet the residence requirements for the retention of citizenship. As previously noted, section 201(g) of the 1940 Act originally required that an individual who acquired citizenship through a U.S. citizen parent reside in the United States for a period or periods totaling five years between 13 and 21 years of age. However, section 301(a)(7)(b) of the Immigration and Nationality Act of 1952 (the Act) amended these requirements as follows:

Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

The Act of October 27, 1972, Pub.L. 92-582, 86 Stat. 1289 further amended the retention requirements of section 301, stating in pertinent part:

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 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 absence 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.

Under the 1972 amendments, individuals who had arrived in the United States prior to their enactment could choose to comply with the retention requirements set forth in the 1952 Act rather than those just discussed.

On appeal, counsel contends that the applicant has satisfied the requirements for retaining citizenship as he was continuously present in the United States for two years between the ages of 14 and 28. As proof, counsel offers a Social Security Administration printout of the applicant's earnings in the United States from 1970 to 2006. She asserts that the printout is proof that the applicant was physically present in the United States during 1970 and 1971, when he was 27 and 28 years of age. Counsel also offers as proof the declaration of [REDACTED] who states that the applicant, in 1966, began working on a ranch near San Jose, California and worked there for at least three years before moving with his parents to El Coyote Ranch in the San Jose area.

Although the Social Security Administration printout indicates that the applicant worked in the United States in 1970 and 1971, the totals of his reported earnings are too low to establish his continuous presence in the United States during those years. The AAO also notes that the applicant's earnings in 1971 are less than half of what was earned by his father, with whom, according to [REDACTED] he worked during this period. The AAO observes that on April 28, 1971, the applicant turned 28 years of age and that, as of this date, he was no longer between the ages of 14 and 28, as required by the 1972 amendments. Accordingly, the Social Security Administrative printout is insufficient proof that the applicant was physically present in the United States for at least two years between 14 and 28 years of age.

Although the AAO acknowledges [REDACTED] declaration that the applicant was living in the United States beginning in 1966, his statement, alone, is not sufficient to demonstrate the applicant's physical presence in the United States during that time period. The applicant has submitted no primary or secondary documentation of his presence in the United States beginning in 1966 and, the record does not indicate that, in his case, such documentation is unavailable. Moreover, in the absence of primary and secondary documentation, 8 C.F.R. § 103.2(b)(i) requires the submission of at least two affidavits attesting to the facts to be proved. Accordingly, the record fails to establish that the applicant has satisfied the retention requirements of section 201(g) of the 1940 Act, as amended by section 301(a)(7)(b) of the Act and Pub.L. 92-582.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in this proceeding. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.