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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

Office: SAN ANTONIO, TX

Date: JUN 25 2008

IN RE:

Applicant: [Redacted]

APPLICATION:

Application for Certificate of Citizenship under Section 201(i) of the Nationality Act of 1940; 8 U.S.C. § 601(i)(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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Interim District Director, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for further action consistent with this decision.

The applicant was born on February 14, 1949 in Manila, Philippines. The applicant's parents, as indicated on his birth certificate, are [REDACTED] and [REDACTED]. The applicant's father is a native-born U.S. citizen, born on October 2, 1928 in Texas. The applicant's parents were never married to each other. The applicant presently seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his U.S. citizen father pursuant to section 201 of the Nationality Act of 1940, 8 U.S.C. § 601(1940).

The director concluded that the applicant had failed to establish that he had been legitimated by his father and denied the application accordingly. On appeal, the applicant resubmits his father's military records in support of his 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). The applicant was born on February 14, 1949. The Immigration and Nationality Act (the INA) went into effect on December 24, 1952. The Nationality Act of 1940 is therefore the applicable law in this case.

In 1946, Congress added a section to the Nationality Act of 1940 to specifically address the citizenship of children of U.S. citizens who served in the Armed Forces during World War II. That provision, section 201(i) of the Nationality Act of 1940, 8 U.S.C. § 601(i), provided that the following shall be nationals and citizens of the United States at birth:

A person born outside the United States . . . of parents one of whom is a citizen of the United States who has served or shall serve honorably in the armed forces of the United States after December 7, 1941, and before the date of termination of hostilities in the present war . . . and who, prior to the birth of such person, has had ten years' residence in the United States . . . at least five of which were after attaining the age of twelve years, the other being an alien: *Provided*, That in order to retain such citizenship, this child must reside in the United States . . . for a period or periods totaling five years between the ages of thirteen and twenty-one years . . .

The AAO notes that the Act of March 16, 1956, Pub. L. 84-430, 70 Stat. 40, provided

[t]hat section 301(a)(7) of the Immigration and Nationality Act shall be considered to have been and to be applicable to a child born outside of the United States and its outlying possessions after January 12, 1941 and before December 24, 1952, of parents one of whom is a citizen of the United States who has served in the Armed Forces of the United States after December 31, 1946, and before December 24, 1952, and whose case does not come within the provisions of section 201(g) or (i) of the Nationality Act of 1940.

The AAO notes further that section 309(b) of the INA, 8 U.S.C. § 1409(b), provides, in relevant part, that

the provisions of section 301(a)(7) shall apply to a child born out-of-wedlock on or after January 13, 1941, and prior to the effective date of this Act, as of the date of birth, if the paternity of such child is established before the effective date of this Act and while such child is under the age of twenty one years by legitimation.”

The AAO finds that the applicant was not legitimated by his father. Therefore, the applicant has failed to establish that he acquired citizenship pursuant to section 309(b) of the INA.

The AAO notes that the evidence in the record establishes that the applicant’s father served in the U.S. Army between 1946 and 1952. The AAO further notes that the provision added by the Act of March 16, 1956 does not explicitly require that the applicant establish that he was legitimated. The provision does, however, appear to include a retention requirement given its cross-reference to section 301(a)(7) of the INA, 8 U.S.C. § 1401(a)(7).

Section 301(b) of the INA, 8 U.S.C. § 1401(b), provided that a child who acquired citizenship at birth abroad pursuant to section 301(a)(7) of the INA 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 INA, 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. *See* 7 FAM 1133.5-7. Public Law 95-432, effective October 10, 1978, subsequently repealed section 301(b) of the INA, 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).

The AAO notes that the applicant was over 26 on October, 10, 1978. The AAO further notes that he was admitted to the United States as a crewman in August of 2000. The AAO finds no evidence in the record to establish that the applicant fulfilled the applicable retention requirement.

The AAO notes that on March 1, 1995, Title 1 of the Immigration and Nationality Technical Corrections Act of 1994 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. Section 324(d)(1) of the Act, 8 U.S.C. § 1435(d)(1), 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 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.

The AAO notes that the record does not include any evidence of the applicant's father's physical presence in the United States for the required period, other than his military service records. The military records establish that the applicant's father was physically present in the United States from 1946 to 1952. The applicant was born in 1949. The applicant must establish that his father was physically present in the United States for 10 years prior to 1949, five of which after 1942 (the applicant's father's 14th birthday). The matter is remanded to the director to determine whether the applicant's father had the required physical presence in the United States. If applicable, the director shall proceed to restore the applicant's citizenship by administration of the Oath of Allegiance as provided in section 324(d)(1) of the Act, 8 U.S.C. § 1435(d)(4). If the director's decision is adverse to the applicant, the decision shall be certified to the AAO for review.

ORDER: The director's decision in this matter is withdrawn and the matter remanded to the director for further action consistent with the present decision.