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

[redacted]

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FILE: [redacted] Office: DALLAS, TX Date: MAY 25 2004

IN RE: Applicant: [redacted]

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

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, Director
Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, Dallas, Texas. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The July 26, 2002, AAO Order dismissing the appeal will be withdrawn and the appeal will be sustained.

The applicant was born on November 1, 1958, in Chihuahua, Mexico. The record reflects that the applicant's father was born in Tornillo, El Paso, Texas on February 20, 1930, and that he is a United States (U.S.) citizen. The applicant's mother, was born in Mexico in June 1931, and she became a naturalized U.S. citizen on September 1, 1989, when the applicant was thirty years old. The record reflects that the applicant's parents married on December 28, 1952, in Mexico, and that they have lived separately since 1960. The applicant seeks a certificate of citizenship based on the claim that he acquired U.S. citizenship at birth through his father pursuant to section 301(a)(7) of the former Immigration and Nationality Act (the former Act), 8 U.S.C. § 1409(a)(7).[1]

In a decision dated March 26, 2001, the district director concluded that the applicant had failed to establish his father (Mr. was a U.S. citizen. The certificate of citizenship application was denied accordingly. The AAO affirmed the district director's decision on appeal, and dismissed the applicant's appeal on July 26, 2002.

Pursuant to a motion to reopen and reconsider, the district director issued a new decision in the applicant's case on February 19, 2003. In its new decision, the district director found that the applicant had established his father was a U.S. citizen, but that the applicant had failed to respond to requests for evidence establishing that Mr. met the physical residence requirements set forth in section 301(g) of the Act. The district director subsequently denied the applicant's claim due to abandonment.

In his motion to reopen and reconsider counsel asserts that the record contains new and direct evidence of Mr. U.S. citizenship. Counsel asserts further that the AAO finding that the applicant had not established that his father was a U.S. citizen was in error. In support of his assertion, counsel submits copies of Mr. U.S. birth certificates, issued in El Paso County, Texas. Counsel additionally submits a birth record Internet search result from the El Paso, Texas County Clerk website, reflecting that Mr. was born in Texas on February 20, 1930. Counsel asserts that the evidence establishes that the applicant meets the requirements for U.S. citizenship, and that his application should be granted accordingly.

8 C.F.R. § 103.5(a) states in pertinent part:

(a) Motions to reopen or reconsider

. . . .

[1] The previous district director and the AAO decisions indicated that the citizenship law applicable to the applicant's case was section 301(g) of the Immigration and Nationality Act (the Act). The AAO notes that section 301(g) of the Act applies to persons born abroad to a U.S. citizen parent, on or after November 14, 1986. The citizenship law applicable to a person born abroad between December 24, 1952 and November 13, 1986, is found in section 301(a)(7) of the former Act. The AAO finds the error harmless, however, as both the district director and the AAO decision referred to physical presence requirements set forth in section 301(a)(7) of the former Act.

> (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.
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> . . . .
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> (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.
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> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

In the present case, counsel has not asserted that the AAO incorrectly applied a Service policy or the law. Counsel has, however, submitted new facts and evidence to establish that the applicant's father is a native-born U.S. citizen. The present motion will therefore be treated as a properly filed motion to reopen.

The AAO finds that the new birth certificate evidence submitted on motion establishes by a preponderance of the evidence that Mr was born in El Paso County, Texas on February 20, 1930, and that he is a U.S. citizen. The applicant is therefore eligible to apply for a certificate of citizenship based on his father's U.S. citizenship.

"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 1958. 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.

In order to derive citizenship pursuant to section 301(a)(7) of the former Act, it must be established that when the child was born, the U.S. citizen parent was physically present in the U.S. or its outlying possession for ten years, at least five of which were after the age of fourteen. *See section 301(a)(7) of the former Act.* In *Matter of V,* 9 I&N Dec. 558, 560 (BIA 1962), the Board of Immigration Appeals determined that the term "physical presence" meant "continuous physical presence" or "residence" in the United States. The applicant must therefore establish that his father resided in the U.S. for a period totaling ten years between February 20, 1930 and November 1, 1958, and that five of those years were after February 20, 1944, when his father turned fourteen.

The record contains the following documents relating to Mr physical presence in the U.S. during the requisite time period:

> Birth certificate evidence that Mr was born t an in Tornillo, El Paso, Texas on February 20, 1930.

A baptismal certificate reflecting that Mr. was baptized in El Paso, Texas on February 23, 1930;

A baptismal certificate reflecting that the applicant's sister was born to the applicant's parents and baptized in El Paso, Texas on August 6, 1955;

A birth certificate reflecting that Mr. brother, was born to and in El Paso, County, Texas on February 13, 1932;

Evidence reflecting that Mr. resided in Canutillo, Texas and registered with the Selective Service office in El Paso, Texas on September 14, 1948;

A summary FICA earnings statement reflecting the following U.S. based earnings by Mr. prior to the applicant's birth in November 1958:

1951 - $1457.87
1952 - $1418.67
1953 - $1339.80
1954 - $1570.53
1955 - $1240.20
1956 - $3.38
1957 - $1096.38
1958 - $2033.60

An affidavit by Mr. stating that he was born in Tornillo, Texas on February 20, 1930 and that he remained in Texas until 1935 when his parents returned to Mexico. The affidavit additionally states that Mr. returned to Canotillo, Texas, in September 1945 and that he has remained in the U.S. since that time;

An affidavit by the applicant's mother stating that she and Mr. met in New Mexico in 1950, that they married in Mexico in 1952, and that they subsequently returned to live in New Mexico;

An unnotarized statement by Mr. brother, stating that he and his brother, Mr. were born in Texas, that they moved to Mexico with their parents around 1935, and that Mr. returned to the U.S. in 1945;

An affidavit by Mr. friend, Inocente Duran, stating that he met and worked with Mr. in the U.S. in 1953, and that he baptized the applicant and his sister in 1955 and 1958.

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 the preponderance of the evidence standard requires a lesser showing than the clear, unequivocal, and convincing evidence standard applicable in deportation (removal) proceedings. The Commissioner indicated further 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 birth certificate evidence for Mr. and his brother, coupled with their affidavit statements establish that it is probably true that Mr. resided in the U.S. for two years between February 1930 and February 1932. The AAO finds further that the evidence submitted by the applicant reflecting that Mr. registered for the Selective Service in 1948, combined with the

affidavit evidence establishes that it is probably true that Mr was physically present in the U.S. in 1948. Moreover, the AAO finds that the summary FICA earnings evidence submitted for Mr. establish by a preponderance of the evidence that Mr was physically present in the U.S. for five years between 1951 and 1955 and for two years between 1957 and 1958.

Accordingly, the AAO finds that the applicant has established, by a preponderance of the evidence, that Mr. was a U.S. citizen at the time of the applicant's birth and 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 motion to reopen is granted, the previous decisions withdrawn and the appeal is sustained.