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U.S. Citizenship and Immigration Services

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MAY 06 2005

FILE: [redacted] Office: EL PASO, TEXAS Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship pursuant to § 301(a)(7) of the former Immigration and Nationality Act; 8 U.S.C. § 1401(a)(7).

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 application was denied by the District Director, El Paso, Texas and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on May 3, 1963 in Mexico. The applicant's father was born in Texas on November 1, 1924 and was a U.S. citizen. The applicant's mother was born in Mexico and was not a U.S. citizen. The record reflects that the applicant's parents were married in Mexico on March 20, 1946. The applicant seeks a certificate of citizenship pursuant to § 301(a)(7) of the former Immigration and Nationality Act (the former Act); 8 U.S.C. § 1401(a)(7), based on his claim that he acquired U.S. citizenship at birth through his father.

The district director found that, based on the evidence in the record, the applicant had failed to establish that his father resided in the United States for ten years prior to the applicant's birth, at least five years of which occurred after his father turned fourteen, as required by § 301(a)(7) of the former Act. The application was denied accordingly. On appeal, counsel submits an affidavit executed by the applicant's older sister in which the latter states that she was aware that their father lived and worked in the United States when the applicant was a child. Counsel had submitted with the waiver application an affidavit by the applicant's older brother dealing with the same subject.

"When there is a claim of citizenship . . . one born abroad is presumed to be an alien and must go forward with evidence to establish his claim to United States citizenship." *Matter of Tijerina-Villarreal,* 13 I&N Dec. 327, 330 (BIA 1969) (citations omitted). Absent discrepancies in the evidence, where a claim of derivative citizenship has reasonable support, it will not be rejected. *See Murphy v. INS,* 54 F.3d 605 (9th Cir. 1995).

"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 1963; thus § 301(a)(7) of the former Act 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.

The applicant must therefore establish that his father was a U.S. citizen at the time of the applicant's birth and that his father met U.S. physical presence requirements prior to the applicant's birth. In the instant case, the applicant must establish that his father was physically present in the United State for ten years between his father's date of birth on November 1, 1924 and the applicant's date of birth on May 3, 1963. At least five of those years of physical presence must have been after November 1, 1938, when his father attained 14 years of age.

The record contains the following evidence relating to the applicant's father's U.S. citizenship and residence during the requisite time period: a Texas birth certificate for the applicant's father registered when the latter was 22 years old, an affidavit by the applicant's older brother, and an affidavit by the applicant's older sister.

The applicant's brother and sister are nine and 17 years older than the applicant, respectively, and they state that their father was living and working in the United States throughout their childhood. The record, however, does not indicate that they were in a position to know where their father was when he was absent from their home. The applicant's siblings did not live in the United States with their father; they lived in Mexico with their mother and were not witnesses to their father's presence in the United States. Therefore, the affidavits of the applicant's siblings do not establish that the applicant's father was in the United States at any time. The record contains no other evidence establishing the applicant's father's presence in the United States during the requisite period.

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 AAO finds that the applicant failed to establish by a preponderance of the evidence that his father was physically present in the United States for the required period. Accordingly, the applicant is not eligible for citizenship under § 301(a)(7) of the former Act, and the appeal will be dismissed.

ORDER: The appeal is dismissed.