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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



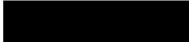
**U.S. Citizenship
and Immigration
Services**



E1

Date: **JAN 26 2012**

Office: SAN DIEGO, CA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Certificate of Citizenship under Section 301 of the Immigration and Nationality Act; 8 U.S.C. § 1401 (1963).

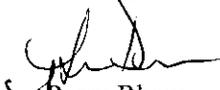
ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Diego, California (the director), and the Administrative Appeals Office (AAO) sustained the applicant's appeal. Upon subsequent review of evidence that was not before the AAO at the time of its decision on appeal, the AAO reopened and reconsidered the proceedings upon notice to the applicant. Upon reopening and reconsideration, the AAO will remand the matter to the director for further action.

Applicable Law

The petitioner, who was born in Mexico, claims 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. *See Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1028 n.3 (9th Cir. 2001) (internal citation omitted). The applicant in the present matter was born in [REDACTED]. Former section 301(a)(7) of the Act, 8 U.S.C. §1401(a)(7) (1963), therefore applies to the present case.¹

Former section 301(a)(7) of the Act stated, 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 and its outlying possessions 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 or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

Pertinent Facts and Procedural History

The record reflects that the applicant was born on [REDACTED] in Mexico. The applicant's parents are [REDACTED]. The applicant's father was born in Mexico on [REDACTED] but acquired U.S. citizenship at birth through his mother, the applicant's grandmother. The applicant's parents were married in Mexico on [REDACTED].

In order to acquire U.S. citizenship at birth under former section 301(a)(7) of the Act, the applicant must therefore establish that his father was physically present in the United States for 10 years prior to August 21, 1963, five of which were after his [REDACTED].

The director denied the application for a certificate of citizenship because he determined that the applicant's father was not physically present in the United States for the statutorily required period of time.

¹Section 301(a)(7) of the former Act was re-designated as section 301(g) upon enactment of the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046. The substantive requirements of this provision remained the same until the enactment of the Act of November 14, 1986, Pub. L. 99-653, 100 Stat. 3655.

In its August 17, 2011 decision, the AAO determined that the preponderance of the evidence submitted below and on appeal established the applicant's father's requisite physical presence in the United States. Specifically, the AAO cited the following evidence: the applicant's father's certificate of citizenship issued in [REDACTED]; certificates for his father's Little League baseball participation in 1953, 1954 and 1955; evidence of his father's first communion in 1956; social security earnings statement of the applicant's father listing earnings, in pertinent part, from 1961 through 1963; the applicant's paternal grandmother's social security statement listing earnings for all but two years between 1952 to 1962; copies of photographs of the applicant's father boxing dated in 1958, 1959 and 1960; and affidavits executed by the applicant's father, relatives and a family friend.

After the AAO's August 17, 2011 decision was issued, the San Diego District Office forwarded the transcript of the applicant's father's testimony during the applicant's criminal trial for being present in the United States after having been previously removed from the country under 8 U.S.C. § 1326(a) and (b).² The AAO also obtained the administrative file of the applicant's father. Review of the applicant's father's administrative file and his testimony during the applicant's criminal proceedings revealed inconsistencies in the applicant's claim that his father was physically present in the United States for the periods required for the applicant to have acquired citizenship under former section 301(a)(7) of the Act. This evidence was not before the AAO at the time of its prior decision and required the AAO to withdraw its August 17, 2011 decision and reopen the proceedings for reconsideration of the applicant's appeal on November 30, 2011. Upon reopening, counsel submits a brief and additional affidavits from the applicant's father, aunt and uncle.

Counsel's Response on Motion

In its November 30, 2011 decision, the AAO discussed the contradiction between the periods of residence of the applicant's father, as stated during a 1956 interview on the applicant's father's own application for a certificate of citizenship and in these proceedings on the applicant's Form N-600, Application for Certificate of Citizenship, and in the May 2011 affidavits of the applicant's father, aunt and uncle. In these proceedings, the applicant claimed that his father resided in the United States from May 1944 to September 1955, and again from January 1958 to the present time. However, during the interview in 1956, the applicant's father stated that he departed the United States for Mexico in January 1950, had not returned to the United States since 1950 and was still living in Mexico at the time of his interview on November 7, 1956 and when his certificate of citizenship was issued on [REDACTED].

On motion, counsel asserts that the notation on the applicant's father's Form N-600 cannot be attributed to the applicant's father, who was only 12 years-old at the time and did not sign the application, which was signed by the applicant's grandmother. In addition, counsel claims the Form N-600 presents conflicting information as the applicant's grandmother's period of residence in the United States was stated as including "from 1950 to present time." Counsel further asserts that other documents and affidavits, including the additional affidavits submitted

² *United States v. Tirado-Ibanez*, No. [REDACTED] S.D. Cal. June 16, 2011).

on motion, outweigh any possible contradiction regarding the applicant's father's residence in the United States after 1950.

In its November 30, 2011 decision, the AAO also discussed the applicant's father's testimony before the jury in the applicant's criminal proceedings, which was inconsistent with the claim that he was physically present in the United States for over five years after his fourteenth birthday on February 13, 1958 and before the applicant's birth on [REDACTED]. In his testimony, the applicant's father indicated in response to questioning that he was living in Mexico at the time of his marriage and the applicant's birth in [REDACTED].

On motion, counsel points to other parts of the applicant's father's testimony before the criminal jury in which he corrected and clarified his earlier statements and affirmed that he was working in the United States, but would visit his wife in Mexico at the time of his marriage and the applicant's birth.

Counsel's final claim on motion regards the additional affidavits of the applicant's father, aunt and uncle dated in December 2011. These affidavits confirm their prior statements in their affidavits submitted below attesting to the applicant's father's presence in the United States. The applicant's uncle again attests that he and the applicant's father resided in California from 1944 to 1955 when the applicant's grandmother moved them back to Mexico. The applicant's uncle confirms that the family moved back to California in 1958 and that the applicant's father lived with the family until he moved to his own residence in 1961. The applicant's aunt reiterates that the applicant lived with her in California from 1950 to 1955 and again from 1958 to 1961. In addition to confirming his periods of residence in the United States, the applicant's father explains that he has no memory of the 1956 interview regarding his Form N-600, but that he clearly recalls his residence in California until 1955 and again from 1958 to the present time. The applicant's father recounts that he moved out of his aunt's home in 1961 when he began residing in [REDACTED] California and working at a restaurant. The applicant's father explains that he visited the applicant's mother on his day off, but never stayed outside of the United States overnight until the applicant was born when he spent three days in Mexico.

Remand

Counsel's claims and the additional affidavits submitted on motion do not fully resolve the inconsistencies in the relevant evidence as discussed in the AAO's November 30, 2011 decision. Accordingly, the matter will be remanded to the San Diego District Office to determine whether proceedings should be commenced to cancel the applicant's certificate of citizenship.

Section 342 of the Act, 8 U.S.C. § 1453, authorizes U.S. Citizenship and Immigration Services (USCIS) to cancel a certificate of citizenship only when it appears to the agency's satisfaction "that such document . . . was illegally or fraudulently obtained . . . or was created through illegality or by fraud." However, section 342 of the Act requires that the applicant "be given at such person's last-known place of address written notice of the intention to cancel such document . . . with the reasons therefor and shall be given at least sixty days in which to show cause why such document . . . should not be canceled." In addition, the corresponding regulations provide that the applicant may appear for an interview in support of his response and

may be represented by an attorney or accredited representative (at no expense to the Government). 8 C.F.R. § 342.1. If the director finds that the certificate was fraudulently or illegally obtained, he shall issue an order of cancellation with written notice to the applicant including a copy of his decision and findings and the director shall inform the applicant of his right to appeal the decision to the AAO. 8 C.F.R. § 342.8.

The applicant retains the burden of proof in these proceedings. See Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 CFR § 341.2(c).

ORDER: The August 17, 2011 decision of the Administrative Appeals Office is withdrawn. The matter is remanded to the San Diego District Office for further action in accordance with the foregoing decision.