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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: NEW YORK, NY

Date: JUL 08 2005

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Certificate of Citizenship under section 201(g) of the Nationality Act of 1940; 8 U.S.C. (1940 Ed.) § 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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, New York, New York, 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 5, 1948, in Rzeszow, Poland. The applicant's father, [REDACTED] was born in McKees Rocks, Pennsylvania on December 14, 1915, and he was a U.S. citizen. The applicant's father died on December 26, 1967, in Rzeszow, Poland. The applicant's mother, [REDACTED] was born in Rzeszow, Poland on November 11, 1910. She is not a U.S. citizen. The applicant's parents married on September 20, 1942, in Rzeszow, Poland. The applicant presently seeks a certificate of citizenship under section 201(g) of the Nationality Act of 1940 (the Nationality Act); 8 U.S.C. (1940 Ed.) § 601(g) (now known as section 301(g) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1401(g)), based on the claim that he acquired U.S. citizenship at birth through his father.

The district director determined the applicant had failed to establish that his father [REDACTED] had resided in the United States or its outlying possessions for a period of ten years prior to the applicant's birth, at least five years of which occurred after [REDACTED] reached the age of sixteen. The application was denied accordingly.

On appeal counsel asserts that the district director misinterpreted the residency requirements in the applicant's case. Counsel additionally asserts that World War II conditions made it impossible for [REDACTED] to leave Poland, and that the applicant therefore established that [REDACTED] constructively met the residency requirements set forth in section 201(g) of the Nationality Act and/or the physical presence requirements set forth in section 301(g) of the Act. Counsel asserts further that the same rationale establishes that the applicant also constructively met U.S. residence and physical presence, retention requirements. Counsel adds that in the event that the applicant failed to meet his U.S. residence or physical presence retention requirements, the applicant is eligible to take an oath of citizenship pursuant to section 324 of the Act, 8 U.S.C. § 1435.¹

"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 1026,1029 (9th Cir. 2000) (citations omitted). The Nationality Act of 1940 was in effect at

¹ 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 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 time of the applicant's birth. The statutory provisions set forth in section 201(g) of the Nationality Act therefore apply to the applicant's citizenship claim.

Section 201(g) of the Nationality Act states 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 by the time he reached the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

Section 201(h) of the Nationality Act states that:

The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

In the present matter, the applicant must therefore establish that his father resided in the U.S. or its outlying possessions for ten years between December 14, 1915, and the date of the applicant's birth on May 5, 1948, and that five of those years occurred after December 14, 1936, when [REDACTED] turned sixteen. In addition, the applicant must establish that he was continuously physical present in the United States or its outlying possessions for five years between the age of fourteen and twenty-eight, if begun before October 27, 1972, or for two years between the age of fourteen and twenty-eight.²

² The Nationality Act of 1940 was repealed on December 24, 1952, by the Immigration and Nationality Act (the former Act). At that time, persons under the age of sixteen, who had been born subject to the retention requirements of section 201(g) of the Nationality Act, and had not taken up residence in the United States, but who wished to keep their U.S. citizenship were required to comply with section 301(b) of the former Act retention requirements unless the person had begun compliance with section 201(g)'s retention requirements and could complete his or her five years of U.S. residence prior to reaching the age of twenty-one. See Volume 7 of the Foreign Affairs Manual (7 FAM) section 1134.6-3(b) and (c).

Section 301(b) of the former Act stated that a child who acquired citizenship at birth abroad through one citizen parent 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 former Act, 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).

Counsel concedes that Mr. [REDACTED] left the United States and moved to Poland with his family in 1930, prior to his sixteenth birthday. Counsel concedes further that [REDACTED] did not return to the United States prior to his death in Poland in 1967. However, counsel asserts that Mr. [REDACTED] had constructive residence in the United States after 1930 because he was unable to leave Poland due to the World War II invasion of Poland in the late 1930s, and due to the subsequent institution of communist power which made travel to the U.S. impossible.

The AAO finds counsel's "constructive residence" assertions to be unpersuasive. In *Wong Gan Chee v. Acheson*, 95 F. Supp. 816, 817 (N.D. Cal. 1951), the U.S. District Court held that for section 201(g) of the Nationality Act, purposes, "[t]he term 'residence' . . . is entitled to a broad and liberal construction. It need not be actual nor continuous, nor does it require physical presence during the full statutory period." In *Drozod v. INS*, 155 F.3d 81, 87 (2nd Cir. 1998), however, the U.S. Second Circuit Court of Appeals made clear that the principle of constructive residence applies only to cases involving *retention* of citizenship. The principle does not apply to the *transmission* of citizenship. The U.S. Second Circuit Court of Appeals clarified further that legal "[c]ases have rejected the argument that statutory requirements to transmit citizenship can be constructively satisfied", and the Court stated that "[t]he application of constructive residence was inappropriate in a citizenship transmission case". *Id.* (Citations and quotations omitted).

In *Savorgnan v. United States*, 338 U.S. 491, 505, (1950) the U.S. Supreme Court defined the term "residence" as the principal dwelling place of a person, or their actual place of general abode, without regard to intent. The U.S. Ninth Circuit Court of Appeals additionally held in *Alvarez-Garcia v. Ashcroft*, 293 F. 3d 1155, 1157 (9th Cir. 2002), that when determining the issue of residence, "[t]he inquiry is one of objective fact, and one's intent as to domicile or as to her permanent residence, as distinguished from her actual residence, principal dwelling place, and place of abode is not material." (Citations and quotations omitted),

The evidence relating to [REDACTED] residence in the United States during the requisite time period consists of the following:

A two-year retention requirement was later substituted retroactively in 1972. Specifically, "Public Law 92-584 amended section 301(b) of the former Act, effective October 27, 1972, to read [in pertinent part] as follows:

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 physically 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 absences 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."

See 7 FAM 1133.5-7. Public Law 95-432, effective October 10, 1978, subsequently repealed section 301(b) of the former Act, 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).

A Pennsylvania Birth Certificate reflecting [REDACTED] birth in Allegheny County, Pennsylvania on December 14, 1915.

A Certificate of Baptism reflecting that [REDACTED] was baptized at Saints Cyril and Methodius R.C. in McKees Rocks, Pennsylvania on December 26, 1915. The certificate reflects further that [REDACTED] received First Communion on May 3, 1923, and that he received Confirmation on June 7, 1929.

A notarized affidavit signed by [REDACTED] in McKees Rocks, Pennsylvania, on January 28, 2000. The affiant states that she was born in Stowe Township, Pennsylvania, and that she knows [REDACTED] was born in Stowe Township, PA, and lived there for fifteen years before immigrating to Poland with his mother. The affiant additionally states that she remembers attending church with [REDACTED] and hearing family conversations about him.

The AAO finds that the evidence submitted by the applicant establishes by preponderance of the evidence that [REDACTED] resided in the United States between 1915 and 1929, until he was approximately fourteen years old. The AAO finds, however, that the applicant has failed to establish that [REDACTED] resided in the U.S. at any time after 1929. The present record contains no evidence to establish that [REDACTED] 1930 departure from the United States was temporary in nature, that he and his family obtained returning citizen forms from the Immigration and Naturalization Service (now, U.S. Citizenship and Immigration Services, CIS) prior to departing the U.S., or that he or his family maintained a home, personal possessions, employment, or any other tie to the United States after 1929.

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 applicant has failed to establish that [REDACTED] resided in the United States after 1929. Thus the applicant has not met the burden of establishing that his father resided in the United States for ten years, prior to the applicant's birth, five years of which were after Mr. [REDACTED] turned sixteen. Accordingly, the applicant is not eligible for citizenship under section 201(g) of the Nationality Act, and the appeal will be dismissed.³

ORDER: The appeal is dismissed.

³ The AAO notes that it is therefore unnecessary to address whether the applicant met U.S. residence or physical presence retention requirements, or to address the applicant's eligibility to take an oath under section 324 of the Act.