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U.S. Citizenship
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Services

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JUL 12 2007

FILE:

OFFICE: LOS ANGELES, CA

DATE:

IN RE:

APPLICATION:

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

ON BEHALF OF APPLICANT:

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 District Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application denied.

The record reflects that the applicant was born in Mexico on March 22, 1964. The applicant's mother was born in Mexico, and she is not a U.S. citizen. The record indicates that the applicant's father was born in Mexico, and that he acquired U.S. citizenship at birth through a U.S. citizen parent. The applicant's parents married in September 1961. The applicant presently seeks a Certificate of Citizenship pursuant to section 301(a)(7) of the former Immigration and Nationality Act (the former Act); 8 U.S.C. § 1401(a)(7) (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 that the applicant had failed to establish that his father [REDACTED] was physically present in the United States for ten years prior to the applicant's birth, at least five years of which occurred after [REDACTED] reached the age of fourteen, as required by section 301(a)(7) of the former Act. The application was denied accordingly.

On appeal, counsel asserts that an immigration judge order establishes that the applicant presented prima facie evidence of his U.S. citizenship status during removal proceedings. Counsel indicates that the evidence presented to the immigration judge was the same evidence presented with the applicant's Form N-600, Application for Certificate of Citizenship (Form N-600 application), and counsel asserts that because the immigration judge's findings with regard to the applicant's U.S. citizenship were not appealed by the government, the burden of rebutting the immigration judge's finding shifted to U.S. Citizenship and Immigration Services (CIS). Counsel asserts that CIS has failed to present evidence to rebut the immigration judge's finding, and that CIS must therefore find that the applicant is a U.S. citizen. In addition to the above claims, counsel asserts that the Act does not require the applicant to submit dated evidence of his father's U.S. physical presence prior to the applicant's birth, and counsel indicates that the affidavit and photo evidence contained in the record, combined with the immigration judge's determination, establish the applicant's U.S. citizenship under section 301(a)(7) of the former Act.¹

The AAO finds that CIS is not bound by any finding that the immigration judge may have made regarding the applicant's U.S. citizenship status. The AAO notes first that the immigration judge's finding in the applicant's case was a determination that the government had failed to meet its burden of proving the applicant's alienage and deportability by clear, convincing and unequivocal evidence. *See Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995) (holding that in deportation proceedings, the government must prove alienage by clear, unequivocal and convincing evidence.) The AAO notes further that an immigration judge does not have authority to declare that an alien is a citizen of the United States, and that such jurisdiction rests with the CIS citizenship unit and with the federal courts. *See Minasyan v. Gonzalez*, 401 F.3d 1069 (9th Cir. 2005.) Regulations specify further at 8 C.F.R. § 341.3(c), that CIS has jurisdiction over certificate of citizenship proceedings, and that the burden of proof is on the alien to establish his or her claim to U.S. citizenship by a preponderance of the evidence.

¹ It is noted that counsel indicated on the Form I-290B, Notice of Appeal to the AAO, that he would send a brief and/or additional evidence to the AAO within 30 days. No brief or additional evidence was received within the requested time period. Counsel also failed to submit a brief and/or additional evidence in response to a subsequent AAO faxed request for the documentation.

“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 record reflects that the applicant was born in Mexico in March 22, 1964. Section 301(a)(7) of the former Act is therefore applicable to the applicant’s acquisition of U.S. citizenship claim.

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.

In the present matter, the applicant must establish that his father was physically present in the U.S. for ten years between January 14, 1942 and March 22, 1964, and that five of those years occurred after January 14, 1956, when [REDACTED] turned fourteen.

The record contains the following evidence relating to [REDACTED] physical presence during the requisite time period:

A U.S. Certificate of Citizenship reflecting that [REDACTED] was born in Mexico, and that he resided in Ciudad Juarez, Chihuahua, Mexico at the time he received his Certificate of Citizenship, on August 27, 1958.

A marriage license, reflecting that [REDACTED] married in the state of New Mexico on September 25, 1961.

An affidavit signed on May 28, 2005, by [REDACTED] brother, [REDACTED] stating in pertinent part that [REDACTED] was born in Juarez, Mexico, and that when [REDACTED] was in the fourth grade, he moved to El Paso, Texas, where he sold newspapers and lived on the streets. [REDACTED] states that [REDACTED] later worked at a drugstore called, [REDACTED] in El Paso, Texas, and that [REDACTED] lived in an attached apartment while he worked there. [REDACTED] states that he visited [REDACTED] at his apartment in El Paso, Texas and that around May 1969, he moved with [REDACTED] to California. [REDACTED] additionally states that exhibit photos contained in the record are images of [REDACTED] in his apartment in El Paso, Texas.

An affidavit signed on May 28, 2005, by [REDACTED] stating that the San Pedro Thrifty Pharmacy #3 was owned and operated by her father and their family. [REDACTED] Marusich states that [REDACTED] worked at the pharmacy as a boy. She states further that exhibit photos contained in the record are of [REDACTED] in front of the pharmacy.

An affidavit signed on May 29, 2005, by [REDACTED] stating that exhibit photos shown to him are of the San Pedro Thrifty #3 pharmacy in El Paso, Texas.

An El Paso Herald Post newspaper article (undated) reflecting that [REDACTED] family owned the San Pedro Thrifty Pharmacy # 3, in El Paso, Texas for 60 years.

The exhibit photos referred to in the affidavits.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence. Under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true. *See Matter of E-M*, 20 I&N Dec. 77 (Comm. 1989.)

The AAO finds that the applicant has failed to establish by a preponderance of the evidence that his father was physically present in the United States for ten years between January 1942 and March 1964. The AAO notes that the affidavit evidence submitted by the applicant lacks material detail regarding the dates that [REDACTED] lived in the United States and the addresses where he lived. The AAO notes further that the statements made in the affidavits fail to demonstrate that the affiants had personal knowledge of [REDACTED] physical presence in the United States for the requisite time period set forth in section 301(a)(7) of the former Act. In addition, the AAO notes that information contained in [REDACTED] affidavit stating that [REDACTED] moved to the United States when he was in the fourth grade is contradicted by [REDACTED]' Certificate of Citizenship which indicates that [REDACTED] resided in Mexico in 1958, when he was sixteen years old. Additionally, the photos contained in the record do not establish how long [REDACTED] was physically present in the United States prior to the applicant's birth, and the newspaper article does not mention [REDACTED] or establish that he was physically present in the United States prior to the applicant's birth.

The AAO finds that the totality of the evidence contained in the record fails to establish by a preponderance of the evidence that [REDACTED] was physically present in the United States for ten years prior to the applicant's birth, at least five years of which occurred after January 14, 1956, when [REDACTED] turned fourteen. The applicant has thus failed to meet his burden of proof in the present matter. Accordingly, the appeal will be dismissed and the application denied.

ORDER: The appeal is dismissed. The application is denied.