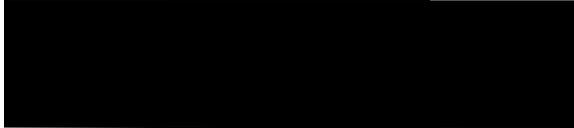




U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



FILE:



Office: EL PASO, TX

Date:

AUG 08 2008

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship pursuant to Section 201 of the Nationality Act of 1940; 8 U.S.C. § 601.

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.

A handwritten signature in black ink, appearing to read "R. P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant was born in Mexico on April 22, 1949. The applicant's parents were [REDACTED] and [REDACTED]. The applicant's parents were married in 1932, in Mexico. They are both now deceased. The applicant's mother was a native-born U.S. citizen, born on November 30, 1917. The applicant's father was not a U.S. citizen. The applicant entered the United States without inspection in 1987, and became a lawful permanent resident in 1990. The applicant presently seeks a certificate of citizenship claiming that she acquired U.S. citizenship at birth under section 201 of the Nationality Act of 1940 (the Nationality Act), 8 U.S.C. § 601.

The field office director denied the application for certificate of citizenship finding that the applicant had failed to establish that her mother had the required residence in the United States.

On appeal, the applicant, through counsel, submits an appellate brief. She maintains that the field office director erred in finding that she had not demonstrated her mother's residence in the United States. Specifically, the applicant states that the affidavits in the record, the transcript of her son's removal proceedings, and the immigration judge's order terminating proceedings against her son together demonstrate, by a preponderance of the evidence, that she is eligible to obtain a certificate of 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 1949. The Immigration and Nationality Act went into effect on December 24, 1952. The Nationality Act is therefore applicable in this case.

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.¹

¹ Section 201(h) of the Nationality Act further states that "[t]he 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 her mother resided in the U.S. or its outlying possessions for ten years between November 30, 1917 and the date of the applicant's birth [REDACTED], and that five of those years occurred after November 30, 1933, when the applicant's mother turned 16 years old. In addition, the applicant must establish that she had continuous physical presence in the United States or its outlying possessions for five years between the ages of 14 and 28, if begun before [REDACTED] or had two years of continuous physical presence in the United States between the ages of 14 and 28, if begun after [REDACTED].² The applicant was between the ages of 14 and 28 between [REDACTED] and [REDACTED].

² The AAO notes that 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 the retention requirements of section 301(b) of the former Act 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).

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).

The AAO notes that the applicant has submitted a delayed birth certificate, issued in 1963, to evidence her mother's birth in Texas in 1917. The record also contains the applicant's mother's baptismal certificate. The applicant has also submitted her parents' marriage certificate, reflecting their marriage in 1932. The applicant's birth certificate reflects her birth in Mexico in 1949 and indicates, *inter alia*, that she was the applicant's mother's ninth child. The record contains the baptismal and delayed birth certificate relating to the applicant's uncle, indicating that he was born in Texas in 1920. There is also an employment verification letter, signed in 1974, reflecting that the applicant's mother was employed for 25 years in Texas. Finally, the record includes sworn statements executed by relatives and friends purporting to establish the applicant's mother's U.S. residence claiming that the applicant's mother resided in the United States, approximately, in 1936-1938, 1939, and sometime between 1946 and 1948.³

The AAO notes "[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).

The AAO further notes the Board of Immigration Appeals finding in *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 331 (BIA 1969), that:

[W]here a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily. However, when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies, then the special inquiry officer need not accept the evidence proffered by the claimant. (Citations omitted.)

The AAO finds the sworn statements submitted by the applicant do not establish that her mother resided in the United States for the requisite period, particularly for the period after September 1933. The AAO notes that the statements are vague and lack detail. The AAO further notes that the applicant's birth certificate indicates that she was her parents' ninth child, but the record does not contain the birth certificates of her mother's older siblings. The AAO notes that the applicant's mother was married in Mexico in 1932. The record, however, does not indicate when she purportedly entered the United States,

³ With respect to the immigration judge's order and transcript, the AAO first notes that neither pertains to the applicant herself. The AAO further notes that USCIS is not bound by the immigration judge's order because immigration judges do not have authority to declare that a person is a citizen of the United States. The immigration judge's finding in the applicant's son's case was thus a determination that the government had failed to meet its burden of proving the applicant's alienage and removability 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). Jurisdiction over certificate of citizenship claims rests with USCIS (and the federal courts). *See Minasyan v. Gonzalez*, 401 F.3d 1069 (9th Cir. 2005). The AAO also notes that, in any event, the testimony in the applicant's son's removal hearing does not establish that his grandmother, the applicant's mother, resided in the United States for the required period.

or the whereabouts of her husband, the applicant's father, at the time. The AAO notes that the applicant was born in Mexico in 1949. The AAO thus finds that the applicant has not met her burden of proof to establish her mother's residence in the United States for the required period.

The AAO further finds that, even had the applicant established her mother's U.S. residence, she failed to fulfill the applicable retention requirements. In this regard, the AAO notes that the applicant indicated in her Form N-600, Application for Certificate of Citizenship, that she entered the United States without inspection in 1987.⁴ The record therefore does not establish, by a preponderance of the evidence, that the applicant was present in the United States between the ages of 14 and 28, as required by the statute.

The AAO notes "[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v United States*, 449 U.S. 490, 506 (1981). 8 C.F.R. § 341.2(c) provides that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In order to meet this burden, the applicant must submit relevant, probative and credible evidence to establish that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant in this case has not met her burden of proof. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.

⁴ The AAO notes that the applicant testified at her son's removal hearing that she entered the United States in 1959. There is no documentary evidence in the record to explain this important discrepancy, or to establish the applicant's date of entry into the United States. The applicant has therefore failed to meet her burden of proof in this regard.