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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: OKLAHOMA CITY, OK

Date:

JUL 17 2008

IN RE:

Applicant:

[REDACTED]

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Oklahoma City, Oklahoma, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be reopened. The previous decisions by the director and the AAO will be withdrawn. The appeal will be sustained and the application approved.

The applicant was born in Germany on December 16, 1947. The applicant was born out of wedlock to [REDACTED], a native-born U.S. citizen, and [REDACTED]. The applicant's father was born in Louisiana on November 7, 1924. He served in the U.S. Armed Forces from 1945 to 1949. The applicant's mother is not a U.S. citizen. The applicant presently seeks a certificate of citizenship claiming that he acquired U.S. citizenship through his father pursuant to the Nationality Act of 1940 (the Nationality Act).

The applicant first applied for a certificate of citizenship in 2006. His application was denied, and an appeal of the denial was dismissed by this office on April 30, 2007. The applicant's instant application was filed on October 29, 2007. On January 23, 2008, the director denied the instant application finding that the applicant had failed to establish that he was legitimated, as required by section 205 of the Nationality Act, 8 U.S.C. § 601.

The AAO notes that the regulations at 8 C.F.R. § 341.6 provide that "[a]fter an application for a Certificate of Citizenship has been denied and the appeal time has run, a second application submitted by the same individual shall be rejected and the applicant instructed to submit a motion for reopening or reconsideration" ¹ The instant application must therefore be rejected.

The AAO notes, however, that the applicant has provided the following new evidence with the instant application: a copy of the 1930 census information to establish his father's residence; affidavits executed by his aunts; and the applicant's social security earnings statements for the years 1967 to 1975. The AAO finds that the new evidence provided warrant reopening of the applicant's case.

"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 1947. The Immigration and Nationality Act went into effect on December 24, 1952. The Nationality Act of 1940 (the Nationality Act), 8 U.S.C. § 601(i), is therefore applicable in this case.

¹ A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Section 201(i) of the Nationality Act, 8 U.S.C. § 601(i) was added by Congress in 1946 to specifically address the citizenship of children of U.S. citizens who served in the Armed Forces during World War II. It provided that the following shall be a national and citizen of the United States at birth:

A person born outside the United States . . . of parents one of whom is a citizen of the United States who has served or shall serve honorably in the armed forces of the United States after December 7, 1941, and before the date of termination of hostilities in the present war . . . and who, prior to the birth of such person, has had ten years' residence in the United States . . . at least five of which were after attaining the age of twelve years, the other being an alien: *Provided*, That in order to retain such citizenship, this child must reside in the United States . . . for a period or periods totaling five years between the ages of thirteen and twenty-one years . . .

The AAO notes that the Act of March 16, 1956, Pub. L. 84-430, 70 Stat. 40, provided

[t]hat section 301(a)(7) of the Immigration and Nationality Act shall be considered to have been and to be applicable to a child born outside of the United States and its outlying possessions after January 12, 1941 and before December 24, 1952, or parents one of whom is a citizen of the United States who has served in the Armed Forces of the United States after December 31, 1946, and before December 24, 1952, and whose case does not come within the provisions of section 201(g) or (i) of the Nationality Act of 1940.

Section 301(a)(7) of the former Act states 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.

The AAO finds that the applicant has established that his father is [REDACTED] and that his father served in the U.S. Armed Forces between 1941 and 1952. The AAO further finds that the applicant has established that his father was physically present in the United States for ten years prior to the applicant's birth (five of which after attaining the age of 14 years). In this regard, the AAO notes the 1930 census record as well as the affidavits from the applicant's aunts. This evidence corroborates the evidence previously submitted by the applicant.

The AAO also finds that the applicant complied with the any applicable retention requirements as specified in section 301(b) of the Act, 8 U.S.C. § 1401(b). Section 301(b) of the Act stated that a child who acquired citizenship at birth abroad pursuant to section 301(a)(7) of the Act 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 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. *See* 7 FAM 1133.5-7. Public Law 95-432, effective October 10, 1978, subsequently repealed section 301(b) of the 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.” *Id.* *See* 7 FAM 1133.5-13(a) and (c).²

The AAO notes that the applicant was admitted to the United States in 1967 at the age of 19 years. The AAO finds that the applicant was physically present for the period required for retention of U.S. citizenship under the Act. Specifically, the AAO notes that social security earnings statement verifying that the applicant was employed since 1967. The AAO finds that the social security statement sufficiently corroborates the statements made by the applicant and his relatives regarding his continued residence in the United States.

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). As noted above, the applicant’s case will be reopened, the previous decisions will be withdrawn, and, because the applicant has met his burden of proof, the appeal will be sustained.

ORDER: The matter is reopened, all previous decisions are withdrawn, the appeal is sustained and the application approved.

² The AAO notes that the applicant was over 26 years old on October 10, 1978.