



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

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2009

IN RE: Applicant: [REDACTED]

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

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center on August 2, 2007. The Director considered the applicant's appeal as a Motion to Reopen/Reconsider, upon rejecting it as untimely, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The Director's October 25, 2007 decision will be withdrawn, the appeal will be sustained.

The record reflects that the applicant was born on June 4, 1955 in Mexico. The applicant's parents are [REDACTED] and [REDACTED]. The applicant's mother was a native-born U.S. citizen, born on September 28, 1927 in Texas. The applicant's parents were married in Mexico in 1946. The applicant seeks a certificate of citizenship claiming that he acquired citizenship at birth through his mother pursuant to section 301 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401.

The Director denied the applicant's citizenship claim, finding that he had failed to establish that his mother resided in the United States for the period required by the Act. The application was denied on August 2, 2007. The applicant filed his appeal, with the appropriate fee, on August 31, 2007, by mailing it to the California Service Center. The record suggests that the appeal was received by the Texas Service Center, and later forwarded to the California Service Center. The Director rejected the appeal as untimely on October 25, 2007, and, upon considering the appeal as a Motion to Reopen/Reconsider, denied the Motion. The instant appeal followed.¹

On appeal, the applicant claims that the director erred in rejecting his appeal of the August 2, 2007 decision. The applicant further claims that he sufficiently established his mother's physical presence in the United States. The applicant first notes that the Director erroneously required the applicant to establish that his mother "resided" in the United States when the Act only requires that he demonstrate her "physical presence." The applicant also noted that his mother, who has since passed away, provided sworn testimony to the immigration court regarding her presence in the United States.

"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 1955. Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7), is therefore applicable to his citizenship claim.²

¹ The AAO notes that the record indicates that the applicant properly and timely filed his appeal on August 31, 2007, within 33 days of issuance of the Director's decision. The AAO notes, in any event, that the Director was without jurisdiction to consider an untimely appeal as a Motion, unless the Director was inclined to grant the Motion. See 8 C.F.R. § 103.3(a)(2)(iv) (providing that if the reviewing official will not be taking favorable action, the appeal shall promptly be forwarded to the AAO) and 8 C.F.R. § 103.3(a)(2)(v)(B) (providing that an untimely appeal that meets the requirements of a motion, must be treated as a motion and a decision must be made on the merits of the case).

² Section 301(a)(7) of the former Act was re-designated as section 301(g) by the Act of October 10, 1978, Pub. L. 95-432, 92 Stat. 1046. The requirements of section 301(a)(7) remained the same after the re-designation and until 1986.

Section 301(a)(7) of the former Act stated 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 applicant must thus establish that his mother was physically present in the United States for at least 10 years prior to the applicant's birth in 1955, five of which after his mother's 14th birthday in 1941.³

The AAO notes that the record includes, in relevant part, the applicant's mother's birth and baptismal certificates; social security records with reported earnings in 1945, 1946 and 1949; birth certificates for the applicant's siblings, born in the United States in 1949, 1951 and 1952; and the applicant's mother's school records indicating some attendance in 1944. The record also includes sworn statements from the applicant's mother's acquaintances attesting to her presence in the United States. Further, the record includes the applicant's mother's sworn testimony before the immigration court attesting to her physical presence in the United States. Specifically, the applicant's mother testified that she was physically present in the United States from birth until she was 11 (in 1938). After 1938, she lived with her godmother in the United States, but she frequently visited her mother in Mexico. She also indicated that she worked in the United States. In 1946, she married in Mexico but continued to travel back and forth to the United States while her husband was in Mexico and she was living with her sister here. She also testified that her oldest child was born in Mexico in 1946, but that three of her children were born in the United States in 1949, 1951 and 1952. The immigration judge found the applicant's mother's testimony to be credible, and noted the difficulty in establishing her physical presence given her living arrangements and frequent border crossings. The AAO is not bound by the findings of the immigration judge,⁴ but is nevertheless persuaded by his findings and analysis. The AAO also notes that the

³ The applicant is correct in noting that the requirement in section 301(a)(7) is "physically present," not "residence," in the United States.

⁴ The immigration judge does not have jurisdiction or authority to declare that an alien is a U.S. citizen. Rather, the immigration judge's termination of removal proceedings against the applicant was based on the judge's jurisdictional determination that the U.S. Department of Homeland Security 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

applicant's mother's sworn testimony is supported by objective, documentary evidence (including her social security earnings and her children's birth certificates). The AAO therefore concludes that the evidence in the record sufficiently establishes that the applicant's mother was physically present in the United States for 10 years prior to 1955, five of which while after her 14th birthday in 1941.

Pursuant to 8 C.F.R. § 341.2(c), 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 has met her burden and the appeal will be sustained.

ORDER: The Director's October 25, 2007 decision is withdrawn, the appeal is sustained.

convincing evidence), *see also Minasyan v. Gonzalez*, 401 F.3d 1069 (9th Cir. 2005) which clarifies 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 USCIS citizenship unit and with the federal courts.