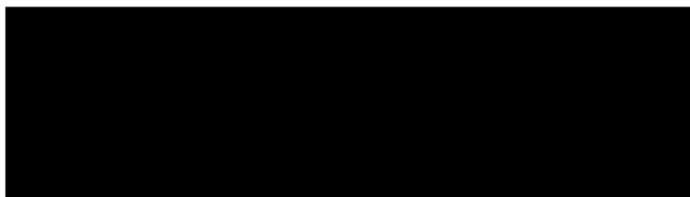


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



E₂

Date: **AUG 16 2012**

Office: HARLINGEN, TX

FILE: 

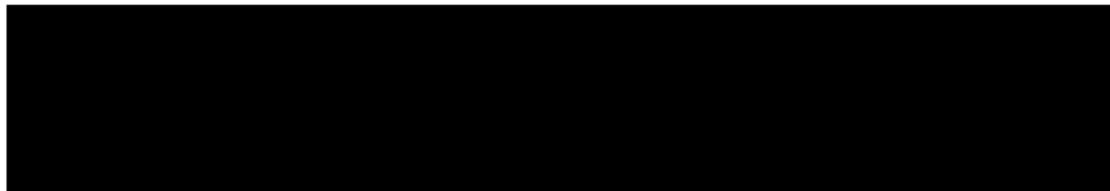
IN RE:

Applicant: 

APPLICATION:

Application for Certificate of Citizenship under Section 201 of the Nationality Act of 1940; 8 U.S.C. § 601 (1941).

ON BEHALF OF APPLICANT:

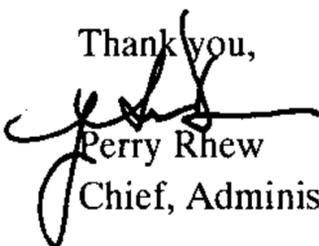


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Harlingen, Texas, and the matter came before the Administrative Appeals Office (AAO) on appeal. The appeal was initially rejected as improperly filed. The matter is now before the AAO on the applicant's motion to reopen. The motion will be granted.¹ The appeal will be dismissed.

The record reflects that the applicant was born on December 7, 1941 in Mexico. The applicant's parents are [REDACTED]. The applicant's mother was born in Texas on February 25, 1917. The applicant's parents were married in Texas in 1934. The applicant seeks a certificate of citizenship claiming that he acquired U.S. citizenship at birth through his mother.

The field office director denied the applicant's citizenship claim upon finding that the applicant was born in wedlock and that his mother had not resided in the United States for the statutorily required period of time.

On appeal, the applicant, through counsel, contends that he was born out of wedlock. See Appeal Brief. According to the applicant, his father was married to Juana Zapata in 1913 and his subsequent marriage to [REDACTED] the applicant's mother, is therefore void. *Id.*

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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, 1028 n.3 (9th Cir. 2001) (internal citation omitted). The applicant in the present matter was born in 1941. Section 201(g) of the Nationality Act of 1940 (the Nationality Act), 8 U.S.C. § 601(g), is therefore applicable to his citizenship claim.

Section 201(g) of the Nationality Act states in pertinent part 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.

¹ According to the regulation at 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts and be supported by affidavits or other documentary evidence. The matter was rejected for failure to submit a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. The motion is accompanied by a newly executed Form G-28. Thus, the motion meets the regulatory criteria of a motion to reopen and must be granted.

In order to acquire U.S. citizenship at birth, the applicant must therefore establish that his mother resided in the United States for 10 years prior to 1941, five of which were after the age of 16 (after 1933). The record indicates that the applicant's mother resided in the United States from birth until 1934. Thus, the applicant did not acquire U.S. citizenship at birth under section 201(g) of the Nationality Act because his mother did not reside in the United States for five years after the age of 16.

The applicant claims that he was born out of wedlock. Section 205 of the Nationality Act was applicable to children born out of wedlock. Section 205 of the Nationality Act provided, in relevant part, that

[a] child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States . . . shall be held to have acquired at birth her nationality status.

The applicant, through counsel, maintains that his parents' marriage in 1934 was void *ab initio* because his father was previously married. The applicant claims that his father was married to [REDACTED] in a religious ceremony in Mexico in 1913. Alternatively, he states that they were in a common law marriage. The AAO finds it unnecessary to resolve the question of whether the applicant was born in or out of wedlock because, in either case, the applicant is subject to retention requirements which he did not fulfill.²

The applicant entered the United States in 1970, at the age of 29. Former 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 Foreign Affairs Manual (FAM) § 1133.5-2(c). Under former section 301(b) of the Act, 8 U.S.C. § 1401(b), a child who acquired citizenship at birth abroad must have been 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. A two-year retention requirement was later substituted retroactively in 1972. See 7 FAM § 1133.5-7.³ The applicant was not present in

² The AAO notes that the applicants' parents were married in 1934 in the State of Tamaulipas and, in accordance with the Civil Code for the State of Tamaulipas, a "marriage enjoys the presumption of validity until it is dissolved either by judicial decision or, in some cases, by official administrative action." See *Matter of Hernandez*, 14 I&N Dec 608 (AG 1974) (citing *Codigo Civil para el Estado de Tamaulipas*, Chapter IV, Arts. 2155 to 2157 and Art. 239 of the Mexican Civil Code). The applicant's parents' marriage was not declared null or void, either judicially or administratively, and is therefore presumed valid.

³ 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

the United States for a two year period prior to his twenty-eighth birthday. Thus, even if he acquired U.S. citizenship under section 205 of the Nationality Act, his citizenship was lost for failure to fulfill the retention requirements.

The burden in these proceedings is on the applicant to establish eligibility for U.S. citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 CFR § 341.2. The applicant in this case has not met his burden of proof. The appeal will therefore remain dismissed.

ORDER: The motion is granted. The appeal remains dismissed.

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). As noted above, the applicant entered the United States in 1970 at the age of 29.