



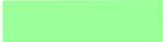
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 12 2013**

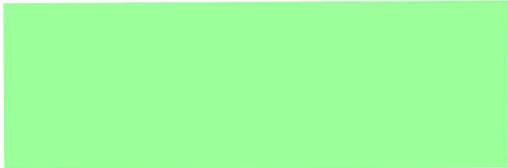
OFFICE: SAN DIEGO, CA

FILE: 

IN RE: 

APPLICATION: Application for Certificate of Citizenship under former Sections 301 and 309 of the Immigration and Nationality Act; 8 U.S.C. §§ 1401 and 1409

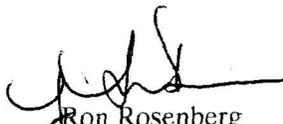
ON BEHALF OF APPLICANT:



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.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Harlingen, Texas (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The matter is remanded to the director for action consistent with this decision.

The applicant was born in Mexico on December 4, 1957. His father, deceased since December 1963, was born in the United States on November 28, 1898, and was a U.S. citizen at the time of the applicant's birth. The applicant's mother was born in Mexico and was not a U.S. citizen. The applicant seeks a certificate of citizenship pursuant to former sections 301(a) and 309(a) of the Immigration and Nationality Act (the former Act), 8 U.S.C. §§ 1401(a) and 1409(a), based on the claim that he acquired U.S. citizenship at birth through his father.

In a decision dated July 11, 2012, the director determined that the applicant failed to establish that his father was born in the United States; that his father legitimated him prior to his 21st birthday, as required by section 309(a) of the former Act; or that his father satisfied U.S. physical presence requirements set forth in section 301(a)(7) of the former Act. The application was denied accordingly.

Through counsel, the applicant asserts on appeal that evidence establishes his father was a U.S. citizen, that his father legitimated him, and that his father met the physical presence requirements set forth in the former Act. In support of these assertions, counsel submits baptism certificates, U.S. census records, draft registration information, and Social Security Administration evidence for the applicant's father. The record also contains the applicant's father's California marriage certificate, and birth certificates for children born in the United States. In addition, the record contains a copy of the applicant's U.S. passport.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. See *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). See also, 8 C.F.R. § 341.2(c) (the burden of proof shall be on the claimant to establish his or her claimed citizenship by a preponderance of the evidence.) The "preponderance of the evidence" standard requires that the record demonstrate that the applicant's claim is "probably true," based on the specific facts of each case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989)). Even where some doubt remains, an applicant will meet this standard if she or he submits relevant, probative and credible evidence that the claim is "more likely than not" or "probably" true. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

In the present matter, the record lacks birth certificate evidence to establish that the applicant's father was born a U.S. citizen. The regulation provides in pertinent part at 8 C.F.R. § 103.2(b)(2):

- (i) [T]he non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or

petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

- (ii) [W]here a record does not exist, the applicant or petitioner must submit an original written statement on government letterhead establishing this from the relevant government or other authority. The statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available.

Counsel asserts that it is impossible to obtain a birth certificate for the applicant's father because he was born in California prior to 1905, and birth records are thus not available. To corroborate her assertion, counsel submits brochure information from the California Office of Vital Records, stating that the office maintains records of all births that have occurred in California since July 1905. Counsel also submits an October 20, 2011 letter from the California vital records office stating the office is unable to process counsel's request for a birth record prior to July 1905.

In order to establish the applicant's father's birth in the United States, counsel submits two baptism certificates from [REDACTED] in San Diego, California, dated October 15, 1964 and February 1, 2008. The October 1964 certificate states that the applicant's father was baptized on March 12, 1899, and that he was "presumably" born in San Diego, California on November 28, 1898. The February 2008 certificate states that the applicant was born in San Diego, California on November 28, 1898, and that he was baptized on March 12, 1899. The record also contains: U.S. Census records for the years 1910, 1920, and 1930 reflecting the applicant's father was born in California; a September 12, 1918, Selective Service registration card signed by the applicant's father reflecting he was born in the United States on November 28, 1899; an application for a Social Security number signed by the applicant's father on November 30, 1939, reflecting he was born in Lakeside, California on November 28, 1899; and an April 27, 1942, Selective Service registration card signed by the applicant's father reflecting he was born in Lakeside, California on November 28, 1897.

The record additionally contains the applicant's father's California marriage certificate, dated July 12, 1920, reflecting he was born in California; birth certificates for the applicant's father's five U.S. citizen children, born between 1922 and 1933, reflecting the applicant's father was born in Lakeside, San Diego County, California; and the applicant's Mexican birth certificate reflecting the applicant's father is North American. A December 21, 1888 marriage certificate for the applicant's father's parents reflects they married in San Diego, California, and that both were born in the United States and resided in San Diego, California.

The AAO finds that the applicant has established that obtaining a California birth certificate is not possible in his father's case because his father was born prior to 1905. Moreover, although the evidence in the record contains some discrepancies with regard to the year the applicant's father was born (in some cases stating 1897, in others 1898 or 1899,) the evidence is consistent with regard to the place of the applicant's father's birth (California). Upon review of the totality of the evidence,

the AAO finds that the applicant has met his burden of establishing that his father was born in the United States, and that his father was a U.S. citizen at the time of the applicant's birth.

"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. INS*, 247 F.3d 1026, 1029 (9th Cir., 2000) (citations omitted). Here, the applicant was born in 1957. Section 301(a)(7) of the former Act therefore applies to the present case.

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 applicant must therefore establish that his father was physically present in the United States for 10 years prior to the applicant's birth on December 4, 1957, at least five years of which were after his father turned 14 on November 28, 1912.

Furthermore, because the applicant was born out of wedlock, he must establish that he was legitimated by his father. The applicant was born prior to November 14, 1986, and he was over the age of eighteen on November 14, 1986. The legitimation requirements contained in section 309 of the former Act therefore apply to his case.

Section 309 of the former Act provided in pertinent part that:

- (a) The provisions of paragraphs (3)(4)(5), and (7) of section 301(a) . . . shall apply as of the date of birth to a child out-of-wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

Legitimation can take place under the law of the child's or the father's residence or domicile. *See* section 101(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(c). Accordingly, the applicant must establish that he was legitimated by his father prior to his 21st birthday pursuant to the law in Baja California, Mexico, where the applicant resided, or under the law in the State of California, where the applicant's father resided.

According to an April 2011 advisory opinion from the Library of Congress (LOC 2010-004760) discussing state laws on legitimation in Mexico, the 1974 Civil Code in Baja California, as amended in 1996, governs legitimation in the State of Baja California. Under the Baja California Civil Code,

legitimation occurs only upon the marriage of the parents. See LOC 2010-004759 and LOC 2010-004760. In the present matter, it is undisputed that the applicant's parents did not marry. Accordingly, the applicant was not legitimated by his father under the law in Baja California, Mexico.

Section 230 of the California Civil Code, in effect at the time of the applicant's birth and until 1975, provided that a child born out of wedlock was legitimated by his or her father if the father publicly acknowledged the child as his own, "receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child[.]" Similarly, California Civil Code section 7004, effective in 1975, provided that a child born out of wedlock was legitimated by his or her father if the father received the child into his home and openly held out the child as his natural child.

Marriage certificate evidence contained in the record reflects that the applicant's father married [REDACTED] in Lakeside, California on July 12, 1920. Birth certificate evidence reflects that the applicant's father and his wife had children born in Lakeside, California between 1922 and 1933, and that the applicant's father resided with his family in Lakeside California. The applicant does not assert that he lived with his father in California at any time, and the record contains no evidence to indicate or establish that his father received the applicant into his family in California, or openly held the applicant out as his natural child. The applicant therefore failed to establish that he was legitimated by his father in accordance with California law.

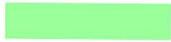
Because the applicant has not established that he was legitimated under section 309 of the former Act, it is not necessary to address whether the applicant's father has satisfied the physical presence requirements of section 301(a)(7) of the former Act.

The regulation provides at 8 C.F.R. 341.2(c) that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in this case.

It is noted that the record contains a copy of the applicant's U.S. passport, issued April 3, 2012 and valid through April 2, 2022. In *Matter of Villanueva*, 19 I&N Dec. 101, 103 (BIA 1984), the Board of Immigration Appeals (Board) held that a valid U.S. passport is conclusive proof of U.S. citizenship. However, where, as here, the applicant has failed to establish statutory eligibility for U.S. citizenship, a certificate of citizenship cannot be issued. See *Fedorenko v. U.S.*, 449 U.S. 490, 506 (1981) (stating that strict compliance with statutory prerequisites is required to acquire citizenship.)

Because the record does not demonstrate the evidentiary basis upon which citizenship was established for U.S. passport purposes, the submission of additional documentation may be required, or the passport file may need to be requested. The matter will therefore be remanded to the director for further action. If after review there are differences or discrepancies between the Service's information and the Passport Office records which would indicate that the application should not be approved, no action should be taken until the Passport Office has an opportunity to review and decide whether to revoke the passport. The director shall issue a new decision once the Passport

(b)(6)



Page 6

Office's review is completed and, if adverse to the applicant, shall certify the decision to the AAO for review.

ORDER: The matter is remanded to the director for action consistent with this decision and for issuance of a new decision, which, if adverse to the applicant, shall be certified to the AAO for review.