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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-L-

DATE: NOV. 16, 2016

APPEAL OF SALT LAKE CITY, UTAH FIELD OFFICE DECISION

APPLICATION: FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP

The Applicant, a native and citizen of Mexico, seeks a Certificate of Citizenship. *See* Immigration and Nationality Act (the Act) section 309(c), 8 U.S.C. § 1409(c). An individual born outside the United States who acquired U.S. citizenship at birth, or who automatically derived U.S. citizenship after birth but before the age of 18, may apply to receive a Certificate of Citizenship. For an individual claiming to acquire citizenship at birth and who was born after December 23, 1952, to an unmarried U.S. citizen mother, the mother must have been physically present in the United States for 1 continuous year before the individual's birth.

The Field Office Director, Salt Lake City, Utah, denied the application concluding that the evidence the Applicant submitted was insufficient to establish that his mother did not reside[1] in the United States for 1 year before the Applicant was born, as required for acquisition of U.S. citizenship at birth.

The matter is now before us on appeal. On appeal, the Applicant asserts that the evidence he submitted, when considered in the aggregate, demonstrates that his mother satisfied the requisite physical presence in the United States prior to his birth, and that he has thus established that he acquired U.S. citizenship at birth from his mother.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The record reflects that the Applicant was born out of wedlock on [redacted] in Mexico. The Applicant's mother was born in Mexico in [redacted] but she acquired U.S. citizenship at birth, as evidenced by the Certificate of Citizenship issued to her in 1981. The Applicant's birth certificate does not provide information about the Applicant's father. In 1985, the Applicant was admitted to the United States for permanent residence as an unmarried son of a U.S. citizen based on an

[1] The Applicant states on appeal that the Director incorrectly applied the requirement of continuous "residence," instead of the "physical presence" under section 309(c) of the Act. We agree that the Director's reference to continuous "residence" was improper. However, because we consider the entire record *de novo*, the Director's error does not affect our adjudication on appeal.

approved immigrant visa petition filed on his behalf by his mother. The Applicant seeks a Certificate of Citizenship indicating that he acquired U.S. citizenship from his mother at birth pursuant to section 309(c) of the Act.

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, 1029 n.3 (9th Cir. 2001) (internal quotation marks and citation omitted).

The Applicant was born in to an unmarried U.S. citizen mother. Accordingly, the Applicant's citizenship claim falls within the provisions of section 309(c) of the Act, which provides that:

> [A] person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

II. ANALYSIS

The only issue to be decided on appeal is whether the Applicant has demonstrated that his U.S. citizen mother was physically present in the United States for a continuous period of 1 year before the Applicant's birth in as required to transmit U.S. citizenship under section 309(c) of the Act.

Because the Applicant was born abroad, he is presumed to be a foreign national 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).

The Applicant represented on the Form N-600, Application for Certificate of Citizenship, that his mother was present in the United States from September 1962 until October 1963. In support of this representation, the Applicant initially submitted an affidavit by an individual who attested that the Applicant's mother traveled to the United States in September 1962, and that she returned to Mexico in October 1963. The Director found that the affidavit, uncorroborated by other evidence, was insufficient to establish the mother's claimed presence in the United States. The Director issued a request for evidence (RFE), asking the Applicant to provide additional evidence, such as paystubs, Social Security work records, and taxes, that would prove the mother was present in the United States before the Applicant's birth. In response, the Applicant submitted two handwritten notes dated in January and July 1962, and several other notes, letters and receipts, dated between April and October 1963, referencing his mother's name. The Director considered this evidence, along with the previously-submitted affidavit, but found that it did not demonstrate that the Applicant's mother resided in the United States continuously for 1 year.

On appeal, the Applicant avers that the documents he submitted establish, pursuant to the applicable preponderance of the evidence standard, that his mother was physically present in the United Sates for a continuous period of 1 year before his birth in [redacted].

Upon review of the entire record, we conclude that the documents the Applicant presented are insufficient to show by the preponderance of the evidence that his mother was continuously physically present in the United States for 1 year before his birth. We find, therefore, that the Applicant has not established that he acquired U.S. citizenship at birth from his mother under section 309(c) of the Act.

A. Physical Presence of the Applicant's Mother in the United States

The evidence of the Applicant's mother's physical presence in the United States consists of the documents referenced above, which the Director found insufficient. The Applicant does not submit new evidence on appeal, but claims that the documents he already provided show that his mother's was likely present in the United States for the requisite period of 1 continuous year as he claims.

In evaluating the evidence, we are guided by *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989), which states that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, U.S. Citizenship and Immigration Services (USCIS) must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Even if USCIS has some doubt as to the truth, if the Applicant submits relevant, probative, and credible evidence that leads the agency to believe that the claim is "probably true" or "more likely than not," the Applicant has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If USCIS can articulate a material doubt that leads it to believe that the claim is probably not true, then USCIS may deny the application. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Unlike "residence," the term "physical presence" has its literal meaning, and is computed by the actual time spent in the United States.[2]

One of the documents the Applicant submitted to prove his mother's physical presence in the United States is an affidavit by a person who claims she was born in [redacted] and placed to live with the Applicant's mother and another individual when she was 5 years old, because her own parents were

[2] *See* INS Interp. 301.1(5)(iv), (6)(ii); 7 FAM 1133.3-4, *Methods of Counting Physical Presence.* Usually, it is not necessary to compute the U.S. physical presence required to transmit U.S. citizenship down to the minute, and a parent who was in the United States for a sufficient number of years may transmit citizenship even if the "exact months, days, or hours are unknown. 7 FAM 1133.3-4(b). However, if it is not clear that the parent has more than enough physical presence in the United States, it is important to obtain the exact dates of the parent's entries and departures. 7 FAM 1133.3-4(c).

unable to raise her. The affiant states that the Applicant's mother traveled from Mexico to the United States in September of each year to perform agricultural field work. According to the affiant, in September 1962, the Applicant's mother and this individual went to the United States together. The affiant states that this trip to the United States was particularly memorable, because when they returned to Mexico in October 1963, the mother was pregnant and soon thereafter gave birth to the Applicant. The Applicant states that pursuant to *Matter of E-M-*, *supra*, affidavits alone may serve to establish facts by a preponderance of the evidence when they are detailed and consistent. The Applicant claims that because the affidavit he submitted is detailed, and corroborated by other evidence in the record, it should be accepted as proof of the Applicant's mother in the United States for 1 continuous year before

We agree that affidavits are acceptable in these proceedings to establish eligibility. However, when affidavits are submitted, they must overcome the unavailability of both primary and secondary evidence. 8 C.F.R. § 103.2(b)(2). *Cf. Vera-Villegas v. INS*, 330 F.3d 1222, 1235 (9th Cir. 2003) (holding that the applicant met his burden of proving physical presence despite lack of contemporaneous documentation where he presented detailed testimony, three witnesses, and numerous affidavits); *Lopez Alvarado v. Ashcroft*, 381 F.3d 847, 854 (9th Cir. 2004) (finding that the applicants substantiated their physical presence in the United States through testimony by multiple employers, and letters from landlords, friends, family, and church members).

In this case, the Applicant has submitted only one affidavit, and he asserts that the affiant's testimony confirms his mother's presence in the United States from September 1962 until October 1963. However, as the affiant indicates she was in Mexico during the time period she attests to, the affiant can only testify as to the mother's absence from Mexico, not to her presence in the United States. Thus, the affiant's statement indicating that the Applicant's mother was in the United States from September 1962 until October 1963 is not based on her personal knowledge. Furthermore, the affiant would have been 10 years old in when she claims the Applicant's mother and the individual, with both of whom she claims she lived and who were raising her, traveled to the United States together. The affiant does not explain where she resided and who took care of her while her guardians were absent from Mexico for over a year. We find that lack of this information and the lack of the affiant's personal knowledge of the Applicant's mother's presence in the United States diminishes the probative value of the affiant's claim. We acknowledge the Applicant's statement on appeal that the Director could have questioned the affiant about the contents of her affidavit during the Applicant's citizenship interview, when the affiant was available and willing to testify. However, the burden of proof to establish the claimed citizenship rests with the Applicant. 8 C.F.R. § 341.2(c).

The Applicant also states that although the Director indicated at the time of the interview that the immigration file of the Applicant's mother would be obtained and examined prior to final adjudication of the Applicant's citizenship claim, the Director's decision does not address the contents of the mother's file. We have reviewed the documents from the mother's file on appeal. These documents include the Form N-600, Application for Certificate of Citizenship, she filed in 1978, and supporting evidence. Unfortunately, on the Form N-600, the Applicant's mother only

included information about her arrival in the United States in August 1974, and the file does not contain any statements, documents, or other evidence pertaining to her presence in the United States before that date.

The Applicant has previously submitted some documents and mementos[3] related to his mother's presence in the United States. They include two informal notes dated in January and April 1962, which acknowledge that the mother earned $50 and $5 dollars in those 2 months working for someone. While the notes, written in English, show that the mother was likely in the United States in January and April 1962, the evidence that the mother performed some work for someone 3 months apart is not indicative of her continuous presence in the United States during this time. The Applicant has not submitted any other documents dated in 1962. The remaining documents are two similar work acknowledgment notes from April 1963, and documents dated from June through October 1963. These documents include work and loan receipts, uncashed checks, personal letters, evidence that the Applicant's mother received prenatal care in the United States, and books with dated dedications to the Applicant's mother. We find that these documents, considered in the aggregate, demonstrate that the Applicant's mother was likely continuously physically present in the United States for 5 months between June and October 1963. However, the remaining documents show only the mother's possible presence in the United States from January 1962 through April 1962 and in April 1963. Accordingly, there is a 1 year gap in the mother's presence in the United States between April 1962 and April 1963. Thus, the totality of the evidence does not tend to support the Applicant's claim that his mother was continuously physically present in the United States for a period of a whole year from September 1962 until October 1963.

Accordingly, we are unable to find based on the evidence before us that the Applicant's mother was physically present in the United States for a continuous period of 1 year prior to the Applicant's birth in We conclude, therefore, that the Applicant has not established that he acquired U.S. citizenship at birth from his mother under section 309(c) of the Act.

III. CONCLUSION

It is the Applicant's burden to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. § 341.2(c). Here, that burden has not been met, as the Applicant has not demonstrated that his mother was likely continuously present in the United States for 1 year before the Applicant's birth.

ORDER: The appeal is dismissed.

Cite as *Matter of E-L-*, ID# 9990 (AAO Nov. 16, 2016)

[3] While the record before us includes only photocopies, it appears that the Applicant submitted original documents for the Director's review. There is no indication that the Director questioned the authenticity of these documents, or that they are not genuine.