U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-H-G-J-

DATE: MAY 3, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Applicant, who was born out of wedlock in Mexico in , seeks a Certificate of Citizenship indicating he acquired U.S. citizenship at birth from his father. *See* Immigration and Nationality Act (the Act) former section 301(a)(7), 8 U.S.C. § 1401(a)(7), *amended by* Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046. 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. An individual who, like the Applicant, was born to unmarried parents between December 24, 1952, and November 14, 1986, and is claiming acquisition of citizenship at birth through a U.S. citizen father must satisfy certain legitimation requirements and show that the father was physically present in the United States for 10 years (with at least 5 years after the age of 14) before the individual's birth.

The Director of the Houston, Texas, Field Office denied the application, concluding that the Applicant did not establish that his U.S. citizen father had the requisite physical presence in the United States to transmit citizenship. We dismissed the appeal, finding the evidence of the father's presence in the United States insufficient. In 2016, the Applicant filed a Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (Complaint) in the U.S. District Court for the of Texas.[1] The Complaint requested the District Court to review our adverse decision and declare that the Applicant derived U.S. citizenship under former section 301(a)(7) of the Act. On 2017, the District Court Judge signed a Final Dismissal Order, based upon a Joint Stipulation of Dismissal filed by the parties. Based upon that stipulation, we subsequently reopened the matter on our own motion and issued a request for evidence (RFE) to give the Applicant an opportunity to supplement the record. The Applicant's response to the RFE includes a brief, copies of previously-submitted evidence, and new U.S. border crossing documentation of the father's older siblings.

Upon review, we find that the evidence, considered in the aggregate, does not demonstrate that the Applicant's father was likely present in the United States for 10 years before his birth. We will therefore affirm our decision to dismiss the appeal.

[1] Civil Action No.

I. LAW

The record reflects that the Applicant was born to a U.S. citizen father and a foreign national mother. 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). At the time of the Applicant's birth in former section 301(a)(7) of the Act provided that the following were 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, or periods of employment with the United States Government or with an international organization . . . may be included in computing the physical presence requirements of this paragraph.

A person who, like the Applicant, was born out of wedlock, may acquire citizenship under former section 301(a)(7) of the Act only if he also meets conditions concerning paternity and legitimation set forth in section 309(a) of the Act, 8 U.S.C. § 1409(a). Prior to November 14, 1986, that section required paternity of a child to be established by legitimation under the law of either the father's or the child's domicile, while the child was under the age of 21 years.[2]

The regulations at 8 C.F.R. § 103.2(b)(2)(i) outline rules for submitting secondary evidence and affidavits in these proceedings. They provide that if a required document does not exist or cannot be obtained, an applicant must demonstrate this and submit secondary evidence pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant must then demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. *Id.* Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence. *Id.*

The regulations provide further that if a record does not exist, the applicant must submit an original written statement on government letterhead establishing this from the relevant government or other

[2] The Act of November 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655, amended section 309(a), applying the changed provisions to individuals who were not yet 18 years of age on November 14, 1986, and whose paternity was not established by legitimation before that date. Because we are satisfied that the Applicant was legitimated by his father in Mexico, when he was a child, we do not address the requirements of amended section 309(a) of the Act.

authority. 8 C.F.R. § 103.2(b)(2)(ii). Such statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available. *Id.*

II. ANALYSIS

There is no dispute that the Applicant's father is a U.S. citizen, born in the United States in and that the Applicant's paternity was established by legitimation before he was 21 years old.[3] The remaining issue is whether the Applicant has demonstrated that his father was physically present in the United States for at least 10 years before the Applicant's birth in and that 5 of those years were after the father's 14th birthday in

To show that his father meets this requirement, the Applicant initially submitted: birth, baptismal and census records; affidavits from the father and his family members; a photograph of his father as an infant; and printouts from a genealogy resources website. In our appeal decision, we found that while this evidence demonstrated that the father lived in the United States for approximately two years following his birth, the affidavits were neither sufficiently detailed, nor supported by other documents to substantiate the affiants' claims of the father's school attendance and work in Texas in later years. Accordingly, when we reopened the case, we asked the Applicant to submit the father's school records, additional information regarding his employment in the United States, and any other relevant evidence to show that his father was in the United States after his birth in We also explained that to prove eligibility based on the affidavits, the Applicant had to first establish that primary and secondary evidence of his father's presence in the United States was unavailable or could not be obtained.

In response, the Applicant submits documents indicating that his father's older siblings were admitted to the United States on several occasions between 1936 and 1948 as nonimmigrants. He asserts that these documents, when considered with the previously-submitted evidence, show that his father was physically present in the United States his entire life, except for a short period of time in 1965, when he met his spouse in Mexico and started a family. He further states that the records pertaining to the father's school attendance in Texas are unattainable, and that he is also unable to present evidence of the father's employment in the United States because his father was an unskilled laborer who was always paid in cash. The Applicant avers, however, that the affidavits he submitted overcome documentary deficiencies as they provide a consistent and detailed account of his father's

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[3] We have previously determined that the Applicant was legitimated under the law of Mexico, when his father registered the Applicant's birth in 1985 acknowledging paternity. *See Iracheta v. Holder,* 730 F.3d 419, 426-427 (5th Cir. 2013) (under the law of Mexico, a child whose father placed his name on the birth certificate before the Civil Registry was an "acknowledged" child and had the same filial rights vis-à-vis the father as a "legitimated" child).

[4] In the alternative, the Applicant may show that his father satisfied the physical presence requirement through honorable service in the U.S. Armed Forces or employment with the U.S. Government or an international organization abroad. However, as the Applicant does not claim or submit evidence of his father's U.S. military service or qualifying employment, he must demonstrate that his father was physically present in the United States for the entire 10-year period.

work and residence in the United States. Lastly, the Applicant argues that because U.S. Citizenship and Immigration Services (USCIS) had previously determined based on the same evidence that his siblings acquired U.S. citizenship at birth from the father, he also should be issued a Certificate of Citizenship.

For the reasons explained below, we affirm our previous determination that the evidence the Applicant presented is insufficient to meet his burden of proof in these proceedings, and that he is, therefore, ineligible for a Certificate of Citizenship.

A. Standard of Proof

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). In evaluating the evidence, we are guided by *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989), which holds that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 79-80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, we 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 there is some doubt as to the truth, if the Applicant submits relevant, probative, and credible evidence that leads us to believe that his 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, on the other hand, a material doubt exists that leads us to believe that his claim is probably not true, or the evidence is insufficent to show that it is, then we must deny the application. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

B. Physical Presence v. Residence

The Applicant refers in his brief to both his father's "physical presence" and "residence" in the United States. However, we must clarify at the onset that these terms are not interchangeable in the context of his citizenship proceedings, as former section 301(a)(7) of the Act specifically requires prior "physical presence" of the U.S. citizen. The term "physical presence" has its literal meaning, and is computed by the actual time spent in the United States.[5] "Residence," on the other hand, is the person's "place of general abode[,] . . . his principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33).

The Applicant points out that the Act does not define "physical presence," but that the U.S. Supreme Court interpreted a related term, "residence," as "the physical dwelling of a person without regard to intent."[6] The Applicant refers to a decision of the U.S. Court of Appeals for the Ninth Circuit,

[5] *See* INS Interp. 301.1(5)(iv), (6)(ii); 7 FAM 1133.3-4, *Methods of Counting Physical Presence.*
[6] *Savorgnan v. United States*, 338 U.S. 491, 505 (1950).

Alcarez-Garcia v. Ashcroft, 293 F.3d 1155 (9th Cir. 2003), to support his claim that physical presence does not need to be counted down to the minute, and that his father satisfied the 10-year "physical presence" requirement through his life-long "residence" in the United States. In that case, the Ninth Circuit found that temporary absences from the United States did not preclude establishment of 10-year *residence* necessary for the U.S. citizen parent to transfer citizenship to a child under section 201(g) of the Nationality Act of 1940, 8 U.S.C. § 601(g).[7] However, former section 301(a)(7) of the Act, which governs the Applicant's citizenship claim, requires him to demonstrate that his U.S. citizen father was actually *physically present* in the United States for 10 years in the aggregate during the periods of time the Applicant claims he *resided* in the United States. He has not shown this.

C. Father's Physical Presence in the United States

The preponderance of the evidence in the instant case indicates that the Applicant's father was present in the United States from his birth in until 1930 or 1931, but the Applicant has not demonstrated that his father likely spent 8 more years in the United States between 1931 and necessary for him to satisfy the 10-year physical presence requirement.

1. Physical Presence From to 1931

We have previously found that the Applicant's father was in the United States for years as a child, and we affirm this finding. The father's birth certificate issued in 1975 shows he was born in Texas, in Another certificate shows he was baptized there in July that year. Moreover, U.S. census records establish that as of 1930, he lived in with his parents, older sister, and older brother. Finally, the 1938 and 1944 border crossing documents of the father's older brother, born in show that this brother claimed residence in the United States until 1930 or 1931. This evidence is sufficient for us to conclude that the Applicant's father likely lived in Texas with his family until 1931.

2. Physical Presence From 1936 to 1953

In his affidavit, the Applicant's father claims that during the above-referenced time period he lived in Texas. While the Applicant submitted corroborative declarations from the father's younger brother and cousin, other evidence casts significant doubt on the veracity of these claims.

The record reflects that the Applicant's father was the only child of his parents born in the United States. His older sister and brother were born in Mexico in and respectively. The father also had two younger brothers born in Mexico in and In his affidavit, the father states that from 1936 until 1953 he lived at his aunt's house in with his mother and younger brothers.

[7] Specifically, the Ninth Circuit held that a Mexican farm worker who was physically present and working in the United States for nine months each year for eight years out of a nine-year period, established a nine-year residence in the United States for the purposes of transmitting U.S. citizenship to his child.

He explains that his own father and older brother also lived in [redacted] during this time, but with another relative. The father's younger brother, born in [redacted] confirms this, adding that when he moved to [redacted] in 1948, his mother and brothers remained in [redacted] However, the information on the entry documents of the father's older siblings that the Applicant submits on motion undermines this testimony. Specifically, the father's older sister claimed in April 1936 that she permanently resided in Mexico with their father, the Applicant's grandfather. Moreover, the father's older brother represented during his entries into the United States in 1938 and in 1944 that he lived in Mexico with their mother. This is inconsistent with the father's claim that his brothers and both parents lived in Texas from 1936 to 1953.

The evidence is also insufficient to substantiate the father's general statement that he attended [redacted] school in [redacted] for three or four years with his younger brothers and cousins when he was a child. The father's younger brother, who states he lived in Texas then, confirms that the Applicant's father went to school with his cousin and "another kid," but does not mention his own school attendance. According to USCIS records, however, this younger brother claimed on his immigrant visa application that he was never in the United States before 1968, except for "short local trips" with a border crossing card. USCIS records show that the father's other younger brother, born in [redacted] also represented on his 1968 visa application that he was never in the United States, and that he was employed in Mexico since 1951.[8] This raises doubts about the credibility of the father's and his younger brother's statements about their residence in the United States during the time period prior to 1953.

Similarly, we do not find the affidavit of the father's cousin, born in [redacted] to have significant probative value. While she states that the father and his family lived in her mother's home from 1946 until her older brother's death in [redacted] her statements concerning the father's school attendance are not clear. In one part of the affidavit, she states she was told that the father attended Buell elementary school in [redacted] with her older brother; in another, she claims that her cousins (the father and his younger brothers) went to school while they lived at her parents' house. This seems unlikely, as the Applicant's father would have been 17 years old in [redacted] but, according to his testimony, he only attended school as a child. The Applicant does not submit documents to resolve this discrepancy. Although he asserts that the father's school records are beyond his reach, the Applicant has not presented evidence to show that he attempted to obtain them or evidence from the school system that such records are unavailable. As the information in the immigration records of the father's siblings greatly undermines the probative value of the affiants' testimony, however, the affidavits alone are insufficient to establish the father's claimed presence in Texas.

[8] The brother's 1937 Mexican baptismal certificate, 1953 Mexican military service certificate, and statements regarding his marriages in Mexico in 1954 and 1961, are consistent with this representation.

3. Physical Presence From 1953 to 1965

For the same reasons, the affidavits do not overcome the lack of primary and secondary evidence of the father's purported presence in the United States in the later period between 1953 and 1965.

The father states that after his cousin died in his mother and siblings moved to another house in where his father was living. According to the father, after the death of his mother in or 1958, they all moved to and lived there for the next four or five years. The father's younger brother states he had been living in since 1948, and attests that the Applicant's father moved to after the death of their mother. However, the younger brother's statement carries little weight in light of his claim on the immigrant visa application that from 1948 until 1968 he resided in Mexico and worked there as a refrigeration technician. While the father's cousin confirms that the father lived in until 1958, she qualifies her statement by indicating that she left around the same time in 1958. The cousin adds that she heard from other family members that the father and his brothers continued to live in Texas after 1958. However, as this statement is not based on the cousin's personal knowledge and it is also inconsistent with the residential and employment information the father's younger brothers provided on their respective visa applications, it merits little weight. The Applicant has not submitted additional documents, such as the death certificate of his father's mother, or details about the father's employment in the United States, which would lend credibility to his and the affiants' claims that he lived in either or during this time period.

4. Physical Presence From 1965 to

Lastly, the declarations and documentary evidence do not show that the father spent any significant amount of time in Texas after he met his future spouse in Mexico in 1965, and before the Applicant's birth in

The Applicant's father states, and his younger brother affirms, that the only time he was absent from the United States was in 1964 or 1965 when he lived in Mexico for about a month where he met the Applicant's mother. The father claims that although he bought a small house in he continued to live in until 1970, working in the fields during the week, and visiting the Applicant's mother in Mexico on the weekends. This claim, however, is inconsistent with the facts recorded on the birth certificates of the Applicant's older siblings, born in and Specifically, when the father registered the births of those children in June 1969 before civil registry officials, he represented himself as a federal employee[9] domiciled in Mexico. This information contradicts the father's claim that he was a full-time field worker in the United States between 1965 and 1970, and that during this time he primarily lived in Texas. In addition, on the birth certificate of the Applicant's younger sister, the father's occupation was recorded as an "electrician."[10] While this certificate is dated after the relevant statutory period, like the other two

[9] "*Emp. federal*" (*empleado federal*) in original.
[10] "*Electricista*" in original. The remaining certificates, including the Applicant's, are extracts from the birth records and

certificates it raises doubts about the Applicant's claim that his father worked as an unskilled laborer all his life, and that he therefore is unable to obtain the father's employment records.

Because this evidence undermines the credibility of the statements regarding the father's occupation and employment in the United States, we find that the testimony of the Applicant's mother about the father's residence and full-time work in the fields in between 1966 and 1970 also lacks probative value.

The father states further that in 1970, he moved to where he lived for five or six months with his younger brother before returning to to be closer to his family in The record supports this statement. The father's birth certificate, issued in 1975, indicates he was assigned a social security number in 1970. In addition, according to USCIS records, the father's younger brother applied for admission to the United States in 1972 as a lawful permanent resident indicating he resided in We find this evidence tends to show that the father was likely present in the United States in 1970, the Applicant's birth.

Based on the above, we conclude that although the preponderance of the evidence reflects that the Applicant's father was in the United States as a child and later as an adult, it is insufficient to show that his physical presence amounted to at least 10 years before the Applicant's birth in While the Applicant previously submitted genealogy website printouts indicating that his father's name appeared in the U.S. Public Records Index between 1950 and 1993, those printouts do not indicate when the father was actually present in the United States within that time period. Moreover, although the Applicant submits U.S. census records reflecting his father was in the United States 1930, he does not submit 1940 census records, nor does he explain why those records are unavailable. Accordingly, we again conclude that the Applicant has not demonstrated that his father met the statutory physical presence requirement for transmission of U.S. citizenship.

D. Evidence Offered in U.S. Citizenship Proceedings of the Applicant's Siblings

The Applicant asserts that because USCIS found the affidavits, certificates, and census records he submitted in the instant matter sufficient to establish the father's physical presence in the citizenship proceedings of his siblings, this evidence should also be accepted as satisfactory in his case. In support of this assertion, the Applicant references one of our non-precedent decisions.[11] We found in that case that because testimony regarding physical presence of the U.S. citizen parent's was reviewed and accepted in adjudication of an individual's citizenship claim, it could not be ignored in the citizenship proceedings of that individual's sibling even though it was no longer accessible.[12] This decision, however, was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Moreover, our conclusion in that case was

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they do not include information about the father's employment.

[11] *Matter of J-D-G-* (AAO Feb. 26, 1985).

[12] Specifically, the equipment necessary to play the audio-recorded testimony of the individual's grandmother was no longer available.

based on lack of evidence of fraud or gross error in a prior adjudication. Here, the border crossing documents the Applicant submitted in response to the RFE conflict with the testimony offered by the father and his family members in the siblings' proceedings. In addition, because the birth certificates or their translations offered by the siblings were abridged, USCIS may have been unaware that the father's employment in Mexico recorded on the certificates contradicted his claims of residence and work in the United States as an unskilled laborer. Although this information would have likely affected the adjudication of the siblings' citizenship applications, a review of their records does not indicate that it was known or considered at the time. Accordingly, we are unable to conclude that there was no error in issuance of Certificates of Citizenship to the Applicant's siblings.

We agree with the Applicant that "where a claim of derivative citizenship has reasonable support, it cannot be rejected arbitrarily." *Matter of Tijerina-Villarreal,* 13 I&N Dec. 327, 331 (BIA 1969). However, "when good reasons appear for rejecting such a claim such as the interest of witnesses and important discrepancies," we need not accept the claims proffered by the Applicant. *Id.*

As stated above, the evidence in the instant matter is sufficient to establish that the Applicant's father was present in the United States for approximately three years before the Applicant's birth. However, the affidavits offered as proof of other time periods not only lack detail, but they are also inconsistent with other documents and USCIS records. Therefore, they do not overcome the absence of primary and secondary evidence, nor are they sufficient to meet the Applicant's burden of proof. Therefore, although certificates and census records demonstrate the father's to 1931 presence in the United States, he has not established physical presence for the 1931 to time period.

III. CONCLUSION

Based on the foregoing, we affirm our previous determination that the Applicant did not acquire U.S. citizenship at birth from his father. The Applicant is therefore not eligible for a Certificate of Citizenship.

ORDER: The appeal is dismissed.

Cite as *Matter of J-H-G-J-*, ID# 339887 (AAO May 3, 2017)