U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-V-S-

DATE: FEB. 22, 2018

APPEAL OF SAN ANTONIO, TEXAS FIELD OFFICE DECISION

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

The Applicant, who was born in Mexico in 1976, seeks a Certificate of Citizenship indicating he acquired citizenship at birth through his claimed father. *See* Immigration and Nationality Act (the Act) sections 301(a)(7) and 309(a), 8 U.S.C. §§ 1401(a)(7) and 1409(a), *amended by* Act of November 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655. For an individual claiming to be a U.S. citizen at birth, who was born to unmarried parents between December 24, 1952, and November 14, 1986, and is claiming citizenship through a U.S. citizen father, the father must have been physically present in the United States for 10 years (with at least five years occurring after the age of 14) before the individual's birth and the individual must also satisfy legitimation requirements.

The Director of the San Antonio, Texas Field Office denied the application, concluding that the Applicant did not establish he was the biological child of his claimed U.S. citizen father, or that his alleged father was physically present in the United States for 10 years, at least 5 after the age of 14, as required.

On appeal, the Applicant submits additional evidence and claims that the Director erred in denying his Form N-600, Application for Certificate of Citizenship. Specifically, he asserts that the record demonstrates he is the biological child of a U.S. citizen father, he meets former section 309(a) of the Act legitimation requirements, and that his U.S. citizen father was physically present in the United States for the period of time required. The Applicant also raises a constitutional claim, arguing that the Act improperly treats U.S. citizen fathers of children born out of wedlock differently than U.S. citizen mothers, because it requires fathers to establish 10 years of U.S. physical presence prior to the child's birth while mothers need only demonstrate one year of U.S. physical presence. The Applicant contends that this distinction is unconstitutional and, therefore, his father should be required to demonstrate only one year of U.S. physical presence.

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

I. LAW

The record reflects that the Applicant was born on [redacted] 1976, in Coahuila, Mexico to unmarried parents who subsequently married each other in 1977. His mother is a Mexican citizen. He claims his father was born in Texas in [redacted] 1955, and is a U.S. citizen.

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). Based on his date of birth in [redacted] 1976, the Applicant's citizenship claim falls within the provisions of former section 301(a)(7) of the Act, which provided that the following shall be citizens of the United States:

> 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:

Because the Applicant was born out of wedlock, he must also satisfy the requirements of section 309(a) of the Act, which pertain to legitimation. Prior to November 14, 1986, former section 309(a) of the Act stated, in part that:

> 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 . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.[1]

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 "preponderance of the evidence" standard requires that the record demonstrate that the Applicant's claim is "probably true," based on the specific facts of his case. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

[1] The Act of November 14, 1986, amended former section 309(a), applying changed provisions to individuals who were not yet 18 years of age on November 14, 1986, unless their paternity was established by legitimation before November 14, 1986. Although the Applicant was 10 years old in November 1986 and therefore could have benefited from the changed section 309(a), he does not argue that he was legitimated under the changed law. Rather, he asserts that his claimed father legitimated him in Mexico in 1981, when he was four years old, when former section 309(a) was still in effect.

II. ANALYSIS

The issues in this case are whether: 1) the Applicant has shown that his paternity was established by legitimation in accordance with former section 309(a) of the Act; and 2) the record establishes that his claimed father was physically present in the United States for 10 years prior to the Applicant's birth in 1976, at least 5 of those years were after the father turned 14, in 1969. Before discussing the evidence, however, we will first address the constitutionality issues that the Applicant raises on appeal.

A. Constitutional Claim

The Applicant claims that former section 309(a) of the Act's incorporation of a 10-year U.S. physical presence requirement for citizen fathers of children born out of wedlock (set forth in former section 301(a)(7) of the Act) unjustly differs from the section 309(c) of the Act requirement of only one year of U.S. physical presence for citizen mothers of children born out of wedlock. He concludes that the distinction is unconstitutional.

Like the Board of Immigration Appeals, we cannot rule on the constitutionality of laws enacted by Congress. *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992)("[M]oreover, it is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations"). Nevertheless, we recognize that the U.S. Supreme Court recently addressed this issue in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). Specifically, the Supreme Court found that the different U.S. physical presence requirements for unwed mothers in section 309(c) of the Act, and for unwed fathers under former section 301(a)(7) of the Act (and current section 301(g) of the Act, 8 U.S.C. § 1401(g), which requires the unwed father to show five years of U.S. physical presence) violate equal protection provisions of the Fifth Amendment. *Id.* at 1700-01. However, despite its finding, the Supreme Court did not indicate that the one-year physical presence requirement for out of wedlock children seeking to derive through their mothers would also apply to out of wedlock children seeking to derive through their fathers. Instead, the Court stated that in the interim the longer physical presence requirement should also apply, prospectively, to children born to unwed U.S. citizen mothers. *Id.* The Court emphasized that its decision would affect future rights only. *Id.*

After the Supreme Court's decision, the Fifth Circuit Court of Appeals (the court with jurisdiction over the Applicant's claim) clarified in *Villegas-Sarabia v. Sessions*, 874 F.3d 871 (5th Cir. 2017) that other than eliminating the discriminatory benefit to mothers, the Supreme Court did not rewrite previous statutory requirements for acquiring citizenship, and that an individual's citizenship is governed by the statutes in place at the time of his or her birth. Thus, at present, the U.S. citizen father of child who, like the Applicant, was born out of wedlock in 1976, must satisfy the 10-year U.S. physical presence requirement in order to transmit citizenship to that child.

B. Paternity by Legitimation

The Applicant claims that his paternity was established by legitimation prior to 1986 and he, therefore, satisfies former section 309(a) of the Act. The Applicant was born in 1976 before his parents' marriage in 1977, and his parents did not register his birth until 1981. We note that in 1977 the State of Coahuila, Mexico where the Applicant was born, repealed its Articles on legitimation (354, 355, 357). According to guidance provided by the Library of Congress (LOC), Article 389 of the 1983 edition of the Coahuila Civil Code (in force between 1941 and 1999) provided that a child born out of wedlock who was acknowledged by the father, by the mother, or by both parents had the right to use the last name of the acknowledging parent or parents. *See* LOC Response No. 2013–009043 (March 2013). The 1983 version of the Civil Code also provided at Articles 360 and 369 that filiation of a child born out of wedlock could be established, with respect to the father, by acknowledgement of the child on the birth certificate before a Civil Registry Official. *Id.*

The record contains the parents' [redacted] 1977 marriage certificate reflecting they married 10 months after the Applicant's birth. The Applicant's birth certificate, as well as his April 1987 baptism and October 1994 confirmation certificates, also contain both parents' names. Accordingly, the totality of the evidence sufficiently establishes that the Applicant's U.S. citizen father established his paternity of the Applicant by legitimation thus satisfying former section 309(a) of the Act.[2]

C. U.S. Physical Presence of Father

The Applicant claims that his father meets former section 301(a)(7) of the Act physical presence requirements because he lived in Texas from the time of his birth in [redacted] 1955 until 1960; moved with his family to Mexico in 1960; and returned to live permanently in the United States in 1965. The Applicant has provided insufficient evidence, however, to corroborate his claims.

1. [redacted] 1955 to 1960

First, the Applicant has not demonstrated that his father was physically present in the United States for the entire period between [redacted] 1955 and 1960, as claimed. In support, the Applicant submits a statement from his father asserting generally that he was born in [redacted] Texas in [redacted] 1955 where he lived until 1960 when he moved with his family to Mexico in 1960.[3] The Applicant's

[2] We note that the Applicant would have been considered legitimated even if the repealed legitimation Articles had remained in place because his parents married after his birth and expressly acknowledged the Applicant as their child. According to the repealed Article 357, legitimation was to be effective from the day on which the parents married, even if acknowledgment took place afterward.

[3] The Applicant indicates that the Director erred in not granting a request for his father, who is presently in federal custody, to provide sworn testimony to an immigration officer about his physical presence in the United States. We note, however, that the record already contains a written statement from the Applicant's father regarding his presence in the United States, and the Applicant could have obtained additional affidavits from his father to submit into the record as well. The Director was not obligated to send a U.S. Citizenship and Immigration Services employee to interview the Applicant's father in federal detention, as it is the Applicant who bears the burden of establishing his U.S. citizenship

paternal grandfather, a U.S. citizen by birth, makes similar statements in an affidavit. Other than listing an address in [redacted] neither affidavit is specific about the time spent in the United States from 1955 through 1960. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the affected party to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The father's birth certificate corroborates that he was born in Texas in [redacted] 1955. The record also contains a birth certificate for one of the father's brothers, reflecting he was born in [redacted] Texas in [redacted] 1956. This evidence shows that the Applicant's father was likely physically present in the United States in [redacted] 1955 and in [redacted] 1956. But, the record contains no other documentation, such as medical, residence, academic, or other evidence, to corroborate claims that the Applicant's father was physically present in the United States for the time period between September 1955 and September 1956, or that he was physically present after [redacted] 1956 until 1960.

We acknowledge the evidence showing that the Applicant's paternal grandfather was born and baptized in Texas in 1929 and was listed in a 1930 U.S. Census. We also note that the grandfather registered for the U.S. selective service in 1963 and earned money in the United States during this time period. The 1929/1930 evidence, however, pre-dates the Applicant's father's birth in 1955 and therefore is not relevant to corroborating the father's claimed physical presence during the 1955 to 1960 years. And, while the grandfather may have been present in the United States to register for the draft in 1963 and earn money, there is no evidence that the Applicant's father accompanied the grandfather during the corresponding period of time. To the contrary, the Applicant's father specifically stated that he moved with his family to Mexico from 1960 through 1965 and did not place himself within the United States at any time during this period.

In sum, the evidence relating to the 1960 through 1965 years does not show physical presence in the United States for the entire period time, just up to two months in [redacted] 1955 and [redacted] 1956.

2. 1965 to [redacted] 1976

The record also contains insufficient evidence to demonstrate that the Applicant's father was physically present in the United States for the entire period between 1965 and [redacted] 1976, as claimed. To corroborate this claim, the Applicant's father and grandfather assert in their affidavits that the Applicant's father moved from Mexico to [redacted] Texas with his mother and siblings in 1965. They contend that the Applicant's father subsequently went to school in [redacted] for about two years after which time he worked with the Applicant's grandfather in the fields. Both the Applicant's father and grandfather list addresses and cities where they claim the Applicant's father worked or lived with his family. In addition, the Applicant's father's brother claims in an affidavit that he was born in Mexico in [redacted] 1964, and that as a very young child he and his family moved

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claim.

from Mexico to [redacted] The brother states he also remembers that the Applicant's father went to work with their father in the fields.

Although they all list street addresses where they lived, the Applicant's father, grandfather, and uncle do not provide sufficiently detailed dates for the residences, or provide home ownership, rental payment, utility bill, or other evidence to corroborate claims that the Applicant's father was physically present in the United States for the claimed time periods and at the specified locations. They also do not provide employer names and dates, or other specific details about the Applicant's father's presence and activities in the United States after 1965, such as the years he claims to have attended [redacted] in [redacted] In addition, the record reflects that the Applicant's paternal grandmother was issued a provisional Mexican passport in May 1970, to travel back and forth from Mexico to the United States with the father's brother, for leisure purposes. This information contradicts claims that the Applicant's father and his family lived in the United States only during the 1965 to [redacted] 1976 time period.

Affidavits from two family friends claiming personal knowledge of the Applicant's father's physical presence in [redacted] Texas after 1965 also lack details regarding their source of knowledge, and dates and circumstances of their interactions with the Applicant's father. The Applicant's mother also claims in an affidavit that she met the Applicant's father in Mexico in mid-1972, and that she lived with him in the United States between 1973 and October 1995, when she returned to Mexico. She contends that they lived primarily in [redacted] but that they also traveled to other states as migrant workers. Again, the claims lack detail and are uncorroborated by independent U.S. physical presence evidence for the father. The Applicant also does not explain why he was born in Mexico in 1976, if his mother and father lived permanently in the United States during that time, as claimed.

The Applicant's father's social security earnings statement (for the period between 1972 and 2012) reflects that he earned the following income in the United States between 1972 and 1976:

1972: $832.00
1973: $0.00
1974: $1204.00
1975: $1921.00
1976: $1803.00

The statement shows that his father was physically present in the United States at some point in 1972 and for some time between 1974 and 1976. The statement does not, however, reflect a consistent income, and does not specify who the Applicant's father worked for, or when or how long his father was present in the United States during the years that he earned a salary. Even if we were to credit physical presence to the Applicant's father based on the social security earnings statement, such evidence would demonstrate, at best, only four years of physical presence (1972 and 1974-1976).

Regarding the Applicant's father's claim to have attended [redacted] in [redacted] Texas, the Applicant submits a letter from the [redacted] reflecting

that it was unable to locate records under his father's name for any elementary school years. The letter adds that retention records schedules require only that high school records be kept, and general information about [redacted] retention schedule requirements shows that academic records for grades pre-K through grade 8 are required to be retained only from the date of withdrawal plus seven years. The Applicant submits [redacted] school records for his father's brother, who was born about 10 years after the Applicant's father, reflecting that he attended school and had an address in [redacted] between 1972 and 1980. The school records for the brother do not demonstrate that the Applicant's father was physically present in the United States during the same period of time, however, as the Applicant's father would have been between the ages of 17 and 25 during the 1972 through 1980 years and, as an adult for the majority of that time period, would not have necessarily lived with his minor brother.[4]

A biographic/family history sheet and family tree flow chart prepared by the Applicant (claiming birth dates and locations for family members), and undated photographs of alleged family members also do not demonstrate that the Applicant's father was physically present in the United States between 1965 and the Applicant's birth in [redacted] 1976 for any significant period of time.[5] Regarding the photographs, they provide evidence of the Applicant's father's alleged presence (as claimed by the Applicant) in [redacted] Texas and in [redacted] Idaho on the day that each photo was taken only. We note, however, that the Applicant's father's statement claims residence in [redacted] Texas during these time periods but not in [redacted] Texas or [redacted] Idaho.

The Applicant also contends that it is difficult to obtain U.S. physical presence documentation for these time periods because his father was a migrant worker and because a storm in 2007 destroyed many of his father's records. He has not, however, provided detailed testimony or corroborative evidence to show that his father was a migrant worker in the United States after 1965, as claimed. In addition, although he submits a general article discussing a severe storm in the [redacted] area in 2007, the record contains no evidence establishing his father was physically present in [redacted] when the storm occurred. Although the Applicant has established that his father was physically present in the United States for periods of time, he has not shown that the time periods amount to a total of 10 years of physical presence at least five of which were after his father turned 14 in 1969.[6]

III. CONCLUSION

As previously mentioned, the Applicant 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. at 468. Here, the Applicant has sufficiently established that his paternity was established by legitimation prior to

[4] For example, we note that the Applicant's father had two children born in Mexico in 1974 and 1976, one of whom was the Applicant. There is no evidence, testimonial or otherwise, that the Applicant resided with his minor brother in [redacted] Texas during the years that the brother attended schools there.

[5] Similarly, evidence showing the Applicant's grandmother obtained a U.S. passport in 2008 does not demonstrate that the Applicant's father was physically present in the United States prior to the Applicant's birth in 1976.

[6] Moreover, although the Director also found the Applicant had not established his biological relationship to his father, we need not reach that issue as physical presence requirements have not been met.

his 21st birthday, as required under former section 309(a) of the Act. He has also shown that his father was physically present in the United States for up to two months in [redacted] 1955 and in [redacted] 1956, and for an unknown period of time in 1972, and between 1974 and 1976, which at best would amount to four years, not the required 10 years with five of those years occurring after the Applicant's father turned 14. Accordingly, the Applicant has not established that he acquired U.S. citizenship from his father under former section 301(a)(7) of the Act and his application for a Certificate of Citizenship remains denied.

ORDER: The appeal is dismissed.

Cite as *Matter of E-V-S-*, ID# 106177 (AAO Feb. 22, 2018)