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U.S. Citizenship
and Immigration
Services

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FILE:



Office: SAN DIEGO, CA

Date: NOV 25 2008

IN RE:

Applicant:



APPLICATION: Application for Certificate of Citizenship pursuant to Section 322 of the Immigration and Nationality Act, 8 U.S.C. § 1433.

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Michael Shumway
for

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the District Director, San Diego, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the Form N-600 will be denied.

The record reflects that the applicant was born in Mexico on [REDACTED]. He will turn eighteen on [REDACTED]. The applicant's father was born in Mexico and acquired U.S. citizenship at birth through his father. The applicant's mother is not a U.S. citizen. The applicant's parents married in California on November 19, 1986. The applicant seeks a certificate of citizenship pursuant to section 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1433, based on the claim that he derived U.S. citizenship through his father.

In a decision dated May 17, 2006, the district director adjudicated the applicant's U.S. citizenship claim pursuant to section 301(g) of the Act, 8 U.S.C. § 1401(g). The district director determined that the applicant had failed to present evidence establishing that his father was physically present in the United States for five years prior to the applicant's birth, at least two years of which occurred after his father turned fourteen. The applicant's Form N-600 was denied accordingly for failure to meet section 301(g) of the Act requirements.

In a timely filed appeal to the AAO, the applicant asserted, through counsel, that he was applying for citizenship under section 322 of the Act, and that a Form N-643 Supplement A, Application for Transmission of Citizenship Through a Grandparent, had been submitted in his case. The applicant asserted that evidence in the record established that his grandfather met section 322 of the Act, U.S. physical presence requirements, and the applicant requested approval of his Form N-600.

Prior to forwarding the applicant's appeal to the AAO, the district director reconsidered the matter for section 322 of the Act adjudication purposes. The district director interviewed the applicant and his parents on April 27 and May 23, 2008. During the interviews it was revealed that the applicant attended school and resided with his parents in the United States. The district director determined that the applicant had therefore failed to establish that he resided outside of the United States with his citizen parent, as required by section 322 of the Act, or that he was temporarily present in the U.S. pursuant to a lawful admission and was maintaining such lawful status. The Form N-600 was again denied, and the applicant's original appeal was forwarded to the AAO.

The regulation at 8 C.F.R. § 103.3(a)(2) provides:

(iii) Favorable action instead of forwarding appeal to AAU. The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under Sec. 103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

(iv) Forwarding appeal to AAU. If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAU in Washington, DC.

In the present matter, the district director reconsidered and re-adjudicated the applicant's Form N-600 based on a section 322 of the Act, a new basis never before addressed. The district director did not take favorable action in the applicant's case. Rather, the district director again denied the Form N-600 application. The district director then forwarded the applicant's original appeal to the AAO without allowing the applicant an opportunity to address the new basis of denial.

Because the district director failed to follow the procedures set forth in 8 C.F.R. § 103.3(a)(2), the AAO sent the applicant and counsel a Request for Evidence (RFE) on August 5, 2008, allowing the applicant a 12-week period of time in which to address the basis of denial in his claim for U.S. citizenship under section 322 of the Act, and in which to provide any evidence that he resides outside of the United States in the legal and physical custody of his U.S. citizen father, that he is temporarily present in the U.S. pursuant to a lawful admission and is maintaining such lawful status. The AAO advised the applicant that after the 12-week period, the AAO would prepare and issue a decision, taking into account all of the evidence of the record, including any additional evidence submitted in response to this notice. The AAO received no additional evidence or information from the applicant. The AAO will therefore adjudicate that applicant's U.S. citizenship claim based on the record as it is presently constituted.

"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. Immigration and Naturalization Service*, 247 F.3d 1026,1029 (9th Cir. 2000) (Citations omitted.) The applicant was born in Mexico on [REDACTED] Section 301(g) of the Act, 8 U.S.C. § 1401(g), would therefore apply to an acquisition of citizenship at birth claim.

Section 301(g) of the Act provides in pertinent part that the following shall be 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 five years, at least two of which were after attaining the age of fourteen years

The record contains the following evidence relating to the applicant's father's [REDACTED] physical presence in the United States prior to the applicant's birth:

A U.S. Certificate of Citizenship issued to [REDACTED] on July 12, 1988, reflecting that he resided in San Diego, California.

The record contains no other evidence of [REDACTED] physical presence in the United States prior to the applicant's birth. Accordingly, the applicant failed to establish by a preponderance of the evidence that his father was physically present in the United States for five years prior to the applicant's birthday, at least two years of which occurred after [REDACTED] turned fourteen. The applicant therefore failed to meet the requirements for acquisition of citizenship under section 301(g) of the Act.

Section 322 of the Act applies to derivative citizenship claims by children born and residing outside of the United States and states, in pertinent part, that:

(a) A parent who is a citizen of the United States . . . may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General [now Secretary, Homeland Security, "Secretary"] shall issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General [Secretary], that the following conditions have been fulfilled:

(1) At least one parent is . . . a citizen of the United States, whether by birth or naturalization.

(2) The United States citizen parent--

(A) has . . . been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; or

(B) has . . . a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(3) The child is under the age of eighteen years.

(4) The child is residing outside of the United States in the legal and physical custody of the applicant. . . .

(5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and . . . upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General [Secretary] with a certificate of citizenship.

certificate of citizenship establishes that the applicant's father is a U.S. citizen. The applicant's birth certificate additionally establishes that the applicant is under the age of eighteen. The applicant therefore meets the requirements contained in section 322(a)(1) and (3) of the Act.

The applicant also established that he meets the requirements contained in section 322(a)(2)(B) of the Act. The record contains a birth certificate reflecting that the applicant's paternal grandfather was

born a U.S. citizen in San Diego, California on July 4, 1919. In addition, the record contains the following evidence relating to [REDACTED]'s physical presence in the U.S.:

U.S. Naval Service records reflecting [REDACTED] Sr.'s U.S. military service for three years between October 1942 and October 1945.

[REDACTED], San Diego public school transcripts for eight years between 1929 and 1937.

The totality of the evidence contained in the record establishes by a preponderance of the evidence that the applicant's paternal grandfather was physically present in the United States for over five years, at least two years of which occurred after [REDACTED]'s fourteenth birthday.

It is noted that a death certificate contained in the record reflects that [REDACTED] died in San Diego, California on November 20, 1988, prior to the applicant's birth. However:

Assuming an alien child meets all other requirements of Section 322, an alien child remains eligible after the death of the citizen parent's own citizen parent, so long as the citizen parent's own citizen parent met the physical presence requirement in Section 322(a)(2)(B) at the time of death.

See HQ 70/34.2-P Memorandum by William R. Yates, Acting Associate Director, CIS, entitled "Effect of Grandparent's Death on Naturalization under INA Section 322" (April 17, 2003.) **The requirements** contained in section 322(a)(2)(B) have therefore been satisfied.

The record contains no evidence, however, to establish that the applicant resides outside of the U.S. in the legal and physical custody of his U.S. citizen father, or that he is temporarily present in the U.S. pursuant to a lawful admission, and is maintaining such status. Moreover, the record reflects that district director interviews with the applicant, his father and their attorney revealed that the applicant presently resides and attends school in the United States. The AAO therefore finds, upon review of the evidence, that the applicant has failed to establish that he meets the requirements set forth in section 322(a)(4) and (a)(5) of the Act. Accordingly, the applicant does not qualify for U.S. citizenship under section 322 of the Act.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish his claimed citizenship by a preponderance of the evidence. The applicant has not met his burden of proof in the present matter. The appeal will therefore be dismissed and the Form N-600 will be denied.

ORDER: The appeal is dismissed. The application is denied.