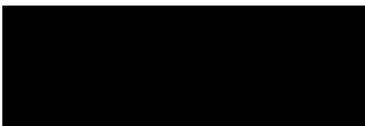




U.S. Department of Justice
Immigration and Naturalization Service

Ed

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

FILE: [Redacted] Office: San Antonio

Date:

IN RE: Applicant: [Redacted]

APPLICATION: Application for Certificate of Citizenship under § 341(a) of the
Immigration and Nationality Act, 8 U.S.C. 1452(a)

SEP 12 2000

IN BEHALF OF APPLICANT:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Antonio, Texas, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on March 6, [REDACTED] in [REDACTED]. The applicant's father, [REDACTED] was born in the United States in April [REDACTED]. The applicant's mother, [REDACTED] was born in [REDACTED] in [REDACTED] and never became a U.S. citizen. The applicant's parents married each other in August [REDACTED]. The applicant in this matter was lawfully admitted for permanent residence on December 17, [REDACTED]. The applicant seeks a certificate of citizenship under § 201(g) of the Nationality Act of 1940 (NA 1940).

The district director determined the record failed to establish that the applicant's United States citizen parent had resided in the United States or its outlying possessions for a period of 10 years, at least 5 of which were after the age of 16 years. The district director then denied the application accordingly.

On appeal, counsel states that the district director failed to give a summary of the evidence considered, failed to consider the cases of the applicant's three siblings who were issued certificates of citizenship, and failed to comply with Medina v. INS, 993 F.2d 499 (5th Cir. 1993).

The record reflects that Medina v. INS, is not relevant in this matter as it dealt with an alien in exclusion proceedings. The same individual in that matter was charged with alienage a second time after the issue had been previously adjudicated by an immigration judge. The decision indicates that the affected person must be the same in both cases. In the present matter, there is no evidence that the applicant has been previously granted a certificate of citizenship.

The citizenship of a person born outside the United States is determined by the statutes and law in existence at the time of the person's birth. Matter of B--, 5 I&N Dec. 291 (BIA 1953), overruled on other grounds; Matter of M--, 7 I&N Dec. 646 (BIA 1958); Montana v. Kennedy, 278 F.2d 68 (7th Cir. 1960), aff'd, 366 U.S. 308 (1961). Section 201(g) of NA 1940, was in effect at the time of the applicant's birth.

Section 201 of NA 1940 states, in pertinent part, that the following shall be nationals and citizens of the United States at birth:

(g) a person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person has had 10 years' residence in the United States or one of its outlying possessions, at least 5 of which were after attaining the age of 16 years, the other one being an alien....

The retention requirements in effect at the time of the applicant's birth under § 201(g) and (h) of NA 1940, stipulated that a citizen

child born abroad to one U.S. citizen and one alien parent, in order to retain United States citizenship, must demonstrate 5 years residence in the United States between ages 13 and 21. The Act of 1952 stipulated that such citizen born abroad must demonstrate 5 years of continuous physical presence in the United States between the ages of 13 and 28 in order to retain citizenship. The Act of October 27, 1972, extensively liberalized the retention requirements extending back to birth abroad after May 24, 1934, and reduced the period of continuous physical presence to 2 years. The retention requirements were eliminated by an amendment to the Act effective October 10, 1978. Persons born on or after October 10, 1952, are relieved of the necessity of complying with any retention requirements.

One of the applicant's siblings was born abroad in [REDACTED] during which § 1993 of the Revised Statutes (R.S. § 1993) was in effect, which incorporated the Act of Feb. 10, 1855 (10 Stat. 604).

R.S. § 1993 was amended by the Act of May 24, 1934 (48 Stat. 797) which provided, in part, that:

Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Immigration and Naturalization Service.

Under R.S. § 1993 the word "resided" was construed to mean "lived" in the United States and it was administratively determined that physical presence alone in the United States was sufficient to establish prior residence.

The applicant was born in [REDACTED] during which NA 1940 was in effect. NA 1940 was in effect from January 13, 1941 through December 23, 1952. During that period of time the term "residence" was statutorily defined and the U.S. Supreme court in Savorqnan v. U.S., 338 U.S. 491, 506 (1950) held that a person's residence under NA 1940 was his place of general abode, which meant his principal actual dwelling place in fact, without regard to intent.

Two of the applicant's siblings were born after December 24, 1952 when the Immigration and Nationality Act (the Act) was in effect.

Section 301(g) of the Act in effect prior to November 14, 1986 provides, in pertinent part, that 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 10 years, at least 5 of which were after attaining the age 14 years, shall be nationals and citizens of the United States at birth.

The 1952 Act substituted physical presence for the former residence requirement and the term "physical presence" has its literal meaning and "residence" is not required.

The record reflects that the applicant's father was interviewed on May 25, 1979 and he stated that he lived in the United States from birth [REDACTED] until 1920 and from 1939 until the time of the interview when he worked in the United States as a visitor. The record contains evidence of the father's employment in the United States but fails to contain evidence that he lived in the United States during that period of time.

Based on the father's testimony, the applicant's father clearly satisfied the residence requirement of R.S. § 1993, and the physical presence requirement of § 301(g) of the 1952 Act regarding the applicant's three siblings. However, the applicant has not shown that he acquired United States citizenship at birth under § 201(g) of NA 1940, because he has failed to establish that his father resided in the United States a total of 10 years, 5 of which were after the age 16.

8 C.F.R. 341.2(c) states 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 that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.