



U.S. Department of Justice
Immigration and Naturalization Service

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



FILE: [Redacted] Office: Houston

Date:

MAR - 7 2001

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)

IN BEHALF OF APPLICANT:



PUBLIC COPY

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.

Identification data deleted to
prevent clearly unremarried
[Redacted]

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Houston 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 August 30, 1978 in Mexico. The applicant's father, [REDACTED], was born in September 1957 in Mexico and acquired U.S. citizenship at birth under § 301(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1401(b). The applicant's mother, [REDACTED], was born in November 1958 in Mexico and never had a claim to United States citizenship. The applicant's parents married each other in February 1979. The applicant claims that he acquired United States citizenship at birth under § 301(g) of the Act, 8 U.S.C. 1401(g).

The district director denied the application after determining that the record failed to establish that the applicant's United States citizen parent had been physically present in the United States or one of its outlying possessions for 10 years, at least 5 of which were after age 14, as required under § 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1401(g), at the time of the applicant's birth.

On appeal, counsel discusses a matter relating to the former retention requirements which were placed upon a child of a U.S. citizen. Counsel makes reference to decisions in which the applicants were born in 1935.

The retention requirements in effect 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.

The applicant in this matter was born in August 1978 and he is not subject to any retention requirements. Therefore, the applicant's reference to case law regarding a citizen's lack of knowledge that he or she actually acquired citizenship at birth and failed to make a timely entry into the United States prior to their 23rd or 26th birthday, in Matter of Yanez-Carrillo, 10 I&N Dec. 366 (BIA 1963); and Matter of Farley, 11 I&N Dec. 51 (BIA 1965), need not be addressed because they address the now obsolete retention requirements as indicated in the title of INTERP 301.1(b)(6)(ii), Establishment of "residence" and "physical presence" for retention purposes prior to the repeal of § 301(b), (c), and (d).

The issue in this proceeding is to determine whether the applicant's U.S. citizen father had the required physical presence in the United States to transmit citizenship to the applicant at the time of his birth. The parent cited by counsel in Matter of Navarrete, 12 I&N Dec. 138 (BIA 1967), was also born abroad and did not lose her U.S. citizenship due to the concept of "constructive physical presence." The applicant's father acquired United States citizenship at birth, never lost that citizenship and he was never barred from entering the United States as the citizen was in In re Juan Becerra-Torres, (BIA, unreported) A17 147 226, El Paso, August 26, 1969.

On appeal, counsel states that the applicant's father never knew that he was United States citizen himself. When he found out about his U.S. citizenship, the applicant was already born. Therefore, the applicant's father had the required constructive physical presence to transmit.

Montana v. Kennedy, 278 F.2d 68, affd. 366 U.S. 308 (1961), held that to determine whether a person acquired U.S. citizenship at birth abroad, resort must be had to the statute in effect at the time of birth. Section 301(g) of the Act was in effect at the time of the applicant's birth.

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 district director noted that the applicant's father attended school in the United States during the 1971-72 school year and he earned wages in the United States in 1977, 1978 and 1979.

Other than the above dates, the record is devoid of evidence to show that the applicant's father was physically present in the United States at any other period of time. The record is also devoid of any statement by the applicant's father. The present record fails to show that the applicant's father was prevented from coming to the United States due to circumstances beyond his control or reliance upon erroneous information in order to establish the concept of constructive physical presence as held in Matter of Navarrete, supra. The applicant's father attended school in 1971-72 and was employed in the United States in 1977 and part of 1978 prior to the applicant's birth.

Based on the record before the Associate Commissioner, the applicant has failed to establish that he acquired United States citizenship at birth because he has failed to establish that his



father was physically present in the United States for the required period prior to the applicant's birth.

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 this burden. Accordingly, the appeal will be dismissed.

It must also be noted that, should this matter appear before the Associate Commissioner again, it must be accompanied by the Service file of the applicant's father, [REDACTED], in order for the Associate Commissioner to review previous documentation submitted by his father.

ORDER: The appeal is dismissed.