U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27649463

Date: AUG. 17, 2023

Appeal of El Paso, Texas Field Office Decision

Form N-600, Application for Certificate of Citizenship

The Applicant seeks a Certificate of Citizenship to reflect that he acquired U.S. citizenship at birth from his father under former section 301(a)(7) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(a)(7).[1]

The Director of the El Paso, Texas Field Office denied the Form N-600, concluding that the Applicant did not establish that his father satisfied the prior U.S. physical presence requirements for transmission of citizenship.[2] The matter is now before us on appeal.

On appeal, the Applicant submits additional evidence and asserts that ineffective assistance of counsel prejudiced his citizenship claim in removal proceedings and limited the record before U.S. Citizenship and Immigration Services (USCIS).

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

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 n.3 (9th Cir. 2001) (internal quotation marks and citation omitted). The Applicant was born in Mexico in [redacted] 1970 to married parents. His father was born in Mexico in [redacted] 1949, but acquired U.S. citizenship at birth from his parents, both of whom were born in the United States. The Applicant's mother was a noncitizen.

[1] Re-designated as section 301(g) of the Act by Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046.

[2] The denial indicates that the Director considered the Applicant's citizenship claim under the provisions of former section 301(g) of the Act; however, at the time the Applicant was born former section 301(a)(7) was in effect. The error is harmless, as the physical presence requirements under former sections 301(a)(7) and 301(g) of the Act were the same and did not change until former section 301(g) was amended in 1986.

At the time of the Applicant's birth former section 301(a)(7) of the Act governed acquisition of U.S. citizenship by persons born abroad to one U.S. citizen and one noncitizen parent. It provided in relevant part that such person would be a national and citizen of the United States if the U.S. citizen parent "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 abroad, he is presumed to be a noncitizen and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). Under the preponderance of the evidence standard, the Applicant must demonstrate that what he claims is "probably true," where the determination of "truth" is made based on the circumstances of his individual case. *Matter of Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

II. ANALYSIS

The issue on appeal is whether the Applicant has met his burden of proof to show by a preponderance of the evidence that his father was physically present in the United States for 10 years before his birth in [redacted] 1970, and that at least five of those years were after the father's 14th birthday in [redacted] 1963. Upon review of the entire record as supplemented on appeal, we conclude that he has not met this burden.

A. Relevant Facts and Procedural History

The record reflects that the Applicant was admitted to the United States as a lawful permanent resident in 1985, as a child of a U.S. citizen (IR-2).[3] He was subsequently placed in removal proceedings on criminal grounds, but contested removability based on a claim that he acquired U.S. citizenship through his father. During a removal hearing in June 2008, the Applicant's father testified that he began working in the United States sometime in 1963, and lived with his aunt in [redacted] Texas until 1970, when she moved to another town. When asked whether he worked every day he responded that sometimes he did, and other times he did not. The father's younger sister (born in Mexico in 1957) testified that she remembered him living with their aunt in [redacted] when she was approximately six years old, and also recalled that he worked in the fields and in construction; she stated that she was not sure where the father lived before 1963, and was too young at the time to remember.

An Immigration Judge found that this testimony and the evidence submitted, which included the father's social security earnings statement, clearly showed that the father did not have the requisite physical presence in the United States to transmit his citizenship to the Applicant, and ordered the Applicant removed from the United States as a noncitizen convicted of removable offenses. In October 2008 the Board of Immigration Appeals affirmed the Immigration Judge's decision without opinion, and denied his motion to reopen in 2019.

[3] The Applicant does not claim, and the record does not show that he met the criteria for derivative citizenship under former section 320 of the Act, 8 U.S.C. § 1431, which provided in relevant part that a child born abroad to one U.S. citizen and one noncitizen parent and residing in the United States as a lawful permanent resident would become a U.S. citizen upon naturalization of the noncitizen parent, if such naturalization took place before the child's 18th birthday. Here, there is no evidence that the Applicant's noncitizen mother naturalized before he turned 18 years old.

In 2021, the Applicant filed the instant Form N-600 indicating that his father lived in the United States from 1949 through 1956, and from 1963 until present. In support, he submitted birth and marriage certificates, social security records, two paystubs dated in 1967, a printout from a genealogy website, and affidavits. The Director subsequently issued a notice of intent to deny (NOID) pointing out that the Applicant's representations concerning his father's physical presence in the United States were inconsistent with the father's prior testimony that he did not begin living in the United States until 1963. The Director also advised the Applicant that the evidence he submitted was not sufficient to substantiate the father's written statement in support of the Form N-600 that he lived in the United States from birth until 1956, and from 1963 to present, as his social security earnings report reflected income only in 1966, 1967, and 1968 during the relevant 1963-1970 period. The Director further advised the Applicant that the two paystubs from 1967 could not be considered evidence of his father's physical presence in the United States because they did not include the payee's name, and the printout from the genealogy website indicating that the father lived in Texas at some point within the 1950-1993 timeframe was similarly insufficient as proof of his requisite 10-year U.S. physical presence before November 1970. Lastly, the Director noted that the affidavit from the Applicant's paternal uncle was not consistent with his father's prior testimony concerning his presence in the United States, and the Applicant did not explain the relevance of his paternal grandmother's earnings report to his father's presence in the United States.

Because the Applicant did not address the above deficiencies and inconsistencies in his response to the NOID, and he did not offer any additional evidence of his father's physical presence in the United States prior to 1970, the Director denied the Form N-600, finding the record insufficient to establish that the Applicant acquired U.S. citizenship at birth from his father.

The Applicant now submits updated affidavits from his father and uncle, an affidavit from his father's younger sister, as well as previously provided evidence. He also submits documents related to his removal proceedings, including a transcript of the 2008 hearing and the Immigration Judge's decision. He avers that the evidence is sufficient to show that his father met the physical presence requirements for transmission of citizenship. The Applicant further states that the counsel who represented him in removal proceedings failed to prepare the documentary evidence and witnesses for the hearing, and that this ineffective assistance of counsel prejudiced him from properly presenting his citizenship claim before the Immigration Judge and USCIS, and led to his removal from the United States.

B. Determination Concerning Citizenship Claim in Removal Proceedings

As an initial matter, the entry of the removal order against the Applicant reflects only that the Department of Homeland Security met its burden of proof *in removal proceedings* to establish the Applicant's alienage and deportability by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a); *see also Minasyan v. Gonzalez*, 401 F.3d 1069, 1073 (9th Cir. 2005) (clarifying that an Immigration Judge does not have authority to declare that a person is a citizen of the United States, and that such authority rests with the USCIS citizenship unit and with the federal courts). Consequently, we are not bound by the Immigration Judge's adverse finding concerning the Applicant's citizenship claim as it relates to removability.

As stated, however, in citizenship proceedings before USCIS the burden is on the Applicant to prove that he is a U.S. citizen by a preponderance of credible evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. § 342(c); *Matter of Baires-Larios*, 24 I&N Dec. at 468. Thus, in adjudicating the Applicant's citizenship claim we must 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 Applicant's citizenship claim is probably true. *Matter of Chawathe*, 25 I&N Dec. at 376.

Consequently, while we acknowledge the Applicant's assertion that ineffective assistance of counsel led to his removal from the United States, this does not affect our de novo review of the record and adjudication of his citizenship claim in the instant proceedings.

C. Father's Prior Physical Presence in the United States

Nevertheless, we conclude upon review that the evidence considered in the aggregate remains insufficient to show that the Applicant's father satisfied the overall 10-year physical presence requirement to convey his citizenship to the Applicant at birth.

Physical presence refers to the actual time a person is in the United States, regardless of whether they have a residence in the United States. *See generally* 12 *USCIS Policy Manual* H.2(E)(1), https://www.uscis.gov/policy-manual (explaining the difference between residence and physical presence in the context of citizenship proceedings); *see also* 7 FAM 1133.3-4 (stating that the term "physical presence" has its literal meaning and is computed by the actual time spent in the United States; while usually it is not necessary to compute U.S. physical presence down to the minute, if it is not clear that the parent has more than enough physical presence in the United States, it is important to obtain the exact dates of the parent's entries and departures).

1. Physical Presence from 1949 to 1963

The evidence of the father's physical presence in the United States prior to his 14th birthday consists of two affidavits and a copy of his mother's 1953-1959 earnings report.

When affidavits are submitted to substantiate a citizenship claim, we determine their evidentiary weight based on the extent of the affiants' personal knowledge of the events they attest to, and the plausibility, credibility, and consistency of their statements with each other and evidence in the record. *Matter of E-M-*, 20 I&N Dec. at 81. The affidavits the Applicant submits have limited weight, because they are neither sufficiently detailed nor adequately corroborated by other evidence.

The Applicant's father states in his affidavit that from 1952 to 1956 he resided in [redacted] Texas with his mother and maternal uncle, P-T-,[4] and that from 1949 to 1952, he also lived in [redacted] but does not know the address because he was very young. He explains that when he was seven years old, his mother sent him to Mexico so he could attend school. However, as he does not provide any other evidence, such as baptismal, medical, census, or other records, we cannot conclude that his claim of having been physically present in the United States for the entire three-year period from 1949 to 1952 is "probably true." The Applicant's maternal uncle confirms in his affidavit only that the Applicant's

[4] We use initials throughout for privacy.

father and his mother (the Applicant's maternal grandmother) lived with him in [redacted] from 1952 until 1956, and that the father returned to Mexico when he was seven years old to attend school. The uncle further states that during this four-year period the Applicant's grandmother worried about how to support her children without her husband, who had abandoned her, and that when she was at work she always wanted to make sure that her children were taken care of. However, he does not provide any other details, such as when the Applicant's grandmother moved in with him, how many children she had, whether all of them lived in his [redacted] apartment, if the grandmother and the children traveled to Mexico during this period, and at what point in 1956 the Applicant's father returned to Mexico. Absent such details, the uncle's affidavit is not sufficient for us to determine how much time the Applicant's father was actually physically present in the United States within the 1952-1956 timeframe. If testimonial evidence lacks specificity or detail, there is a greater need for the affected party to submit corroborative evidence. *See generally Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998). While the grandmother's 1953-1959 earnings report is consistent with the uncle's claim that she worked in the United States in the 1950s, we note that it encompasses the period after 1956 when according to the father's own statements he lived in Mexico. As such, it is not adequate to compensate for the lack of detail in the uncle's affidavit and to show how much time the Applicant's father was actually physically present in [redacted] during the 1952-1956 period when he resided there with his uncle and the Applicant's grandmother.

Consequently, even if we were to give the uncle's affidavit full weight (which we cannot, in light of the deficiencies discussed above), the evidence would be sufficient, at best, to demonstrate that the Applicant's father was physically present in the United States for up to four years before his 14th birthday in [redacted] 1963.

We acknowledge the father's claim that although he does not have documentary evidence to show that he was physically present in the United States from 1949 to 1956, he has three cousins who grew up with him and who are willing to provide affidavits attesting to his physical presence in the United States during that time. However, as the Applicant does not submit such affidavits on appeal we are unable to assess the probative value of the cousins' potential testimony.

2. Physical Presence from March 1963 to November 1970

The evidence is also insufficient to determine how much physical presence the Applicant's father accumulated in the United States following his 14th birthday in [redacted] 1963, and before the Applicant was born.

The father states in his updated affidavit that after 1963 he lived in [redacted] permanently, staying with his aunt, D-D-. He explains that as a minor he was initially paid in cash, and did not receive checks until 1966. The father states that he and the Applicant's mother were married in [redacted] in 1967, and that afterwards he would go on the weekends to Mexico to see his spouse. The father's younger sister explains in her affidavit that because she was born in 1957, her memories of the father's presence in the United States are from 1963 and thereafter. She states that she and her siblings had a difficult life because their mother was always working in the United States, and she remembers staying with their maternal uncle, P-T-, their aunt D-D-, and other family members in [redacted] She further states that she remembers that the Applicant's father worked in construction, and that he helped their mother with expenses. The Applicant also submits a 2008 affidavit from a notary public in [redacted] who

attests that the father's aunt D-D- stated under oath that the father lived with her in [redacted] "from 1963 up to 1970."
Neither the affidavits nor the previously provided supporting evidence, which consists of the father's marriage certificate, his 1966-2007 social security earnings record, the two paystubs dated in 1967, and the printout from a genealogy website are sufficient to show when and how long the father was physically present in the United States from the time he turned 14 years old until the Applicant was born in Mexico in [redacted] 1970.

The Applicant's father does not explain where he worked, whether he was employed on a full-time or temporary basis, or how often he would travel to Mexico before he married the Applicant's mother in 1967. As noted, the father testified in the Applicant's removal proceedings that sometimes he worked every day and sometimes he did not, which indicates that his employment in some years was either seasonal or temporary. The information in the father's social security earnings statement supports such a conclusion, as it reflects that he reported income in the United States only in 1966, 1967, 1968, and 1970 during the relevant period before the Applicant's birth. Moreover, his relatively low income in 1967 ($674) and 1970 ($109) is not indicative of his full-time employment in those years.[5] The father does not explain how he supported himself and where he lived when he was not working, and the Applicant does not provide other evidence, such as his father's employment, tax, and residential records. The general statement of the father's aunt, D-D-, that the father lived with her in [redacted] from 1963 up to 1970, as relayed in the notary public's affidavit, is not adequate to determine how long the father was actually physically present in the United States within this period, given that he did not report any income in 1969, his income in 1967 and 1970 was low and, according to his own testimony, he regularly traveled to Mexico to visit his spouse. The affidavit from the father's sister also does not provide any specific information about the amount of time the Applicant's father spent in the United States between 1963 and 1970. Lastly, we note that while the Applicant's father claims that he established residence in [redacted] as of 1963, the parents' marriage certificate reflects that at the time they were married there in [redacted] 1967, they both claimed before a Texas county clerk to be residents of [redacted], Mexico.

We acknowledge the resubmission of the genealogy website data printout, but agree with the Director that it does not have significant evidentiary value concerning the father's actual physical presence in the United States. Specifically, while the printout indicates that there is a record of the Applicant's father residing in [redacted] Texas in the 1950-1993 U.S. Public Records Index, it is not sufficient as evidence of when and how long the father was in the United States within this period and, as such it does not tend to show, even when considered with other evidence in the record, that his actual physical presence in the United States before [redacted] 1970 amounted to the requisite 10 years with at least five years after his 14th birthday in [redacted] 1963.

Based on the above, we conclude that although the preponderance of the evidence indicates that the Applicant's father lived in the United States for some time as a child, and that he worked in the United states after 1963, it remains insufficient to show that he was likely physically present in the United

[5] Specifically, $674 earned in 1967 was equivalent to $6,262 today, and $109 earned in 1970 had the same buying power as $881 has today. *See* U.S. Bureau of Labor Statistics, Consumer Price Index (CPI) Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

States for a total of 10 years at least five of which occurred after he turned 14 years old and before the Applicant was born.

III. CONCLUSION

The Applicant has not met his burden of proof to show that his father met the U.S. physical presence requirements for transmission of U.S. citizenship. Consequently, he is not eligible for a Certificate of Citizenship, and his application remains denied.

ORDER: The appeal is dismissed.