AAO ACKNOWLEDGES SOME TRUISMS IN AND OF CITIZENSHIP CLAIMS

By Joseph P. Whalen (Monday, August 3, 2015)

Every now and again I see something worth repeating and to which I very much desire to draw attention. The following excerpt from a recently Sustained N-600 Appeal is one such item. A second excerpt follows.

“.... Depending on the specificity, detail, and credibility of an affidavit, letter or statement, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." See, e.g., Matter of S-A-, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." Id. 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).

We note that the applicant was placed in removal proceedings pursuant to a Notice To Appear on September 26, 2014. On April 2, 2015, the immigration judge issued a memorandum and order to terminate the proceedings with prejudice, stating that the applicant and counsel from Department of Homeland Security agreed that termination was appropriate, as the applicant had demonstrated that he acquired U.S. citizenship. It is noted that an immigration judge's finding regarding the applicant's citizenship is not binding on these proceedings. Specifically, an immigration judge may credit an individual's citizenship claim in the course of terminating removal proceedings for lack of jurisdiction because the government has not established the individual's alienage by clear and convincing evidence. See 8 C.F.R. § 1240.8 (a), (c) (prescribing that the government bears the burden of proof to establish alienage and removability or deportability by clear and convincing evidence). U.S. Citizenship and Immigration Services, on the other hand, retains sole

1 “... We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available. See Murphy v. INS, 54 F.3d 605, 611 (9th Cir. 1995) (holding that “[t]estimony should not be disregarded merely because it is . . . in the individual’s own interest”); Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998); Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998); Matter of Dass, 20 I&N Dec. 120 (BIA 1989); see also Matter of Acosta, 19 I&N Dec. 211, 218 (BIA 1985) (disagreeing with the Immigration Judge’s “conclusion that the respondent’s testimony should be rejected solely because it is self-serving”), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).” Matter of S-A-, at 1332.
jurisdiction to issue a certificate of citizenship, and the agency's decision is reviewable only by the federal courts, not the immigration courts. **Sections 341(a) and 360 of the Act**, 8 U.S.C. §§ 1452 (a), 1503; 8 C.F.R. 341.1. See also **Minasyan v. Gonzalez**, 401 F.3d at 1074 n.7 (noting that the immigration court had no jurisdiction to review the agency's denial of Minasyan's citizenship claim).

If USCIS can articulate a material doubt that leads it to believe that the claim is probably not true, then USCIS may deny the application. **Matter of Chawathe**, 25 I&N Dec. 369, 376 (AAO 2010). However, even if USCIS has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the agency to believe that the claim is "probably true" or "more likely than not," the applicant has satisfied the standard of proof. See **U.S. v. Cardozo-Fonseca**, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring)."

JUL102015_01E2309.pdf at p. 4.

In another Sustained N-600 Appeal, AAO corrected USCIS' approach to a fundamental basic in the adjudication of citizenship claims. It has now been correctly acknowledged that what matters most is the **truth of the claim at time of adjudication** rather than a time of filing. While it is preferred and makes better sense to wait to file an N-600 until AFTER the first parent naturalizes in derivation cases, a certificate cannot be withheld on a nonsensical technicality when the applicant has affirmatively proven that he or she is a citizen at time of adjudication.

"An applicant may file only one Form N-600. Where factual circumstances change subsequent to the Form N-600 filing, the applicant should bring the matter to the attention of the officer who issued the denial decision. In the statement "block" on the Form I-290B, the applicant directly addresses these concerns to the district director and requests reconsideration. We note that the filing appears to have been submitted to the district office,
which forward it to the AAO rather than consider it as a motion to reopen and/or reconsider.²

Although the applicant now meets all of the requirements set forth in section 320(a) of the Act³, the director denied the application as premature, as it was filed before either of his parents had naturalized. The record reflects that the applicant’s parents became U.S. citizens before the applicant turned 18, and that he had been residing in the United States in their custody pursuant to a lawful admission for permanent residence since 2006, but that the application was filed on December 29, 2011, prior to the naturalization of his father (the earlier of his parents to do so). While the record shows that the applicant’s parents became naturalized U.S. citizens after the applicant’s Form N-600 was filed, the record also reflects that their naturalization occurred prior to the director’s issuance of a final decision in the applicant’s case. Because the applicant had automatically derived U.S. citizenship from his father pursuant to section 320 of the Act at the time of the director’s decision, the director’s decision shall be withdrawn.

As we find the applicant to have established fulfillment of the requirements for a certificate of citizenship after filing the Form N-600 and before filing the Form I-290B, Notice of Appeal or Motion and, further to have requested the director to revisit the matter, we remand the matter to the director for issuance of a certificate of citizenship.

The burden of proof rests on the claimant to establish the claimed citizenship by a preponderance of the evidence. See 8 C.F.R. § 341.2 (c). Here, the applicant has met this burden. Accordingly, the matter will be returned to the director for further action in accordance with this decision.

ORDER: The appeal is sustained, the director’s decision withdrawn, and the matter remanded for further action.

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¹ As indicated in the form's instructions, if “[y]ou already filed a Form N-600 and received a decision from USCIS on that previously filed Form N-600[,] USCIS will reject (not accept) any subsequently filed Form N-600.” "Who Should Not File This Form," Instructions for Form N-600, Application for Certificate of Citizenship."

² This action was clear and obvious procedural error that did affect the applicant’s substantive rights and was contrary to the legally enforceable entitlement for this citizen to receive a certificate (for which he paid) in the face of substantial evidence that supports the citizenship claim.

³ 8 U.S.C. § 1431
There are several key points from the above two excerpts that I find to be very welcome. I refuse to call them “changes”, instead, I would feel it is more accurate to call them “realizations” by the agency as a whole.

[1] For starters, **jurisdiction** is reviewed, explained, and reinforced. USCIS has sole jurisdiction to issue *Certificates of Citizenship*. USCIS has primary jurisdiction to determine the validity of claims to citizenship within the United States. While an Immigration Judge (IJ) may credit a citizenship claim in so far as deciding an apparent lack of jurisdiction to proceed with a *Removal Proceeding* because DHS had failed to establish alienage by the *clear and convincing* standard of proof, no IJ may review USCIS’ N-600 Denial. Only a District Court may hear a challenge to USCIS’ [AAO’s] N-600 Denial Decisions. The BIA *can* review an IJ’s determination regarding a citizenship claim but it would be more appropriate for the IJ to *administratively close or terminate, without prejudice*, in order to allow an N-600 to be filed with USCIS instead of examining any complex claim.

In addition, although not discussed in either decision above, the DOS’ Passport Agency does not have statutory authority to make a primary citizenship determination domestically.4 DOS has primary statutory authority to make citizenship determinations abroad, and has appropriate procedures in place to perform that function abroad, but not so domestically. Passport applicants inside the U.S. *almost* exclusively have primary evidence of citizenship such as birth certificates issued inside the United States; Certificates of Naturalization or Citizenship issued by INS or USCIS; or Certificates of Birth Abroad of a Citizen of the United States of America.

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4 There is one obscure exception that was delegated from INS via regulation which remains in 8 C.F.R. §301.1(a)(2).
[2] Corroborative testimonial and documentary evidence are what make or break an adjudication decision. Depending on the specificity, detail, and credibility of an affidavit, letter or statement, USCIS may give the document more or less persuasive weight in a proceeding. Witnesses may be compelled to testify when available; substitutes may be accepted if necessary and if found to be relevant by the examining officer; and depositions may be taken abroad if such testimony is deemed essential to the final adjudication decision. See 8 C.F.R. §341.2, and §341.3.

[3] There are two primary purposes for the Form N-600.

(a.) to make a claim to citizenship; and

(b.) to obtain documentary proof of citizenship.

[4] As per INA § 341(a) [8 U.S.C. § 1452(a)], once citizenship is proven to the satisfaction of USCIS*, the citizen is entitled to a certificate if the correct form has been filed and fee paid (or waived); and the claimant has subscribed to the same oath as naturalization applicants.

* According to 8 C.F.R. § 341. 2 Examination upon application.

(c) Proof. The burden of proof shall be upon the claimant, or his parent or guardian if one is acting in his behalf, to establish the claimed citizenship by a preponderance of the evidence. [Emphasis Added]

Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010), is the principle Precedent Decision describing the standards of proof utilized in affirmative benefit requests made by petition or application to USCIS.

[5] A certificate may not be withheld from a claimant, who has demonstrated the truth of their claim to citizenship, based on a technicality, especially when that technicality is contrary to the statute, i.e. ultra vires.
[6] It is most critical to prove full eligibility by time of the final adjudication decision rather than at time of filing.

[7] The dual track statutory scheme created by Congress has been recognized by the courts as ensuring that citizenship claims are always ultimately decided on the merits.

As per 8 C.F.R. §341.5 Decision.

**(e) Subsequent application.** After an application for a certificate of citizenship has been denied and the time for appeal has expired, USCIS will reject a subsequent application submitted by the same individual and the applicant will be instructed to submit a motion to reopen or reconsider in accordance with 8 CFR 103.5. The motion must be accompanied by the rejected application and the fee specified in 8 CFR 103.7.

[76 FR 53804, Aug. 29, 2011]

See also: Angie Ortega v. Eric Holder, Jr., 592 F.3d 738 (7th Cir. 2010)

No. 08-3642 January 15, 2010. (Two links.)

It appears that this variety of benefit request adjudication is improving in quality. The noted improvements are very welcome. I have been advocating for improved training which supports the above observed improvements.

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**Dated this 3rd day of August, 2015**

/s/ Joseph P. Whalen

That’s my two-cents, for now!

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