



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals  
Office of the Clerk

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P. O. Box 1939  
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Name: GARCIA-CABRERO, PATRICIA

A77-263-000

Date of this notice: 06/28/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Lori Scialabba  
Acting Chairman

Enclosure

Panel Members:

HOLMES, DAVID B.  
HURWITZ, GERALD S.  
SCHMIDT, PAUL W.

**RECEIVED**

BY

DATE

July 1, 2002

Falls Church, Virginia 22041

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File: A77 263 000 - San Antonio

Date: JUN 28 2002

In re: PATRICIA GARCIA CABRERO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas Hutchins, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -  
In the United States in violation of law

APPLICATION: Termination of proceedings; motion to remand for adjustment

The respondent has appealed from an Immigration Judge's decision dated February 22, 1999, in which the Immigration Judge ruled that the respondent failed to demonstrate by a preponderance of evidence that her father had lived in the United States for the periods of time necessary to support her claim to derivative citizenship and that the respondent is, therefore, removable as charged. During the pendency of this appeal, the respondent filed a motion to remand based on an approved immediate relative visa petition, but failed to file an application for adjustment of status along with that motion.<sup>1</sup> We find that the respondent presented adequate evidence to prove that she derived citizenship through her United States citizen father. As the respondent is a citizen of the United States, the proceedings will be terminated.

In order to establish that she derived her claimed United States citizenship at birth, the respondent must demonstrate that prior to the respondent's birth her citizen father "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 of 14 years." See section 301(g) of the Immigration and Naturalization Act, 8 U.S.C. §1401(g). Where there is a claim of citizenship, a person born abroad is presumed to be an alien and must come forward with evidence to establish his claim to United States citizenship. See *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969); *Matter of A-M-*, 7 I&N Dec. 332, 336 (BIA 1956). We note that the documentary evidence reflects, and the respondent admits, that she was born in Mexico (Tr. at 6; Exh. 3 at 3A). As such, the respondent is presumed to be an alien and has the burden to prove her citizenship and overcome the presumption of alienage by a preponderance of the evidence. See *Matter of Tijerina-Villarreal*, *supra*; *Matter of A-M-*, *supra*.

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<sup>1</sup> The respondent is unable to show a *prima facie* case to remand for adjustment of status without an application for adjustment of status, therefore, the motion is denied.

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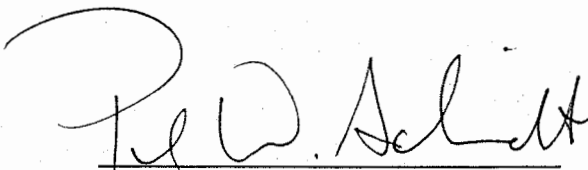
On appeal, the respondent argues that the Immigration Judge erred by not giving proper weight to the affidavit of Edmundo Garcia, the respondent's father. The respondent asserts that her father's affidavit is entitled to great weight. She also claims that Immigration Judge erred when he failed to credit the respondent and her brother's testimony about their family history and their father's presence in the United States between 1916 and 1933. The respondent asserts that the evidence presented provides ample support for her claim to derivative citizenship.

The Immigration Judge found that the respondent failed to meet her burden of proof to establish by a preponderance of evidence that her father was physically present in the United States during the requisite period of time (I.J. at 9). In assessing the evidence, the Immigration Judge observed that there are no records from the Holdings Institute School because of a flood. The records from Laredo High School show presence from 1925 to 1928 and the father's affidavit claims physical presence in the United States from 1916 to 1933 (I.J. at 7-9). The Immigration Judge discredited the testimony of the respondent and her brother as it relates to their father's residence because he found it was based on family folklore (I.J. at 7).

The weight given to Edmundo Garcia's affidavit is a pivotal issue in this case. The respondent asserts that the Immigration Judge gave the affidavit no evidentiary weight and if given proper weight it, combined with the other documentary evidence, is sufficient to meet her burden of proof to show she is entitled to derivative citizenship through her father. An affidavit sworn to, or affirmed by, a third party having personal knowledge of relevant facts in dispute is a form of secondary evidence within the Immigration Judge's authority to consider along with other forms of evidence. Notably, a portion of available primary evidence, the Holdings Institute School records, were destroyed and unavailable. The respondent moved to have her father testify telephonically because of his age and fragile health, but the Immigration Judge denied her request.

On review of the record, we find no basis to discredit Edmundo's affidavit and it appears, under the circumstances of this case, to be the best available evidence. We credit Edmundo's affidavit and find that he was present in the United States for a period more than 10 years and more than 5 years after his 14th birthday. Accordingly, the respondent is a citizen of the United States pursuant to section 301(g) of the Act.

ORDER: The proceedings are hereby terminated.

  
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FOR THE BOARD